

## **Technical Guidance 364.021**

This document is to provide public policy background for Minnesota Statute 364.021, provide guidance to employers concerning application of the new law and to provide answers to the most frequently asked questions that have been submitted to the Minnesota Department of Human Rights.

The MDHR appreciates the information and questions that have been raised by advocates for the new law, employer groups, administrative agencies, legislators and interested stakeholders. The dialog has been helpful in crafting this technical guidance and the shaping the efforts of the Department in seeking to achieve the underlying public policy of the new law.

Because of the hundreds of federal and state laws that bar or limit employment opportunities for individuals, the Department anticipates that this technical guidance may not answer every question concerning application of the new law. The Department therefore welcomes any and all questions subsequent to publication of this technical guidance.

### **Executive Summary**

During the 2013 legislative session, the Minnesota Legislature amended Minnesota Chapter 364 to prohibit private employers from having criminal question on their employment applications inquiring into the criminal history.

Employers subject to the law need to revise their application to take off the “box” (whether literally a “box” or the question in another form) or any questions about “criminal records or history.” Employers may still ask about criminal history but must move their inquiry to the interview or conditional offer stages of the hiring process. In weighing the impact of background information, an employer should concern the relevancy of the information and the potential for its actions to be viewed as discriminatory. Employers who use “off the shelf” application forms need to be aware of the need to modify their application forms.

Employers should know that compliance with Minn. Stat. 364.021 does not equate with compliance with federal or state anti-discrimination laws in the application of their criminal background check policy. Further, an employer exempt under Minn. Stat. 364.021 is still subject to the jurisdiction of the Equal Employment Opportunity Commission and the Minnesota Department of Human Rights when the employer uses information obtained pursuant to a criminal background check policy.

## **Background**

*After an offender has paid his or her debt, he should not be further punished by additional “collateral consequences,” such as being denied access to work. Unfortunately, some employers disqualify applicants based on a job application’s criminal- history inquiry without asking any further questions about reform, capability or fitness. . . . It is unreasonable for society to expect individuals to re-enter the community as productive citizens if their job application is dismissed without an opportunity to meet face-to-face and explain why they would benefit the company as an employee.*

*Mr. Jason Adkins, Executive Director of Minnesota Catholic Conference, testifying in support of Minn. Stat. 364.021*

Minnesota has been a leader in seeking to create opportunities for offenders to secure employment. In 2009, Minnesota passed a state law to “Ban the Box,” requiring public employers to wait until a job applicant has been selected for an interview before asking about criminal records or conducting a criminal record check.

The law made it illegal for public employers to disqualify a person from employment or to deny them a license because of their criminal background unless it is directly related to the position. The law, codified in Chapter 364, limited remedies of applicants to filing a complaint before the Office of Administrative Hearing.

In 2013, the Minnesota legislature amended the “Ban the Box” law to extend its reach to private employers. The new law requires private employers to extend a conditional job offer or wait until a job applicant has been selected for an interview before asking about criminal records or conducting a criminal record check. Remedies to amendment 364 that apply to private employers are limited to filing complaints before the Minnesota Department of Human Rights.

*In Minnesota, we have one of the lowest incarceration rates in the nation, so most of the people who are convicted are on parole or probation. The best thing someone like that can do to reintegrate into the community is get a job.*

*State Senator Roger Chamberlain, Senate Co-Author*

The use of criminal background checks by employers has been dramatic over the past 20 years. A report by the Society of Human Resources Management estimates that

as many as 92% of all employers use criminal background checks<sup>1</sup>. At the same time that the use of criminal background checks has soared, the share of the United States population with a criminal record has soared to over one in four adults<sup>2</sup>. The increased use of criminal background checks complicates matters for employers as they face a dramatic worker shortage in the foreseeable future as the number of working age adults shrinks daily as more than 10,000 Americans turn 65 years of age each day well into the next decade.

The economic impact to society of offenders to be able to secure employment is significant. John Schmitt and Kris Warner, economists at the Center for Economic and Policy Research, used Bureau of Justice Statistics data to estimate that in 2008, the United States had between 12 and 14 million ex-offenders of working age. Citing this population's greatly reduced job prospects, they estimated that prison records and felony convictions lowered total male employment that year by 1.5 to 1.7 percentage points and cost the economy between \$57 and \$65 billion.

The expanded use of criminal background checks also contributes to employment disparities given the racial disparities that exist in the criminal justice system. Although the issue of racial disparities in the criminal justice system is a problem nation-wide, it is arguably more prevalent in Minnesota. Here, "the disparity between Whites and African Americans with criminal records is four times higher than the national average."<sup>3</sup>

Disparate treatment can also occur when employers obtain information concerning an applicant's arrest. An arrest record, regardless of the offense alleged, can and often does disqualify an applicant from potential employment. Having an arrest record containing one of the low-level, non-violent offenses previously mentioned is generally not indicative of an individual's suitability for employment, yet African Americans are subject to arrest for these crimes at a much higher rate than Whites and, consequently, are more likely to be excluded from gainful employment.<sup>4</sup>

<sup>1</sup>Society for Human Resource Management, Background Checking: Conducting Criminal Background Checks, January 22, 2010.

<sup>2</sup>"65 Million 'Need Not Apply': The Case for Reforming Criminal Background Checks for Employment," National Employment Law Project, March 2011.

<sup>3</sup>Unemployment Disparity in Minnesota, Report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, December 2013. Minnesota District Court Judge Lucy Wieland, *Minnesota's racial disparities: A judge's view*, STAR TRIBUNE, Apr. 17, 2011, available at <http://www.startribune.com/opinion/119948639.html?refer=y>.

<sup>4</sup>Unemployment Disparity in Minnesota, Report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, December 2013. Thomas L. Johnson and Cheryl W. Heilman, *An Embarrassment to all Minnesotans: Racial Disparity in the Criminal Justice System*, BENCH AND BAR OF MINNESOTA (2001).

As a result of disproportional arrests and convictions in ethnic communities, we can only reduce economic inequality in our society if we are able to secure full employment of offenders. Fair Employment Practice Agencies such as the Minnesota Human Rights Department are also mindful that some employers are more likely discriminate against some applicants on the basis of their race.<sup>5</sup>

## FREQUENTLY ASKED QUESTIONS

### **Does Minn. Stat. 364.021 require an employer to hire someone with a criminal record?**

No. The new law imposes no requirements on an employer that it needs to hire an individual with a criminal record. The new law does not require an employer to give a preference to an individual with a criminal record over other candidates.

### **Does Minn. Stat. 364.021 require employers to interview someone with a criminal record?**

No. The new law does not compel employers to interview individuals who have a criminal record.

### **Can an employer be liable for discrimination under state or federal law if the employer complies with Minn. Stat. 364.021?**

Yes. The use of criminal background information by an employer to eliminate candidates for employment may constitute a discriminatory practice if the policy has a disproportionate impact for a class of individuals, the employer does not use a targeted screen and the employer fails to provide the applicant with an opportunity to respond to the criminal background information obtained on the applicant.

The discussion of how a criminal background check policy may violate anti-discrimination laws is beyond the scope of this technical assistance. However, a good discussion on this issue can be found within the [EEOC Technical Assistance Guidance on the Use of Arrest and Convictions Records](#), published on April 25, 2012.

### **We initially screen all applicants using an interview process; during our interview process we ask all applicants if they have committed a crime. Do our actions violate Minn. Stat. 364.021 if we have no written application form?**

<sup>5</sup> Devah Pager, EEOC Guidance

Yes. The law prohibits employers from obtaining or requiring applicants to disclose a criminal record or criminal history. While some individuals refer to the new law as “ban-the-box” in reference to the elimination of a question on a paper application form asking applicants if they have committed a crime, the language of the statute is far broader and eliminates any means by which an employer seeks to obtain criminal background information<sup>6</sup>.

**We are a temporary agency and most of our clients are required by law to conduct a criminal background check; can we ask applicants to provide criminal history information on our initial application?**

No. Inquiry into criminal history by the employer would be a violation of the law. However, prior to interview the temporary employment agency may inform all applicants that the majority of its clients utilize a criminal background screen and that employees with a criminal history may have difficulty securing assignments with clients of the company.

Once the temporary employment agency has decided to interview the candidate or has extended a conditional job offer, the temporary employment agency may inquire into the criminal history of the applicant.

**Does Minn. Stat. 364.021 prevent employers from conducting a criminal background check before hiring an applicant?**

No. Employers may still conduct a criminal background check on an applicant before hiring an applicant.

Minn. Stat. 364.021 merely moves the inquiry into criminal history from the initial point of contact with the applicant until after the point in time in which the employer has decided to interview or extend a conditional job offer.

**What steps does the Department suggest that employers undertake?**

The Department suggests that employers undertake the following steps:

- Review its application form to ensure that none of its questions could lead to the disclosure of criminal information

<sup>6</sup> Minn. Stat. 364.021 provides in part that a “private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant.”

- If the employer does not use an application form, the employer should review its initial interview script with applicant to ensure that it contains no questions that could lead to the disclosure of criminal information

If the employer is in several states and has an electronic application, the employer should clearly state, in bold and in a different font, that applicants applying for positions in Minnesota do not need to answer questions inquiring into criminal history under Minnesota Law. If an applicant does answer this question despite the disclaimer the employer should not track or in any way use this information.

- If the decision of an employer as to who is eligible to be hired is regulated by a licensing authority such as the Minnesota Department of Human Services, the employer should ensure that applicants are not excluded beyond the time period identified by the regulating licensing authority
- Review the [EEOC Guidance on Arrest and Conviction Records](#) published on April 25, 2012
- Develop a narrowly tailored written policy for screening applicants and employees for criminal conduct

### **Did the new law create any new exemptions for public employers?**

Yes. The new law modified the old law to exempt the Department of Corrections from Minnesota Chapter 364<sup>7</sup>. The Department of Corrections can therefore ask an applicant to provide criminal background history on its employment application.

### **If I apply to work for a public employer and I believe that the public employer has violated Minnesota Statute Chapter 364, where do I file a complaint?**

Complaints should be filed with the Office of Administrative Hearing (OAH)<sup>8</sup>. OAH can be contacted at 651-361-7900 or <http://mn.gov/oah/>

### **Are there private employers that are exempt from the new law?**

<sup>7</sup> See, Minn. Stat. 364.021(b).

<sup>8</sup> See, Minn. Stat. 364.06, Subd. 1 provides that, “Any complaints or grievances concerning violations of sections 364.01 to 364.10 by public employers shall be processed and adjudicated in accordance with the procedures set forth in chapter 14, the Administrative Procedure Act.”

Yes. Minn. Stat. 364.021 provides that private employers are exempt under the new law if the employer is specifically directed to conduct a criminal history background check or the employer is directed to gather information such that a criminal history background check can be done by a licensing authority.<sup>9</sup>

This provision of the new law has resulted in the most inquiries to the Department. The Department believes that the volume of inquiries is due to the fact that many statutes referencing that a criminal background check must be conducted prior to an employee working in the field do not require the employer to inquire at time of initial application.

An example of employers who may not have employees work for them prior to being approved by a licensing authority but who are not directed to take into consideration an employee's criminal history are employers licensed by the Department of Human Services.

In reviewing the background licensing statute, employers are directed to provide information to the Commissioner of Human Services to allow her to conduct a criminal background check. Employers are not directed to conduct an independent criminal background check. Specifically, Minn. Stat. 245C.05, Background Study; Information and Data Provided to Commissioner, provides in part,

Subdivision 1. Individual studied.

(a) ***The individual who is the subject of the background study must provide the applicant, license holder, or other entity under section [245C.04](#) with sufficient information to ensure an accurate study, including:***

(1) the individual's first, middle, and last name and all other names by which the individual has been known;

(2) home address, city, and state of residence;

(3) zip code;

(4) sex;

(5) date of birth; and

<sup>9</sup> See, Minn. Stat. 364.021(b) provides in part, "This section does not apply . . . to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process."

(6) Minnesota driver's license number or state identification number.

(b) Every subject of a background study conducted or initiated by counties or private agencies under this chapter must also provide the home address, city, county, and state of residence for the past five years.

(c) Every subject of a background study related to private agency adoptions or related to child foster care licensed through a private agency, who is 18 years of age or older, **shall also provide the commissioner a signed consent for the release of any information received from national crime information databases to the private agency that initiated the background study.**

(d) **The subject of a background study shall provide fingerprints as required in subdivision 5, paragraph (c).**

**None of the above language requires that an employer inquire into criminal history at the time of initial application.** The statute only requires employers to obtain a written consent form and background information on the individual from each applicant to be able to allow the Commissioner of Human Services to conduct a criminal background study.

**All individuals working in a facility licensed by the Commissioner of Human Services are still obligated to submit themselves to a background study check by the Commissioner.** Minn. Stat. 364.021 does not abrogate this obligation of individuals or license holders.

PRACTICE TIP: License holders can and should inform all applicants that they will be subject a criminal background study prior to be able to work in the field.

License holders can and should continue to obtain the fingerprints of applicants, a signed consent for the release of any information received from national crime information databases and the information identified by the Commissioner to ensure an accurate study.

License holders may wish to consider having general information on their application concerning the ability of an individual to petition the Commissioner of Human Services for an individual exemption.



Additionally, there are legislative statutes that suggest the applicant should be considered a conditional employee. An example can be found in Minn. Stat. 326.336, Subd. 1, that concerns private detectives and protective agents. Minn. Stat. 326.336, Subd. 1 provides in part,

***When a license holder hires a person*** to perform services as a private detective or protective agent, the employer shall submit to the Bureau of Criminal Apprehension a full set of fingerprints of each employee and the written consent of the employee to enable the bureau to determine whether that person has a criminal record. ***The employee is a conditional employee until the employer receives a report from the bureau*** that, based on a check of the criminal records maintained by the bureau, the prospective employee has not been convicted in Minnesota of a felony or any offense listed in section [326.3381, subdivision 3](#), other than a misdemeanor or gross misdemeanor assault. ***During the period of conditional employment, the person may not serve as a private detective or protective agent, but may be trained by the employer*** (Emphasis added).

The overall legislative scheme clearly envisions that individuals hired as private detectives and protective agents will be subjected to criminal background checks. However, the subdivision identified above clearly suggests that the timing of the criminal background check will occur after a conditional job offer has been made to the individual.

### **Can a private employer that is exempt under the new law inform applicants that they may be disqualified from employment for having previously committed a crime?**

Yes. Exempt private employers may have an application that states that applicants may be disqualified from employment<sup>10</sup>. An employer can provide information to an applicant on their application form that individuals who have a particular criminal history background will be disqualified from employment by the employer.

**PRACTICE TIP:** Because many statute provide an applicant with the opportunity to pursue an exemption from a licensing authority, the employer should inform the applicant of the existence of the statute and the ability to contact the licensing authority to pursue an exemption.

<sup>10</sup> Minn. Stat. 364.021(c) provides, “This section does not prohibit an employer from notifying applicants that law . . . will disqualify an individual with a particular criminal history background from employment in particular positions.”

**Can a private employer that is subject to Minn. Stat. 364.021 inform applicants that they may be disqualified from employment if they have previously committed a crime?**

Yes. Private employers subject to Minn. Stat. 364.021 can inform applicants that if they have previously committed a crime that they may be disqualified from employment.

Example B – Employer policy provides that an applicant will be prohibited from working for the employer. In such situations the applicant should be informed of the types of offenses that are subject to the employer’s policy and what steps, if any, the applicant can undertake to obtain an exception from the employer.

\*\*Assume that an employer informs all applicants that any criminal conviction will result in the elimination of the applicant’s consideration for employment. An individual is selected for an interview for a managerial position. Subsequent to the interview, the employer obtains criminal background information on the individual which indicates that that the applicant pled guilty to underage consumption ten years ago. The employer decides not to hire the individual for the managerial position.

>>The employment application complies with 364.021.

>>The decision not to hire the individual for the managerial position may result in a finding that the employer has violated federal or state discrimination law. Refer individuals to the [EEOC Technical Guidance](#) issued on 4/25/2012 which provides guidance to employers in assessing whether their actions violate federal discrimination law.

The notice provided by the employer can also be based on the policy of the employer to hire an applicant with a criminal history.

**At what point in time during the interview process can an employer obtain criminal history information from an applicant?**

The answer depends on whether the employer is going to interview candidates before determining who to hire for the open position.

If the employer does conduct interviews before an applicant under consideration is hired, the employer should initiate a criminal background check after it has decided to interview the candidate.

**PRACTICE TIP:** In establishing compliance with Minn. Stat. 364.021, the employer may wish to wait until the end of the interview before asking the applicant to submit to a criminal background check.

Alternatively, an employer may wish to inform the applicant in writing that he has been selected for an interview prior to when the employer informs the applicant that she is subject to a criminal background check.

If the employer doesn't conduct interviews before hiring an applicant, the employer may initiate a criminal background check after it decides to extend a conditional offer of employment to the applicant.

**PRACTICE TIP:** An employer may wish to first inform the applicant that she will be hired dependent on the results of the criminal background check prior to requesting the applicant to submit to a criminal background check.

The communication sent to the applicant may subsequently be used by the employer to establish compliance with Minn. Stat. 364.021.

**Can an individual file a lawsuit against a private employer for violation of Minn. Stat. 364.021?**

No. If an individual becomes aware that a private employer has violated Minn. Stat. 364.021 he or she should contact the Minnesota Department of Human Rights at (651) 539-1121.

**Can an employer be fined by MDHR in 2014 for violation of the law?**

Yes. The Commissioner may issue a fine up to \$500 per violation and not to exceed \$500 in a calendar month<sup>11</sup>. However, in 2014 MDHR can only impose a fine after first giving the employer 30 days to change their application form.

**What should an employer do if it receives a letter from MDHR indicating that the employer has violated Minn. Stat. 364.021?**

The employer should provide a response to MDHR within thirty (30) days of receiving notice from the Department of its possible violation of Minn. Stat. 364.021. Failure to provide a timely response to MDHR may result in the Department pursuing a fine against the employer.

<sup>11</sup> Minn. Stat. 364.06, Subd. 2.

If the employer believes that it is exempt from Minn. Stat. 364.021, the employer should provide citation to the law that it believes renders it exempt from the law.

If the employer modifies its application form in response to the warning provided by the Department, the employer should forward its modified application form with a notarized statement by a high ranking official within the company responsible for human resources oversight stating when the employment application was modified and that the modified employment application is being used by the employer.

The MDHR anticipates forwarding a response to any correspondence forwarded to the Department within ten (10) days.

**Is it true that fines for violations of the law by large employers increase in the future?**

Yes. In 2015, employers with more than 20 employees will potentially be subject to fines that could amount to \$2,000 in a calendar month<sup>12</sup>.

**We are an employer with operations in several states that uses one electronic application; can we use our electronic application if we inform applicants residing in Minnesota that they don't have to answer criminal background history questions?**

Yes. A multi-state employer doesn't need to abandon its practice of using one electronic application provided that the electronic application provides language on the application is clear and unambiguous that Minnesota applicants don't have to answer criminal background history questions.

PRACTICE TIP: Employers may wish to put language in in bold text and in different font type to ensure that it clear and unambiguous that applicants residing in Minnesota, under Minnesota Law, don't have to answer criminal background history questions. If an applicant does answer this question, despite the disclaimer, the employer should not track or in any way use this information.

**Our principal place of business is Minnesota but we have operations in two of the states that border Minnesota. Do we need change our application form in a state that borders Minnesota in response to Minn. Stat. 364.021?**

No. An employer based in Minnesota does not need to modify the application forms it uses for positions outside of Minnesota. Minn. Stat. 364.021 only prohibits an

<sup>12</sup> Id.

employer from collecting criminal background information from the applicant if the position is located in Minnesota.

**Are there resources available from the Minnesota Judiciary to find answers to general questions concerning expungement and what constitutes a criminal record?**

The [Minnesota Judicial Branch Self Help Center Website](#) has excellent information on criminal expungement, what constitutes a criminal record, forms and where criminal records are kept in the State of Minnesota. The Website provides information on how to pursue expungement of a criminal record before courts and how to pursue sealing arrest records before a law enforcement agency.

**What can I do if the Minnesota Department of Human Services or the Minnesota Department of Health has disqualified me from working as a health care worker?**

You may wish to consult with an attorney after reviewing the July 2011 DHS Disqualification Fact Sheet published by the Minnesota Legal Services Coalition, <http://www.lawhelpmn.org>, which provides information on the disqualification process, the expungement process and how to find a volunteer attorney.