

“BAN THE BOX”

Presented by

Sophia G. Long
Deputy Attorney General
(702) 486-3165
slong@ag.nv.gov



Office of the Attorney General
555 E. Washington Avenue
Suite 3900
Las Vegas, Nevada 89101

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WHAT WE WILL COVER

- History and overview of Ban the Box legislation
- Nevada AB384 from the 79th (2017) Legislative session
- EEOC and NERC guidance
- Suggested language and best practices

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Fair Chance Policy:

- “Removing criminal inquiries from job applications eases hiring barriers and creates a fair chance to compete for jobs...allows employers to judge applicants on their qualifications first, without the stigma of a record.”
- Estimated 70 million U.S. adults with arrests or conviction records, many of whom are turned away from jobs despite their skills and qualifications
- Hiring barriers
- Disparate impact on minorities: “African Americans and Latinos are arrested at a rate of 2 to 3 times their proportion to the general population”

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- Employment boosts the economy
- Employment significant factor in reducing re-offending
- Research suggests once an employer had the chance to examine the qualifications of an applicant, the employer was more willing to hire the applicant
- Hawaii first state; Philadelphia first city
- Question now banned in 34 states and over 150 cities and counties
- Common reference to any criminal history restrictions

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NEVADA

- AB384 (2017) NRS 284, effective January 1, 2018
 - Prohibits *public* employers from asking applicants about criminal history on an *initial* job application
 - Exception: peace officers, firefighters and any position that entails physical access to a computer or other equipment used to access CJIS or the NCIC
- Refers to criminal history questions on job applications:
 - Have you ever been convicted of a crime? YES NO
 - Must include statement that:
 - A record of conviction will not necessarily bar the applicant from employment

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WHEN TO CONSIDER CRIMINAL HISTORY:

- Can only consider criminal history of an applicant in the classified/unclassified service after:
 - The final interview;
 - A conditional offer made; or
 - Has been certified by the Administrator (unclassified: of Human Resources)
 - Certified: NRS 284.265
- Effectively delays criminal history inquiry until later in the hiring process

TIP:: May inform the applicant of specific criminal history that would disqualify an applicant pursuant to state or federal law

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WHAT TO CONSIDER: CONVICTIONS ONLY!!

Must include a statement that:

- Time since the conviction
- Nature and severity of the offense
- Nature of the job
- Age of person at time of offense
- Evidence of rehabilitation

TIP:: Must have a clear connection why the criminal record makes the applicant unfit for the job

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WHAT NOT TO CONSIDER:

- Arrests not resulting in convictions
- Convictions that were dismissed, expunged or sealed
- Infraction or misdemeanor that did not result in jail time
 - Stayed sentence?

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BEFORE RESCINDING AN OFFER BASED ON CRIMINAL HISTORY

- Provide written notice of the specific items in the background check report that is considered job related AND a copy of the report
- Allow applicant an opportunity to explain the facts and circumstances and/or challenge the report
- Background checks may contain inaccuracies or errors
- Follow the Fair Credit Reporting Act, and any state requirements
- Hold the position open until the review is complete

TIP:: Allow the applicant to include letters of recommendation and certificates from programs or education

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RESCINDING AN OFFER BASED ON CRIMINAL HISTORY:

- Not required to hire those with a criminal background *if job related*
- Provide the applicant with *written notice* including:
 - Specific items in the background check report that is considered job related which is the reason for the rescission
 - Notification that the applicant may discuss the rescission with the Director of Human Resources or designee

NRS 284.281(3); NRS 284.283(3): *may rescind a conditional offer of employment extended to an otherwise qualified person who has criminal charges pending against him or her that were filed within the previous 6 months.*

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EEOC and NERC guidance

- Never refuse an applicant just because of a criminal conviction unless job-related or safety concern
- Employers MUST not treat applicants differently during the hiring process
- Violations are considered an unlawful employment practice.
 - May file a complaint with NERC
 - [http://detr.state.nv.us/PDFS/Ban the Box Guide.pdf](http://detr.state.nv.us/PDFS/Ban_the_Box_Guide.pdf)
 - Sample letters

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Suggested language and Best Practices

- Avoid stigmatizing language: “ex-offenders”, “ex-felons”
 - Instead use “people with records”
- Avoid blanket exclusions on the application: “clean background only”, “must pass a background check”
 - Instead use “a background check will be conducted for this position”
 - MUST include notice that “a record of conviction will not necessarily bar the applicant from employment” and the considering factors
- Remove provision to include “voluntary disclosure” of background check information from the application, including self-reporting



BAN THE BOX GUIDANCE

Effective January 1, 2018, public employers (state, city, incorporated city or unincorporated town, town board, county and local level(s) of government) have a legal duty to ensure careful consideration and fairness to all qualified applicants (for classified and unclassified service) including those applicants that may have a criminal history or "record". Failure to do so may result in a NERC charge, investigation and settlement at employer's expense. There is also a potential for litigation at the state or federal level depending on certain facts.

Exceptions: Peace officer and firefighter positions, positions that entail physical access to a computer or other equipment used for access to the Nevada Criminal Justice Information System or the National Crime Information Center

THE APPLICATION

- Applications should not ask if the applicant has been convicted of a felony or if the applicant has a criminal background.
- The application for employment MUST include a statement that:
A record of conviction will not necessarily bar the applicant from employment and the appointing authority (employer) will consider factors such as: 1) the length of time that has passed since the offense; 2) the age of the applicant at the time of the offense; 3) the severity and nature of the offense; 4) the relationship of the offense to the position for which the applicant has applied; and 5) evidence of the rehabilitation of the applicant.

THE INTERVIEW

- All qualified applicants should be asked questions related to the job duties (essential functions) and qualifications of the applicant. Certain applicants should not be randomly asked if they have a criminal background or "record". This may violate the Equal Employment Opportunity Commission's (EEOC) guidance on disparate treatment.

THE FINAL INTERVIEW/ CONDITIONAL OFFER/ CERTIFICATION OF APPLICANT

- The criminal history of an applicant or other qualified person for a position may be considered after the final interview; a conditional offer has been extended; or, if applicable, the applicant has been certified by the administrator.
- It is at this point, the employer must consider disqualification of a candidate based on a criminal record that identifies a CONVICTION or PENDING CHARGES against the applicant that was filed six (6) months prior.

IMPORTANT NOTE: Arrests [that did not result in conviction]; convictions that were dismissed, expunged or sealed; or an infraction or misdemeanor with no county jail time are not to be considered.

DISQUALIFICATION BASED ON RECORD - CONSIDERATIONS

Employers must consider the following factors (unless pursuant to a provision of state or federal law) if they plan to disqualify the applicant based on a record:

- 1) Whether any criminal offense charged against the person or committed by the person directly related to the responsibilities of the position for which the person has applied or is being considered;
- 2) The nature and severity of each criminal offense charged against the person or committed by the person;
- 3) The age of the person at the time of the commission of the offense;
- 4) The period of time between the offense and the application; and
- 5) Any information or documentation demonstrating the person's rehabilitation.

DISQUALIFICATION BASED ON RECORD - IN WRITING TO CANDIDATE

If the criminal history of an applicant is used as a basis for rejecting an applicant or rescinding a conditional offer of employment, the rejection MUST:

- 1) Be in writing;
- 2) Include a statement indicating that the criminal history of the applicant was the basis for the rejection or recession of the offer; and
- 3) Provide an opportunity for the applicant to discuss the basis for the rejection or rescission of the offer with the director of human resources for the appointing authority or a person designated by the director.

**If you have questions regarding this topic, contact
the Nevada Equal Rights Commission**

Website: www.detr.state.nv.us

Las Vegas Office

1820 E. Sahara Ave, Suite 314
Las Vegas, NV 89104
Telephone: (702) 486-7161
Fax: (702) 486-7054

Reno Office

1325 Corporate Blvd., Room 115
Reno, NV 89502
Telephone: (775) 823-6690
Fax: (775) 688-1292

SAMPLE CONDITIONAL OFFER LETTER

[DATE]

Re: Conditional Offer of Employment & Notice of Conviction Background Check

Dear [APPLICANT NAME]:

We are writing to make you a **conditional offer of employment** for the position of [INSERT POSITION]. Before this job offer becomes final, we will check your conviction history. The form attached to this letter asks for your permission to check your conviction history and provides more information about that background check.

As required by Nevada law, **we will NOT consider any of the following information:**

- Arrests that did not result in conviction;
- Convictions that were dismissed, expunged or sealed; or
- An infraction or misdemeanor with no county jail time.

After reviewing your conviction history report, we will **notify you in writing if we plan to revoke (take back) this job offer after reviewing your conviction history.**

Unless pursuant to a provision of state or federal law, we must consider:

- 1) Whether any criminal offense charged against [applicant] or committed by [applicant] is directly related to the responsibilities of the position for which [applicant] has applied or is being considered;
- 2) The nature and severity of each criminal offense charged against [applicant] or committed by the person;
- 3) [Applicant's] age at the time of the commission of the offense;
- 4) The period of time between the offense and the application;
- 5) Any information, references or documentation demonstrating the person's rehabilitation.

We will identify conviction(s) that concern us, give you a copy of the background check report, and allow you a **reasonable amount of time [i.e. 7-10 business] days** to respond with information showing the conviction history report is inaccurate and/or with information about your rehabilitation or mitigating circumstances.

We will review any information you timely submit and then decide whether to finalize or take back this conditional job offer. We will notify you of that decision in writing. Per Nevada law, **written revocation based on a conviction must:**

- Include a statement indicating that the criminal history of the applicant was the basis for the rejection of the offer; and
- Provide an opportunity for [applicant] to discuss the basis of the rejection or rescission of the offer with the director of human resources for the appointing authority or a person designated by the director.

Sincerely,
Employer Representative
Enclosure: Authorization for Background Check

SAMPLE EMPLOYER NOTICE OF PRELIMINARY DECISION TO REVOKE JOB OFFER BECAUSE OF CONVICTION HISTORY

[DATE]

Re: Preliminary Decision to Revoke Job Offer Because of Conviction History

Dear [APPLICANT NAME]:

After reviewing the results of your conviction history background check, **we have made a preliminary (non-final) decision to revoke (take back) our previous job offer for the position of [INSERT POSITION] because of the following conviction(s):**

- [LIST CONVICTION(S) THAT LED TO DECISION TO REVOKE OFFER]

As prohibited by Nevada law, **we have NOT considered any of the following:**

- Arrest(s) that did not result in a conviction;
- An infraction(s) or misdemeanor(s) that did not result in county jail time; or
- Convictions that have been sealed, dismissed, expunged, or pardoned.

Your Right to Respond:

You may respond to this letter before our decision to revoke the job offer becomes final within [INSERT NUMBER] business days¹ from when you first receive this notice, you may send us:

(A) Evidence of rehabilitation or mitigating circumstances

(B) Information challenging the accuracy of the conviction history listed above

If, within (insert deadline) from the date of this letter/email, you notify us that you are challenging the accuracy of the attached conviction history report, you shall have another (insert deadline) (i.e. 7-10 business days) to respond to this notice with evidence of inaccuracy.

Please send any additional information you would like us to consider to:

_____ [INSERT NAME AND MAILING ADDRESS OR EMAIL ADDRESS] _____

Here are some examples of information you may send us:

- Evidence that you were not convicted of one or more of the offenses we listed above or that the conviction record is inaccurate (such as the number of convictions listed);
- Facts or circumstances surrounding the offense or conduct, showing that the conduct was less serious than the conviction seems;
- The time that has passed since the conduct that led to your conviction(s) or since your release from incarceration;
- The length and consistency of employment history or community involvement (such as volunteer activities) before and after the offense(s);
- Employment or character references from people who know you, such as letters from judges, teachers, counselors, supervisors, clergy, and probation or parole officers;
- Evidence that you attended school, job training, or counseling;
- Evidence that you have performed the same type of work since your conviction;
- Whether you are bonded under a federal, state, or local bonding program; and
- Any other evidence of your rehabilitation efforts, such as (i) evidence showing how much time has passed since release from incarceration without subsequent conviction, (ii) evidence showing your compliance with the terms and conditions of probation or parole, or (iii) evidence showing your present fitness for the job.

¹ The applicant must be allowed a reasonable amount of time (i.e. 7-10 business days) to respond.

We are required to review the information you submit and make another individualized assessment of whether to hire you or revoke the job offer. We will notify you in writing if we make a final decision to revoke the job offer.

Our Individualized Assessment:

We have individually assessed whether your conviction history is directly related to the duties of the job we offered you. We considered all of the following:

- 1. The nature and seriousness of the conduct that led to your conviction(s), which we assessed as follows:** [EMPLOYER, DESCRIBE WHY CONSIDERED SERIOUS]
- 2. How the conviction(s) are directly related to the position applied for:**
[EMPLOYER, EXPLAIN HOW THE CONVICTION(S) RELATE TO THE POSITION APPLIED FOR]
- 3. How long ago the conduct occurred that led to your conviction and age when convicted, which was:** _____ [INSERT AMOUNT OF TIME PASSED AND AGE AT TIME OF CONVICTION] _____
and how long ago you completed your sentence, which was: _____ [INSERT AMOUNT OF TIME PASSED] _____.
- 4. The specific duties and responsibilities of the position of __[INSERT POSITION]__, which are:**
[EMPLOYER, LIST JOB LIST DUTIES]
 - [LIST CONVICTION(S) THAT LED TO DECISION TO REVOKE OFFER]_____

We believe your conviction record lessens your fitness/ability to perform the job duties.

Sincerely,

[Employer contact person name]

[Employer company name]

[Employer address]

[Employer contact phone number]

Enclosure: Copy of conviction history report

SAMPLE EMPLOYER NOTICE OF FINAL DECISION TO REVOKE JOB OFFER BECAUSE OF CONVICTION HISTORY

[Date]

Re: Final Decision to Revoke Job Offer Because of Conviction History

Dear [APPLICANT NAME]:

We are following up about our letter dated [DATE OF NOTICE], which notified you of our initial decision to revoke (take back) the conditional job offer.

(Please check one:)

- We did not receive a timely response from you after sending you that letter, and our decision to revoke the job offer is now final.
- We made a final decision to revoke the job offer after considering the information you submitted, which included: _____ [list information submitted] _____

After reviewing the information you submitted, we have determined that there WAS WAS NOT **(check one)** an error on your conviction history report.

Therefore, we decided to **revoke** our job offer because of the following conviction(s):

- [LIST CONVICTION(S) THAT LED TO DECISION TO REVOKE OFFER] _____

Our Individualized Assessment:

We have individually assessed whether your conviction history is directly related to the duties of the job we offered you. We considered all of the following:

- 1. The nature and seriousness of the conduct that led to your conviction(s), which we assessed as follows:** [EMPLOYER, DESCRIBE WHY CONSIDERED SERIOUS]
- 2. How the conviction(s) are directly related to the position applied for:**
[EMPLOYER, EXPLAIN HOW THE CONVICTION(S) RELATE TO THE POSITION APPLIED FOR]
- 3. How long ago the conduct occurred that led to your conviction and age when convicted, which was:** _____ [INSERT AMOUNT OF TIME PASSED AND AGE AT TIME OF CONVICTION] _____
and how long ago you completed your sentence, which was: _____ [INSERT AMOUNT OF TIME PASSED] _____
- 4. The specific duties and responsibilities of the position of [INSERT POSITION], which are:**
[EMPLOYER, LIST JOB LIST DUTIES]
 - [LIST CONVICTION(S) THAT LED TO DECISION TO REVOKE OFFER] _____

We believe your conviction record lessens your fitness/ability to perform the job duties and have made a final decision to revoke the job offer, despite references because: _____

According to Nevada law, you may discuss this final decision with the [insert human resource director or designee of appointing authority] by contacting us at [insert phone and email or appointment time]

Your Right to File a Complaint: If you believe your rights under Nevada law have been violated during this job application process, you have the right to file a complaint with the Nevada Equal Rights Commission (NERC), <http://www.nvdestr.org/nerc.htm>.

Sincerely,
[Employer contact person name]
[Employer company name]
[Employer address]
[Employer contact phone number]