



CRIMINAL HISTORY BACKGROUND CHECKS

Summary of Issue:

A new law (Chapter 59 of Minnesota Session Laws) was enacted in the 2009 legislature that prohibits cities from inquiring into the criminal history of an applicant for employment prior to being selected for an interview, unless the background check is required by state or federal law. The new law does allow the city to provide notice “up front” of any particular criminal history background that will bar an applicant from employment. The new law reads as follows:

Sec. 11. [364.021] PUBLIC EMPLOYMENT; CONSIDERATION OF CRIMINAL RECORDS.

(a) A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.

(b) This section does not apply to the Department of Corrections or to public 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.

(c) This section does not prohibit a public employer from notifying applicants that law or the employer's policy will disqualify an individual with a particular criminal history background from employment in particular positions.

The new law is part of the Criminal Offenders Rehabilitation law (Chapter 364 of Minnesota Statutes) which provides certain protections to applicants for public employment, including a requirement that the city consider evidence of rehabilitation if it is denying a person a job offer based on their criminal record. More information about the law is available in the League’s HR Reference Manual, Hiring Chapter, under Background Checks. Cities should review the latest change in law in conjunction with the existing requirements of Chapter 364. Chapter 364 does not apply to law enforcement or fire protection agencies; therefore, the new law does not apply to these agencies either.

The new law was specifically designed to require public employers to remove the questions from their employment application forms that ask about criminal convictions. Therefore, these questions will no longer be allowed under the new law unless the application form makes it clear that the questions apply only to applicants for positions within the police or fire department. Since Chapter 364 excludes police and fire protection agencies, criminal history questions are still

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permissible for those completing applications for positions within these two departments of the city.

Criminal history background checks for workers assigned to work with children are authorized – but not required – under state law. Therefore, these types of criminal background checks are probably not permitted until the applicant has been selected for an interview.

Listed below are some ways that cities might consider changing their application process in order to comply with the new law.

Ways to Comply with the New Law:

There are several ways in which your city can make changes to your employment application process to comply with the new law. Some of these options are outlined below. Please note that all of these approaches assume that the city will not conduct criminal history background checks on any job candidates – with the possible exception of candidates to police and fire departments – until the candidates are selected and interviewed for the position for which they have applied. The best practice would be for cities to have the applicants sign a consent form when they appear for the interview that would notify them that the city will be conducting a criminal history background check, as well as their rights under Chapter 364 of Minnesota Statutes.

1. **Remove the information from the employment application that asks job applicants to provide criminal history information and/or modify it so that it is clear that it applies only to applicants for positions within the police and fire departments.** This is the simplest method for complying with the law, but it does not take advantage of the section of the law that states that cities may notify applicants of any criminal convictions that will automatically disqualify them from employment in a particular position with the city. For example, most cities disqualify applicants that have criminal sexual misconduct in their backgrounds from working in positions with children. Using this option could mean that the city ends up having to interview more candidates than it typically would in order to ensure an adequate pool for second round interviews since some candidates may be weeded out once the criminal history background checks have been done.
2. **Remove the information from the employment application that asks job applicants to provide criminal history information. Replace it with general language stating that the city will conduct criminal history background checks on applicants for certain positions (or all positions if that is the city's practice). Then provide separate information to applicants listing job classes for which the city will conduct a criminal history background check and the types of crimes which will disqualify an applicant from employment in each of the job classes.** This could be done as a separate document from the employment application form containing a general listing of all job classes and related crimes. Another approach would be for the city to customize the job announcement for each position listing just the crimes relevant to that position. Ideally, either of these

methods would keep applicants who have an unacceptable criminal history from applying for those jobs for which they would be disqualified. The downside is that compiling the information might be difficult and time-consuming in cities where many/all job classes require a criminal history background check. The language would also have to be reviewed from time to time for updating and legal compliance.

3. **Describe on the city's employment application form the criminal history background check process only for major job classes like police, fire and those working directly with children and how the city will treat those job classes vs. others.** At the end of this document is a League "model" showing language the city might choose to use on its employment application form under this type of approach. This approach has the advantage of making it clear to candidates that the city will be conducting criminal history checks and giving candidates some idea of what will be a disqualifying criminal history but not requiring the city to compile a specific listing of crimes for each job class in advance.

Frequently Asked Questions:

1. **We have a question on our job application that asks applicants about any misdemeanor, gross misdemeanor and felony convictions. Do we have to remove that from our application form under the new law?**

Yes. The new law was specifically intended to prohibit public employers from using this type of question on employment applications. The two exceptions are candidates for police and fire department positions. The city could continue to use this question on the form if the language made it clear that the question was only to be answered by applicants for jobs in these two departments.

2. **We have a question on our application form asking whether the applicant has had any moving traffic violations. Can we continue to use this question?**

Probably not. The new law is not directly related to many moving traffic violations because many such violations are not "crimes." However, other sections of Chapter 364 – specifically 364.02 and 364.04 state that criminal records associated with "misdemeanor convictions for which no jail sentence can be imposed" cannot be used in connection with any application for public employment.

3. **Under the new law, for positions other than police and fire department positions, can we run the background check at the time the candidate is chosen for an interview or must it be done after the interview when we choose our finalists?**

Technically, the law seems to authorize a background check once a person has been "selected" for an interview. However, since the intent of the law was to give the applicant the opportunity for an interview without being eliminated beforehand, the best practice would probably be to conduct the criminal history background check after the interview

has taken place; this approach also makes it easier to obtain the recommended “informed consent” from the applicant at the time of the interview.

4. During the interview, can we ask, “Is there anything in your background that would preclude you from passing our background check for this position?”

Yes, you can ask this question. For candidates who are not applying for positions within the police or fire department, the best practice would be to ask the question in this way, “*The City of _____ conducts criminal history background checks on all candidates for the position of _____. The existence of a criminal conviction record will not automatically disqualify you from this position unless it is related to the duties of the position. Do you know of anything in your background that would preclude you from passing our background check for this position?*”

Samples/Models:

Below is information from Ramsey County and the City of St. Paul, both of which have been voluntarily complying with the new law, even before it was passed. The third sample is a League-developed model that represents a slightly different approach to helping cities comply with the new law.

1. Ramsey County: *“All employment offers are conditioned upon the applicant passing a criminal background check. Convictions are not an automatic bar to employment. Each case is considered on its individual merits and the type of work sought. However, making false statements or withholding information will cause you to be barred from employment, or removed from employment.”*
2. City of St. Paul: St. Paul doesn't have any particular language relating to criminal history checks on the job application form. Wording is placed on the job announcement for the position and customized for the position. For example, this is the wording for Police Officer:

CRIMINAL BACKGROUND STANDARDS: *Under Minnesota Rules, Chapter 6700.0700, Minimum Selection Standards, applicants cannot be appointed to the position of peace officer if any of the following apply:*

- *Required to register as a predatory offender under Minnesota Statutes, section 243.166 or 243.167.*
- *Convicted of a felony in this state or in any other state or federal jurisdiction.*
- *Convicted of any offense in any other state or federal jurisdiction which would have been a felony if committed in Minnesota.*
- *Convicted under Minnesota Statutes, section 609.224, 609.2242, 609.231, 609.2325, 609.233, 609.2335, 609.234, 609.324, 609.465, 609.465, 609.466, 609.52, 609.72, subdivision 3; or convicted under any state or federal narcotics or controlled substance*

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law irrespective of any proceeding under Minnesota Statutes, section 152.18, or any similar law of another state or federal law. (Minnesota Statutes can be found online at www.leg.state.mn.us/leg/statutes.asp).

- *Convicted of any of the crimes listed in this item in another state or federal jurisdiction, or under a local ordinance that would be a conviction if committed in Minnesota.*

For other positions that require a criminal history check, the city states: *"This position requires a criminal history check as a condition of employment,"* on the announcement.

3. League Model (for employment application):

The City of _____ conducts criminal history background checks on (the city could reference "all regular full-time or part-time employees" or list positions individually, such as "all sworn police positions, firefighters, positions which work directly with children or vulnerable adults, positions which involve driving as part of the duties, and positions which work directly with financial records and cash receipts.")

For sworn police positions, felony convictions (and certain other convictions mandated by the state licensing board for police) will automatically disqualify you from further consideration. For non-police positions, the city will look at the type of conviction and whether it is directly related to the job for which you are applying.

Candidates for positions working with children will not be selected if they have been convicted of any crime listed in the Child Protection Worker Act (Minnesota Statutes 299C.61 & 62). Generally, this includes child abuse crimes, murder, manslaughter, felony level assault or any assault crime committed against a minor, kidnapping, arson, criminal sexual conduct, and prostitution-related crimes.

Before any applicant (other than applicants for positions within the police or fire department) is rejected on the basis of criminal conviction, he or she will be notified in writing and will be given any rights afforded by Minnesota Statutes Chapter 364. This includes the right to show evidence of rehabilitation.