

**Amendment to**  
**EXECUTIVE ORDER NO. 5 - 15**

**BACKGROUND CHECKS FOR CITY EMPLOYMENT**

Executive Order No. 5-15, signed December 15, 2015, is hereby amended as follows:

1. Change Section 4 (A)(vii) to read:  
(vii) "Invite the Applicant to submit information rebutting the accuracy or relevance of the criminal record within ten (10) business days . . ." (rather than ten (10) days).
  
2. Change Section 4(E) to read:  
(E) "If ten (10) business days elapse . . ." (rather than five (5) business days).

A signed copy of the Executive Order, as amended, is attached hereto.

12/23/15  
Date

  
Michael A. Nutter, Mayor

**EXECUTIVE ORDER NO. 5-15**

**BACKGROUND CHECKS FOR CITY EMPLOYMENT**

(As amended December 23, 2015)

**WHEREAS**, the City of Philadelphia is committed to supporting the reintegration of formerly incarcerated Philadelphians into the community while ensuring safety in the workplace;

**WHEREAS**, many formerly incarcerated Philadelphians possess skills and talents that would benefit the City's workforce;

**WHEREAS**, more than one in five Philadelphians have criminal records;

**WHEREAS**, exclusionary hiring practices prevent people with criminal records from finding employment, thereby increasing rates of recidivism and intractable poverty;

**WHEREAS**, Pennsylvania law prohibits consideration of a misdemeanor or felony conviction in hiring for a given position, except when the conviction relates to suitability for employment in that particular position or its consideration is required by another law;

**WHEREAS**, best practices for employers include not conducting a criminal background check on a job applicant until a conditional offer of employment has been made; and

**WHEREAS**, performing unnecessary background checks is costly and may cause the City to lose desirable applicants by creating delay in the hiring process.

**NOW, THEREFORE**, I, Michael A. Nutter, by the powers vested in me by the Philadelphia Home Rule Charter, hereby **ORDER** as follows:

**SECTION 1. DEFINITIONS**

"Applicant." Any person who applies to be considered for employment by the City.

"Barrier Conviction." Any misdemeanor or felony conviction that: (1) appears on the valid criminal record of an Applicant who has received a conditional offer of employment; (2) occurred in or resulted in incarceration during the seven (7) years before the date of the criminal background check; and (3) has been identified as potentially relevant to a Sensitive Position in accordance with Section 6 of this Order. Arrests are not Barrier Convictions and shall not be considered in hiring.

"City Agency." Any office, agency, department, board, or commission in the Executive and Administrative Branch of the City of Philadelphia.

“Human Resources Manager.” For each City Agency, the employee responsible for oversight of all human resources matters, or his or her designee within the same human resources office.

“OHR Director.” The Director of the City of Philadelphia Office of Human Resources, or his or her designee.

“Sensitive Position.” A position the duties of which justify requesting a criminal background check when hiring. In creating and updating the list of such positions pursuant to Section 6, Human Resources Managers and the OHR Director shall consider the following: impact on public safety; level of supervision and autonomous authority; access to sensitive information sufficient to facilitate criminal activity; and access to resources highly susceptible to loss or conversion. All positions, including exempt and appointed positions, as well as Civil Service positions, are subject to potential inclusion in this category.

## **SECTION 2. CRIMINAL BACKGROUND CHECKS FOR SENSITIVE POSITIONS**

(A) City Agencies shall neither conduct nor request criminal background checks, nor consider criminal records in filling any position, except as required by law or in accordance with this Order.

(B) When a City Agency makes a conditional offer of employment to an Applicant for a Sensitive Position, the Human Resources Manager may, within ten (10) business days, conduct or request a criminal background check on the Applicant subject to the following conditions:

(i) Criminal background checks shall not be performed on an Applicant until after the Applicant has received a conditional offer of employment;

(ii) An Applicant must give informed written consent, which may be deemed a condition of employment, before a criminal background check may be performed;

(iii) A criminal background check shall request only felony and misdemeanor convictions; and

(iv) Information about arrests shall neither be requested nor considered for hiring purposes.

## **SECTION 3. EVALUATING CRIMINAL BACKGROUND CHECK RESULTS FOR SENSITIVE POSITIONS**

(A) Criminal background check results shall be reviewed by the Human Resources Manager and shall not be disclosed to others, except as required by law or this Order.

(B) Within five (5) business days of learning that an Applicant's criminal background check revealed any criminal conviction, the Human Resources Manager shall determine whether or not the record contains a Barrier Conviction, and:

(i) If the record does not contain a Barrier Conviction, the hiring process shall proceed as usual.

(ii) If the record appears to contain a Barrier Conviction, the Human Resources Manager shall determine whether or not it is relevant and material to hiring the Applicant for the position. In considering whether or not a Barrier Conviction is relevant and material, the Human Resources Manager shall consider the following, among other appropriate factors:

(a) The facts or circumstances surrounding the offense or conduct;

(b) The number of offenses for which the individual was convicted;

(c) The Applicant's age at the time of conviction or release from prison;

(d) The length and consistency of the Applicant's employment history before and after the conviction, and any evidence of rehabilitation, including education and training; and

(e) Whether the individual is bonded under a federal, state, or local bonding program.

(C) Convictions that occurred more than seven (7) years before the date of the criminal background shall be ignored, unless there is reason to believe that the Applicant could have been incarcerated as a result of the conviction at any point in the seven (7) years before the date of the criminal background check.

(i) For example, a misdemeanor from ten (10) years before the date of the criminal background check is not a Barrier Conviction because there is not reason to believe that a misdemeanor would result in incarceration lasting more than three (3) years.

(ii) If an Applicant was engaged in activities incarceration would preclude (e.g., continuous employment) during the period of time incarceration resulting from a conviction that occurred more than seven (7) years before the date of the criminal background check might reasonably have occurred, the conviction shall be ignored.

(D) If a Human Resources Manager determines that an Applicant's criminal record contains a Barrier Conviction that is relevant and material to hiring the Applicant for the position and may disqualify the Applicant, or that there is reason to believe the Applicant has been incarcerated during the past seven (7) years for a relevant and material Barrier Conviction, the

Human Resources Manager shall provide the Applicant with an opportunity to respond in accordance with Section 4 before making any employment decision with respect to the Applicant.

#### **SECTION 4.           APPLICANT'S OPPORTUNITY TO RESPOND**

(A) If a Human Resources Manager determines that an Applicant's criminal record contains a Barrier Conviction that may disqualify the Applicant for hiring, or that there is reason to believe the Applicant has been incarcerated during the past seven (7) years for a relevant and material Barrier Conviction, the Human Resources Manager shall within three (3) business days:

- (i) Notify the Applicant of the potential adverse employment action;
- (ii) Provide the Applicant with a copy of the background check results;
- (iii) Provide the Applicant with a sufficient explanation of why disqualification is being considered to allow the Applicant the opportunity to adequately address the City Agency's concerns;
- (iv) Identify for the Applicant each conviction supporting the potential adverse employment action;
- (v) For any conviction that occurred more than seven (7) years before the date of the criminal background check, include the following written statement with the date of the criminal background check inserted: "IF YOU CAN SHOW THAT YOU WERE NOT INCARCERATED FOR THIS CONVICTION AT ANY POINT IN THE SEVEN (7) YEARS PRIOR TO [DATE OF CRIMINAL BACKGROUND CHECK], THE CITY OF PHILADELPHIA WILL NOT CONSIDER THE CONVICTION IN REVIEWING YOUR APPLICATION FOR EMPLOYMENT."
- (vi) Invite the Applicant to meet with the Human Resources Manager to discuss the Applicant's criminal record as soon as possible; and
- (vii) Invite the Applicant to submit information rebutting the accuracy or relevance of the criminal record within ten (10) business days of receiving notification of the potential adverse employment action or at a meeting scheduled pursuant to Section 4(A)(vi).

(B) In meeting with the Applicant and reviewing information the Applicant provides, the Human Resources Manager shall seek to make an individualized determination about the Applicant's suitability for employment, considering, among other appropriate factors, the factors identified in Section 3(B)(ii), and the following:

- (i) 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;
- (ii) Rehabilitation efforts, including, but not limited to, education or training;
- (iii) Employment or character references and any other information regarding fitness for the particular position; and
- (iv) Evidence pertaining to the dates of incarceration, if any.

(C) For any conviction that occurred more than seven (7) years before the date of the criminal background check, if an Applicant adequately demonstrates that he or she was not incarcerated in connection with such conviction at any point in the seven (7) years before the date of the criminal background check, that conviction is not a Barrier Conviction and shall not be considered in hiring.

(D) Any Human Resources Manager who receives information from an Applicant pursuant to Section 4(A)(vi) or (vii) shall fully consider and memorialize such information before making an employment recommendation pursuant to Section 5.

(E) If ten (10) business days elapse following receipt of notification pursuant to Section 4(A) without a response from the Applicant, the Human Resources Manager may make an employment recommendation pursuant to Section 5 without considering additional information from the Applicant.

**SECTION 5. EMPLOYMENT RECOMMENDATION NOT TO HIRE**

(A) If a Human Resources Manager, after providing an opportunity to respond in accordance with Section 4, determines that an Applicant must be disqualified due to his or her criminal record, the Human Resources Manager shall submit a report, after review and signed approval by the head of the City Agency, to the OHR Director recommending disqualification of the Applicant, which report shall contain the following elements:

- (i) The criminal record, highlighting the specific Barrier Conviction(s) at issue;
- (ii) A copy of the notice sent to the Applicant in accordance with Section 4;
- (iii) All information provided by the Applicant in accordance with Section 4, or a statement certifying that the Applicant failed to respond to the Human Resources Manager; and

(iv) A narrative explanation for the Human Resources Manager's recommendation, including analysis of the factors concerning individualized assessment described in Section 4(B), if applicable.

(B) The Human Resources Manager may not disqualify an Applicant for his or her criminal record without approval from the OHR Director.

(C) If the OHR Director approves disqualification of an Applicant, the Human Resources Manager shall notify the Applicant of the final determination and provide written justification.

## **SECTION 6. LIST OF SENSITIVE POSITIONS AND BARRIER CONVICTIONS**

(A) Within two (2) months of the Effective Date of this Order, or within such other period of time as the OHR Director may in writing provide, each City Agency shall submit to the OHR Director a list of proposed Sensitive Positions and relevant types of Barrier Convictions, including justification for requesting criminal background checks for each proposed Sensitive Position.

(B) The OHR Director shall approve or deny each proposed Sensitive Position.

(C) Within two (2) months of the deadline for submission of lists of Sensitive Positions under subsection (A), the OHR Director shall create and publish on the City's website a list of all approved Sensitive Positions and shall include for each Sensitive Position a list of the types of Barrier Convictions that may be considered when hiring for that Sensitive Position.

(D) A Human Resources Manager may propose a new Sensitive Position to the OHR Director at any time.

## **SECTION 7. NON-CRIMINAL BACKGROUND CHECKS CONDUCTED BY THIRD PARTIES**

(A) Non-criminal background checks, unlike criminal background checks, are permissible for any position; however, non-criminal background checks should only be performed if they seek information relevant to the position an Applicant seeks.

(B) Non-criminal background checks should seek information efficiently: for example, background checks should generally seek educational confirmation only for an Applicant's highest degree.

(C) Appropriate consent, which may be deemed a condition of employment, is required before requesting that a third party conduct a non-criminal background check on an Applicant.

(D) A Human Resources Manager, or other person with authority to disqualify an Applicant from hiring, considering the disqualification of an Applicant based upon information discovered in a non-criminal background check conducted by a third party must provide the Applicant written notice of the contemplated disqualification and also provide the Applicant an opportunity to respond in writing. Such notice shall plainly and clearly state why the disqualification is being contemplated and advise the Applicant of the opportunity to contest the disqualification. An Applicant shall be afforded five (5) business days following receipt of notification to respond with information the Applicant believes renders the contemplated disqualification inappropriate.

(E) Once the Human Resources Manager, or other person with authority to disqualify an Applicant from hiring, has provided the Applicant with notice of the contemplated disqualification and an opportunity for the Applicant to respond in writing, and considered and memorialized the information the Applicant provided in response, if any, that person may submit a disqualification request, after review and signed approval by the head of the City Agency, to the OHR Director. The disqualification request must include:

(i) An explanation for the disqualification request and documentation substantiating the explanation;

(ii) A copy of the written notification to the Applicant of the City Agency's intent to request the disqualification; and

(iii) A copy of the Applicant's response to the City Agency or a statement certifying that the Applicant failed to respond to the City Agency.

(F) Upon receipt of a disqualification request and supporting documentation, the OHR Director shall render a decision regarding the City Agency's request. The decision of the OHR Director will be final.

(G) Exempt hiring is excluded from the foregoing Sections 7(D), (E), and (F).

(H) This Order does not apply to any request between City Agencies concerning an Applicant's indebtedness to the City of Philadelphia.

## **SECTION 8. HIRING PENDING RESULTS OF BACKGROUND CHECK**

City Agencies are encouraged to hire pending the results of background checks, unless prohibited by law.

## **SECTION 9. NO PRIVATE RIGHT OF ACTION**

This Order is not intended to create enforceable rights in Applicants.

**SECTION 10. BACKGROUND CHECKS REQUIRED BY LAW**

Notwithstanding this Order, background checks and hiring determinations shall be made in accordance with all applicable law.

**SECTION 11. REPORTING AND REVIEW**

The OHR Director shall track the number of criminal background checks each City Agency conducts or requests and the number of hiring disqualifications based on criminal records each City Agency makes and publish the de-identified data on the City's website.

**SECTION 12. RESCISSION OF EXISTING EXECUTIVE ORDER**

Executive Order 1-05 ("Background Investigations") is hereby rescinded.

**SECTION 13. EFFECTIVE DATE**

This Order shall take effect immediately, except that City Agencies may conduct or request criminal background checks in accordance with this Order for positions not identified as Sensitive Positions until two (2) months after the deadline for submission of lists of Sensitive Positions under Section 6(A). After two (2) months have elapsed from the deadline for submission of lists of Sensitive Positions under Section 6(A), City Agencies may only conduct or request criminal background checks for Sensitive Positions or as required by law, in accordance with Section 2 of this Order.

December 23, 2015  
DATE

  
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MICHAEL A. NUTTER, MAYOR  
CITY OF PHILADELPHIA

(Original version signed December 15, 2015).