



City of Denton

City Hall
215 E. McKinney Street
Denton, Texas
www.cityofdenton.com

AGENDA INFORMATION SHEET

DEPARTMENT: City Manager's Office

CM/DCM/ACM: Sara Hensley, City Manager

DATE: Dec. 6, 2022

SUBJECT

Receive a report, hold a discussion, and give staff direction regarding a citywide Fair Chance Hiring ordinance.

BACKGROUND

On Aug. 2, 2022, Council Member McGee presented a 2-minute policy pitch to the Council requesting support for a work session to discuss an ordinance regulating the use of criminal history questions on job applications. As pitched, the ordinance would apply to employers citywide and, generally, could mirror similar "fair chance hiring" or "ban the box" ordinances adopted in other cities or states. A future work session on this topic was supported. On Nov. 3, 2022, the City Council was provided with basic information regarding fair chance hiring ordinances and provided direction for staff to hold an additional work session discussion on ordinance components.

Fair Chance Hiring Overview

Fair chance hiring initiatives (also known as "ban the box" initiatives due to their goal of removing criminal history question boxes in job applications) generally refer to a policy or practice of not considering an applicant's criminal history in an employment application until later in the hiring process. This information is then typically obtained once a conditional offer has been made. Importantly, these initiatives and their related ordinances, do not limit the authority of an employer to withdraw an employment offer for a lawful reason.

According to National Employment Law Project (NELP), 37 states and 150 cities/counties enacted fair chance laws for themselves as public employers. Of these, 15 states and 22 cities/counties extend these to private employers. Most cities and counties listed with NELP as having enacted fair chance hiring laws have only had those laws apply to their organization as an employer. An even greater number may utilize this practice outside of a formal ordinance, like the City of Denton.

In Texas, the following cities have enacted formal laws relating to fair chance hiring:

Applies Only to Organization	Applies Across Jurisdiction
Dallas County	City of Austin
City of San Antonio	City of DeSoto
Travis County	
Harris County (2022)	

Existing Laws and Statutes

Title VII of the Civil Rights Act of 1964, does not restrict employers from requesting criminal history information, provided it does not result in unequal treatment with respect to a protected class. To avoid discrimination, employers may conduct an individualized assessment of a candidate's criminal record.

Additionally, some federal and state laws require a criminal background check to be performed for some positions. These include peace officers, Criminal Justice Information Services (CJIS) certifications, and certain positions in other sectors such as insurance, childcare, energy, etc. There is no requirement as to when a criminal background check should be performed under these statutes.

With respect to criminal history inquiries across all job types, no federal or State of Texas laws prohibit inquiring about an applicant's criminal history prior to a conditional employment offer though the Equal Employment Opportunity Commission (EEOC) best practice recommendations suggest employers consider asking criminal history questions later in the hiring process.

Proposed Fair Chance Hiring Ordinance Structure

It is staff's recommendation that fair chance hiring regulations be incorporated into the current Comprehensive Non-Discrimination Ordinance (NDO), codified as Chapter 14, Article VIII of the code of ordinances. In this manner, employment protections already provided under the NDO would be extended to include persons with criminal histories under a new section. Additionally, new definitions specific to fair chance hiring would also be incorporated into the NDO. By including fair chance hiring regulations in the NDO, the same administrative and enforcement provisions would apply to fair chance hiring complaints in the same manner that they currently do for NDO complaints. Importantly, this would not add any protected classes to the NDO.

Proposed Definitions

A fair chance hiring ordinance would include definitions specific to fair chance hiring regulations, including the following:

- Conditional Employment Offer – an oral or written offer by an employer to employ an individual in a job, or placement in a staffing agency's staffing pool, that is conditioned solely on the employer's evaluation of the individual's criminal history and may be conditioned on any pre-employment medical examinations authorized under the Americans with Disabilities Act (ADA).
- Criminal History – an arrest, conviction, plea of nolo contendere, or deferred adjudication arising from a felony criminal accusation, or a Class A or Class B misdemeanor criminal accusation, made under state law, federal law, or a comparable law of another state of the United States.
- Employment – to include full time work, part time work, temporary or seasonal work, contract work, casual or contingent work, work through the services of a temporary or other employment agency, and participation in a vocational, apprenticeship, or educational training program

Proposed Regulated Fair Chance Hiring Practices

Staff is proposing that a fair chance hiring ordinance prohibit employers from:

1. Publishing information that states or implies that criminal history is an automatic disqualifier for employment
2. Soliciting or otherwise inquiring about criminal history on a job application
3. Soliciting criminal history information or considering criminal history prior to a conditional employment offer
4. Refusing to consider an applicant because criminal history was not provided prior to a conditional employment offer

5. Taking adverse action against an individual due to criminal history unless the individual is unsuitable for the job based on an individualized assessment

Staffing agencies may solicit criminal history information and perform an individualized assessment when the staffing agency has identified a job to which the individual will be employed or the individual is placed in a staffing pool.

Additionally, an employer who takes an adverse action based on criminal history must inform the individual in writing that the adverse action was based on the criminal history. The regulation also does not absolve the employer from any other federal or state requirements, as applicable, when withdrawing an offer of employment.

Proposed Applicability and Exclusions

If fair chance hiring regulations are included in the NDO, those regulations would apply to all employers in which the NDO is currently applied. This is generally all employers with 15 or more employees. Additionally, the same exemptions within the NDO would also be applied to the fair chance hiring regulations:

- Religious organizations
- The United States Government or its departments and agencies
- The State of Texas or its departments, agencies, and political subdivisions

An additional exemption specific to fair chance hiring regulations includes positions for which an individual may be disqualified based on criminal history under federal, state, or local law. This includes peace officers and certain positions in fields such as insurance, childcare, the energy sector, etc.

Proposed Administration and Enforcement

If fair chance hiring regulations are included in the NDO, all administrative and enforcement provisions currently applied to NDO complaints would also apply to fair chance hiring complaints. These provisions are outlined in sections 14-203-9 through 14-203-13 of the NDO (**attached**). In summary, the administration and enforcement regulations state:

- The City Manager or designee shall be responsible for implementing and administering this fair chance hiring provisions
- Offenses are a class C misdemeanor with a fine of up to \$500 per violation
- Formal complaints must be filed within 90 days of the offense
- Investigation of complaints will be through a third-party investigator
- If mutually agreed upon by the parties, a third-party conciliator may be used to resolve the complaint
- Investigations will be referred to the municipal prosecutor

Additionally, just as the NDO directs that for complaints where the state or federal government has jurisdiction, those complainants be referred to those entities, should any fair chance hiring complaint indicate a violation of federal or state law based on a protected status, the complainant will be referred to the Equal Employment Opportunity Commission or other applicable agency.

Additional Considerations

In addition to the suggested components of a future fair chance hiring ordinance, there are additional considerations that the Council may weigh when providing direction:

1. Cost and Resources– the costs to administer this ordinance, including the use of a third-party investigator and conciliator, are based on the number of complaints the City receives. As a result, the full cost of this ordinance cannot be estimated and there are currently no funds budgeted to implement this ordinance. Additionally, should a high number of complaints be received, additional staff resources may be required.

2. Costs to Businesses – in addition to the business owner concerns provided to the Council on Nov. 3, businesses may incur additional costs as they may need to seek and pay for outside professional or legal advice to implement new requirements according to law, such as adverse action letters. This does not include any costs associated with defending against a class C misdemeanor charge.
3. Jurisdictional Complexities - complexities and confusion may arise when a City of Denton business hires candidates in a different jurisdiction, such as through a regional, state, or national headquarters, or under a corporate system. Under certain conditions, this could result in enforcement challenges.
4. Criminal Penalty – the criminal penalty may be applied to a corporate entity and/or an individual.

Public Feedback and Engagement

Similar to the process in which the NDO was adopted, staff recommends a robust public engagement period to receive feedback and communicate the components of a proposed ordinance. Staff recommends this include a Discuss Denton feedback period of one month, one or more public information meetings, and one or more public hearings before the Council.

As with the NDO, staff would recommend a 120-day delay in the effective date of the ordinance to communicate the provision of the ordinance to the community.

OPTIONS

1. Proceed with finalizing a draft Fair Chance Hiring ordinance for public engagement, with specific direction on:
 - a. Alignment of Administration and Enforcement with the NDO
 - b. Conditional Offer Being the Threshold for Violation
 - c. 120-Day Delay in Effective Date
2. Other or no direction

PRIOR ACTION/REVIEW (Council, Boards, Commissions)

Nov. 3, 2022: Work Session Discussion

Aug. 2, 2022: Work Session (2-minute Policy Pitch)

EXHIBITS

1. Agenda Information Sheet
2. Presentation
3. City of Denton Comprehensive Non-Discrimination Ordinance (22-407)

Respectfully submitted:
Ryan Adams
Chief of Staff