



Committee: Joint
Committee Review: Completed
Staff: Christine Wellons, Legislative Attorney
Purpose: Final action – vote expected
Keywords: #BanTheBox

AGENDA ITEM #12A
 November 10, 2020
Action

SUBJECT

Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments
 Lead Sponsor: Councilmember Jawando

EXPECTED ATTENDEES

James Stowe, Director, Office of Human Rights

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION

- Action – Council roll call vote required
- The Public Safety (PS) and Health & Human Services (HHS) Committees voted (5-0) to recommend adoption of Bill 35-20 with amendments.

DESCRIPTION/ISSUE

Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments, would:

- alter definitions regarding fair criminal record screening standards;
- prohibit certain inquiries regarding criminal records;
- prohibit consideration of certain arrests and convictions in employment decisions; and
- generally amend the law regarding criminal record screenings.

SUMMARY OF KEY DISCUSSION POINTS

The PS and HHS Committees voted (5-0) to recommend enactment of Bill 35-20 with an amendment to:

- specify that an employer may not consider a first *misdemeanor* (as opposed to *felony*) conviction of second-degree assault.

This report contains:

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M E M O R A N D U M

November 5, 2020

TO: County Council

FROM: Christine Wellons, Legislative Attorney

SUBJECT: Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments

PURPOSE: Action – roll call vote expected

Public Safety/Health & Human Services Committee Recommendation (5-0): enact Bill 35-20 with amendments.

Expected Attendees

Director James Stowe, Office of Human Rights

Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments, sponsored by Lead Sponsor Councilmember Jawando, was introduced on July 29, 2020.¹ A public hearing was held on September 15, at which five speakers testified on the Bill.

Bill 35-20 would:

- alter definitions regarding fair criminal record screening standards;
- prohibit certain inquiries regarding criminal records;
- prohibit consideration of certain arrests and convictions in employment decisions; and
- generally amend the law regarding criminal record screenings.

On September 23, 2020, the PS/HHS Committees met jointly to consider the bill. The Committees voted (5-0) to recommend enactment of Bill 35-20 with an amendment to:

- specify that an employer may not consider a first *misdemeanor* (as opposed to *felony*) conviction of second-degree assault.

¹# BanTheBox

BACKGROUND

In 2014, the Council enacted “Ban the Box” legislation, Bill 36-14, which prohibited employers of 15 or more FTEs in the County from conducting a criminal background check of a job applicant, or otherwise inquiring about the criminal or arrest history of an applicant, prior to the completion of a first interview.

Bill 35-20 would expand the scope of the original legislation by prohibiting background checks until after a conditional job offer has been extended. The bill also would prevent inquiries about certain crimes altogether. In addition, the bill would redefine “employer” to include any employer with one or more FTEs in the County.

SPECIFICS OF THE BILL

Bill 35-20 would accomplish three purposes. First, for purposes of criminal background checks of prospective employees, the bill would redefine employer as follows:

Employer means any person, individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity operating and doing business in the County that employs [15] 1 or more persons full-time in the County. Employer includes the County government, but does not include the United States, any State, or any other local government.

Second, the bill would prohibit any inquiries by employers into whether:

- (1) the applicant has been arrested for, or has an arrest record for, a matter that did not result in a conviction; or
- (2) the applicant has an arrest record or a conviction record for, or otherwise has been accused of:
 - (A) a first conviction of:
 - (i) trespass under §§ 6-402 or 6-403 of the Criminal Law Article of the Maryland Code;
 - (ii) disturbance of the peace under § 10-201 of the Criminal Law Article of the Maryland Code; or
 - (iii) assault in the second degree under § 3-203 of the Criminal Law Article of the Maryland Code;
 - (B) a conviction of a misdemeanor if at least 3 years have passed since:
 - (i) the date of the conviction; and
 - (ii) the date that any period of incarceration for the misdemeanor ended; or
 - (C) a matter for which records:
 - (i) are confidential under § 3-8A-27 of the Courts and Judicial Proceedings Article of the Maryland Code; or
 - (ii) have been expunged under §§ 10-101 – 10-110 of the Criminal Procedure Article of the Maryland Code.

Third, the bill would require the Executive to adopt regulations, “including regulations necessary to inform prospective employees and employers of their rights and responsibilities under Section 27-72.”

SUMMARY OF PUBLIC HEARING

A public hearing was held on September 15, 2020. On behalf of the County Executive, Director Stowe of OHR testified in support of the bill. Director Stowe noted that the bill provides opportunities to those who have paid their debt to society. He also noted that OHR needs additional staff resources to meet its increased responsibilities.

Several organizations and individuals shared positions and comments regarding the bill, including:

- One individual argued that the bill should apply to employers of part-time employees, not just employers of one or more FTE. Some organizations, on the other hand, expressed that employers who employ only 1-15 individuals might not be able to meet the requirements of the bill.
- Some organizations expressed concern with delaying a criminal records inquiry until after a conditional offer has been extended.
- Some organizations expressed that the criminal justice system disproportionately targets black and brown people. Therefore, strengthening the ban the box requirements is a step towards equity.
- The NAACP noted that as of 2020, 35 U.S. states and more than 150 jurisdictions have passed ban the box laws, and that Montgomery County’s current “ban the box” requirements are more restrictive than those of some other jurisdictions.

SUMMARY OF COMMITTEE WORKSESSION

On September 23, 2020, the PS/HHS Committees held a worksession on Bill 35-20 and voted (5-0) to recommend enactment of the bill with an amendment to specify that an employer may not consider a first *misdemeanor* (as opposed to *felony*) conviction of second-degree assault. A prospective employer may consider any felony conviction.

A redraft of Bill 35-20, reflecting the PS/HHS Committees’ amendment, is attached at © 1 for the Council’s consideration.

The PS/HHS Committees discussed the following issues in connection with the bill.

1. Inclusion of Second-Degree Assault

Under the bill as originally drafted, an employer would not be permitted to inquire about, or to consider, a prospective employee’s first conviction of second-degree assault.

The Office of the County Attorney (OCA) pointed out that: “Assault in the second degree in Maryland includes a broad spectrum of conduct, some of which are not minor offenses and may

not have been intended to be included in this subsection. For example, under § 3-203(c) of the Criminal Law Article, second degree assault of a person the attacker knows (or has reason to know) is a law enforcement officer, parole or probation agent, or first responder that intentionally causes physical injury is a felony.”

Given that some second-degree assaults are deemed felonies, the PS/HHS Committees voted (5-0) to amend the bill to specify that an employer may not consider a first *misdemeanor* conviction of second-degree assault. Felony convictions for second-degree assault, however, could be considered.

Additional context regarding 2nd degree assault. At the worksession, Chair Albornoz asked staff to provide additional research on 2nd degree assault in Maryland.

Under Maryland law, “assault” means “the crimes of assault, battery, and assault and battery, which retain their judicially determined meanings.” Md. Code Ann., Criminal Law § 3-201. Maryland’s highest court has explained that the crime of “assault” includes “the common law crimes of attempted battery, a consummated battery, and intent to frighten.” *Watts v. State*, 457 Md. 419, 435-36 (2018).

In Maryland, there are two basic types of assault: 1st degree and 2nd degree. Assault in the 1st degree includes:

- intentionally causing, or attempting to cause, serious physical injury to another;
- committing an assault with a firearm; or
- strangulation.

Criminal Law § 3-202.

First degree assault is a felony, punishable to up to 25 years in prison. *Id.* Under Bill 35-20, an employer would be able to consider a job applicant’s conviction for 1st degree assault.

Assault in the 2nd degree can be a felony or a misdemeanor, depending upon the circumstances. A general assault (battery, attempted battery, or intent to frighten), which does not rise to the level of a 1st degree assault (*i.e.*, a firearm is not involved, serious physical injury is not involved, and strangulation is not involved), typically is a misdemeanor. *See* § 3-203. The only circumstance in which a 2nd degree assault would be a felony is if the person committing the assault “knows or has reason to know that the other is:

- (i) a law enforcement officer engaged in the performance of the officer’s official duties;
- (ii) a parole or probation agent engaged in the performance of the agent’s official duties; or
- (iii) a firefighter, an emergency medical technician, a rescue squad member, or any other first responder engaged in providing emergency medical care or rescue services.” *Id.*

A misdemeanor 2nd degree assault is punishable by “imprisonment not exceeding 10 years or a fine not exceeding \$ 2,500 or both.” *Id.* A felony 2nd degree assault is punishable by “imprisonment not exceeding 10 years or a fine not exceeding \$ 5,000 or both.” *Id.*

Under Bill 35-20, an employer would be able to consider any felony form of assault, but the employer would not be permitted to consider a misdemeanor 2nd degree assault.

2. Size of “Employer” Subject to the Bill

The PS/HHS Committees discussed the size of employers subject to the requirements of the bill. Under current County law, “ban the box” requirements apply only to employers of 15 or more full-time employees (FTEs). Bill 35-20 would amend the law to apply the requirements to any employer in the County of one or more FTEs.

In other jurisdictions, the threshold number of employees required to trigger ban the box requirements generally range between >0 to 25 employees:

Jurisdiction	Threshold Number of Employees
California	5
Colorado	11
Connecticut	>0
District of Columbia	11
Hawaii	>0
Illinois	15
Vermont	>0
Washington State	>0
Los Angeles, CA	10
San Francisco, CA	5
Baltimore, MD	10
Prince George’s County, MD	25
New York, NY	4

For a County comparison, the minimum wage law defines an employer to include those having one or more employees. The PS/HHS Committees did not recommend any amendments in connection with employer size.

3. Timing of Criminal Records Inquiries

The PS/HHS Committees discussed that, under current County law, a criminal records inquiry may occur after the completion of a first interview. Under the bill, the inquiry would be permitted only after a conditional offer is extended to the applicant.

For comparison, the following states and local jurisdictions, among several others, permit criminal background inquiries only after a conditional offer has been made:

California
Hawaii
Austin, TX
Baltimore, MD
District of Columbia
Los Angeles, CA
Philadelphia, PA
New York, NY

The Committees concluded that criminal records inquiries should be delayed until after conditional offers are made in order to maximize opportunities for prospective employees.

NEXT STEPS: A roll call vote on whether to enact Bill 35-20 with amendments (©1), as recommended (5-0) by the PS/HHS Committees.

<u>This packet contains:</u>	<u>Circle #</u>
Bill 35-20 (as recommended by the PS/HHS Committees)	1
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Bill No. 35-20
Concerning: Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments
Revised: 10/27/2020 Draft No. 3
Introduced: July 29, 2020
Expires: January 29, 2022
Enacted: _____
Executive: _____
Effective: _____
Sunset Date: None
Ch. _____, Laws of Mont. Co. _____

COUNTY COUNCIL FOR MONTGOMERY COUNTY, MARYLAND

Lead Sponsor: Councilmember Jawando

AN ACT to:

- (1) alter definitions regarding fair criminal record screening standards;
- (2) prohibit certain inquiries regarding criminal records;
- (3) prohibit consideration of certain arrests and convictions in employment decisions; and
- (4) generally amend the law regarding criminal record screenings.

By amending

Montgomery County Code
Chapter 27, Human Rights and Civil Liberties
Sections 27-71, 27-72, and 27-75

Boldface	<i>Heading or defined term.</i>
<u>Underlining</u>	<i>Added to existing law by original bill.</i>
[Single boldface brackets]	<i>Deleted from existing law by original bill.</i>
<u>Double underlining</u>	<i>Added by amendment.</i>
[[Double boldface brackets]]	<i>Deleted from existing law or the bill by amendment.</i>
* * *	<i>Existing law unaffected by bill.</i>

The County Council for Montgomery County, Maryland approves the following Act:

1 **Sec. 1. Sections 27-71, 27-72, and 27-75 are amended as follows:**

2 **27-71. Findings and purpose; definitions.**

3 * * *

4 (c) *Definitions.* As used in this Article:

5 * * *

6 *Conditional offer* means an offer of employment or an offer of a
7 promotion that is conditioned solely on:

8 (1) the results of the employer’s later inquiry into the applicant’s
9 criminal record; or

10 (2) another contingency expressly communicated to the applicant at
11 the time of the offer.

12 * * *

13 *Employer* means any person, individual, proprietorship, partnership,
14 joint venture, corporation, limited liability company, trust, association,
15 or other entity operating and doing business in the County that employs
16 [15] 1 or more persons full-time in the County. Employer includes the
17 County government, but does not include the United States, any State,
18 or any other local government.

19 * * *

20 *Inquiry* or *Inquire* means any direct or indirect conduct intended to
21 gather information, using any mode of communication.

22 *Inquiry* or *Inquire* does not include:

23 (1) a question about an applicant’s conviction record or arrest record
24 when the existence of the record is [voluntarily] disclosed by the
25 applicant voluntarily and not in response to a question by the
26 employer; or

27 (2) a question about an applicant’s employment history shown on the
28 application or the applicant’s resume.

29 [Interview means any direct contact by the employer with the applicant,
30 whether in person or by telephone or internet communication, to
31 discuss:

32 (1) the employment being sought; or

33 (2) the applicant’s qualifications.

34 Interview does not include:

35 (1) written correspondence or email; or

36 (2) direct contact made for the purpose of scheduling a discussion.]

37 * * *

38 **27-72. Prohibited inquiries; retaliation.**

39 * * *

40 (b) *Preliminary inquiry into criminal record.* In connection with the
41 proposed employment of an applicant, an employer must not, at any
42 time before the [conclusion of a first interview] extension of a
43 conditional offer to the applicant:

44 (1) require the applicant to disclose whether the applicant has an
45 arrest record or conviction record, or otherwise has been accused
46 of a crime;

47 (2) conduct a criminal record check on the applicant; or

48 (3) inquire of the applicant or others about whether the applicant has
49 an arrest record or conviction record or otherwise has been
50 accused of a crime.

51 (c) Prohibition against inquiry into certain criminal records. In connection
52 with the proposed employment of an applicant, an employer must not at

53 any time require an applicant to disclose, conduct a criminal record
 54 check to determine, or otherwise inquire of the applicant or others,
 55 whether:

56 (1) the applicant has been arrested for, or has an arrest record for, a
 57 matter that did not result in a conviction; or

58 (2) the applicant has an arrest record or a conviction record for, or
 59 otherwise has been accused of:

60 (A) a first conviction of:

61 (i) trespass under §§ 6-402 or 6-403 of the Criminal
 62 Law Article of the Maryland Code;

63 (ii) disturbance of the peace under § 10-201 of the
 64 Criminal Law Article of the Maryland Code; or

65 (iii) misdemeanor assault in the second degree under §
 66 3-203 of the Criminal Law Article of the Maryland
 67 Code;

68 (B) a conviction of a misdemeanor if at least 3 years have
 69 passed since:

70 (i) the date of the conviction; and

71 (ii) the date that any period of incarceration for the
 72 misdemeanor ended; or

73 (C) a matter for which records:

74 (i) are confidential under § 3-8A-27 of the Courts and
 75 Judicial Proceedings Article of the Maryland Code;

76 or

77 (ii) have been expunged under §§ 10-101 – 10-110 of
 78 the Criminal Procedure Article of the Maryland
 79 Code.

80 (d) Consideration of Certain Records Prohibited. An employer must not
 81 base a hiring or promotion decision upon any item in an arrest record or
 82 a conviction record described under subsection (c).

83 [(c)] (e) *Retaliation.* An employer must not:

- 84 (1) retaliate against any person for:
 - 85 (A) lawfully opposing any violation of this Article;
 - 86 (B) filing a complaint, testifying, assisting, or participating in
 - 87 any manner in an investigation, proceeding, or hearing
 - 88 under this Article; or
- 89 (2) obstruct or prevent enforcement or compliance with this Article.

90 **Sec. 27-74. Exemptions.**

- 91 (a) The prohibitions and requirements of this Article do not apply if the
- 92 inquiries prohibited by this Article are expressly authorized by an
- 93 applicable federal, State, or County law or regulation.
- 94 (b) The prohibitions and requirements of this Article do not apply to the
- 95 County Police Department, the County Fire and Rescue Service, or the
- 96 County Department of Corrections and Rehabilitation.
- 97 (c) The prohibitions and requirements of this Article do not apply to an
- 98 employer that provides programs, services, or direct care to minors or
- 99 vulnerable adults.
- 100 (d) The prohibitions and requirements of this Article do not apply to an
- 101 employer hiring for a position that requires a federal government
- 102 security clearance.

103 **27-75. Enforcement and Regulations.**

104 (a) A person aggrieved by an alleged violation of this Article may file a
105 complaint with the Director under Section 27-7.

106 (b) The Executive must adopt Method (2) regulations to implement the
107 provisions of this Article, including regulations necessary to inform
108 prospective employees and employers of their rights and responsibilities
109 under Section 27-72.

LEGISLATIVE REQUEST REPORT

Bill 35-20

Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments

DESCRIPTION:	<ul style="list-style-type: none">• Bill 35-20 would:• alter definitions regarding fair criminal record screening standards;• prohibit certain inquiries regarding criminal records;• prohibit consideration of certain arrests and convictions in employment decisions; and• generally amend the law regarding criminal record screenings.
PROBLEM:	Inequitable criminal records screening practices
GOALS AND OBJECTIVES:	Prevent background checks prior to the extension of a conditional offer of employment; prevent inquiries into certain types of arrests and convictions; require regulations; and define terms.
COORDINATION:	
FISCAL IMPACT:	Office of Management and Budget
ECONOMIC IMPACT:	Office of Legislative Oversight
EVALUATION:	
EXPERIENCE ELSEWHERE:	Commonwealth of Massachusetts
SOURCE OF INFORMATION:	
APPLICATION WITHIN MUNICIPALITIES:	Chapter 27 of the Code is not applicable in certain municipalities.
PENALTIES:	Remedies as described under Chapter 27 of the County Code


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MONTGOMERY COUNTY COUNCIL
ROCKVILLE, MARYLAND

WILL JAWANDO
COUNCILMEMBER
AT-LARGE

M E M O R A N D U M

TO: Councilmembers
FROM: Will Jawando, Councilmember 
DATE: July 23, 2020
SUBJECT: Introduction of legislation to Amend “Ban the Box”

On July 28, 2020 I will be introducing Bill XX-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards - Amendments. The majority of Montgomery County’s businesses are small businesses, with 70 percent of all county establishments carrying 15 or fewer employees on payroll. The current law requiring “ban the box” does not apply to businesses with less than 15 employees. This serves to impose greater difficulty upon those residents seeking employment who have an arrest or conviction on their records. While the prohibition would be in effect for the majority of the hiring process, this amendment, as in the case with the original bill, would not prohibit job candidates from being asked about an arrest or their criminal record prior to the final job offer.

The proposed legislation requires the:

- 1) Alteration of the definitions regarding fair criminal record screening standards;
- 2) Prohibition of certain inquiries regarding criminal records;
- 3) Prohibition of consideration of certain arrests and convictions in employment decisions;
and
- 4) Generally amend the law regarding criminal record screenings.

A 2018 report on formerly incarcerated people shows that their unemployment rate was over 27 percent nationally. When you overlay disparate statistics and incarceration rates for black and brown residents, a broader picture shows the status quo continues disparate outcomes for employment. This legislation is especially important now, as these disparities have been magnified during the global pandemic and recession.

If you have any questions or if you would like to co-sponsor the Act, please contact Fatmata Barrie in my office. Thank you in advance for your consideration.

Economic Impact Statement

Office of Legislative Oversight

Bill 35-20

Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments

SUMMARY

The Office of Legislative Oversight (OLO) believes that enacting Bill 35-20 would have the potential to economically benefit Montgomery County residents who have criminal records but will likely have little economic impact on the County as a whole.

BACKGROUND

Since 2015, the “Ban the Box” ordinance, or the Fair Criminal Records Screening Standards Law, has sought to “assist in the successful reintegration into the workforce [of] people with criminal records by removing improper barriers to employment.”¹ If enacted, Bill 35-20 would expand the scope of the ordinance in an attempt to address inequitable criminal records screening practices among employers in the County.² The Bill would expand the ordinance’s scope by making three changes. First, it would apply the ordinance to employers with one or more full-time employees (FTEs) in the County, not just employers of 15 or more FTEs, as the current ordinance does.³ Second, it would prohibit employers from conducting background checks on applicants until after a conditional job offer has been extended.⁴ And, third, it would prohibit inquiries into a set of specified crimes.⁵ Enforcement of the ordinance would continue to be based on complaints filed by persons alleging violations.⁶

METHODOLOGIES, ASSUMPTIONS and UNCERTAINTIES

Ultimately, the economic benefits of Bill 35-20 to residents with criminal records would depend on an *uncertain* outcome—the expanded “Ban the Box” ordinance resulting in employers hiring residents with criminal records who would not have otherwise been hired. OLO is unable to predict if this outcome would occur due to questions surrounding business compliance with “Ban the Box” ordinances and employers using race as a proxy for the likelihood of candidates having a criminal record.⁷ In the below analysis, OLO staff used no

¹ Office of Human Rights, “Ban the Box,” Montgomery County, Maryland, https://www.montgomerycountymd.gov/humanrights/Ban_the_Box.html.

² Montgomery County Council, Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments, Introduced on July 29, 2020, Montgomery County, Maryland, 6.

³ *Ibid*, 2.

⁴ *Ibid*, 3.

⁵ *Ibid*, 3-4.

⁶ *Ibid*, 5.

⁷ Eillie Anzilotti, “How ‘Ban the Box’ Has Helped (and Hurt) the Job Prospects of People with Criminal Records,” *Fast Company*, November 15, 2018, <https://www.fastcompany.com/90267016/how-the-ban-the-box-movement-has-helped-and-hurt-the-job-prospects-of-people-with-criminal-records>; Margaret Barthel, “Employers Are Still Avoiding Former Inmates,” *The Atlantic*, November 5, 2019, <https://www.theatlantic.com/politics/archive/2019/11/are-states-complying-ban-box-laws/601240/>; and Alana

Economic Impact Statement

Office of Legislative Oversight

methodologies. The assumptions underlying the analysis are based on OLO staff judgment.

VARIABLES

Variables that could affect the economic impacts of enacting Bill 35-20 are the following:

- Hiring rates of resident applicants with arrest or conviction records
- Household income for households with breadwinner(s) with records
- Cost of background checks

IMPACTS

Businesses, Non-Profits, Other Private Organizations

Workforce, operating costs, property values, capital investment, taxation policy, economic development, competitiveness, etc.

OLO believes that enacting Bill 35-20 would have a minimal economic impact on private organizations in the County. The reduction in criminal record searches may reduce operating costs for some businesses. Also, businesses may improve their workforce by hiring qualified individuals who otherwise would have been weeded out of the hiring process. Beyond operating costs and workforce, OLO sees no direct connection between enacting Bill 35-20 and the Council's other priority indicators, namely property values, capital investment, taxation policy, economic development, and competitiveness.⁸

Residents

Workforce, property values, income, taxation policy, economic development, etc.

Enacting Bill 35-20 would not create new jobs. It would, instead, alter who is eligible and perhaps likely to receive jobs. OLO believes that enacting Bill 35-20 has the *potential* to economically benefit residents with criminal records. If residents gain employment who otherwise would not have, then these residents and their households would experience an increase in income. If this outcome is sufficiently large, then neighborhoods in the County with relatively higher concentrations of residents with criminal records could experience economic development gains. Beyond income and economic development, OLO believes enacting Bill 35-20 would have an insignificant impact on County residents in terms of the Council's other priority indicators.

WORKS CITED

Anzilotti, Eillie. "How 'Ban the Box' Has Helped (and Hurt) the Job Prospects of People with Criminal Records." *Fast Company*. November 15, 2018, <https://www.fastcompany.com/90267016/how-the-ban-the-box-movement-has-helped-and-hurt-the-job-prospects-of-people-with-criminal-records>.

Barthel, Margaret. "Employers Are Still Avoiding Former Inmates." *The Atlantic*. November 5, 2019, <https://www.theatlantic.com/politics/archive/2019/11/are-states-complying-ban-box-laws/601240/>.

Samuels, "When Banning One Kind of Discrimination Results in Another," *The Atlantic*, August 4, 2016, <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

⁸ For the Council's priority indicators, see Montgomery County Council, Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments, Enacted on July 30, 2019, Montgomery County, Maryland, 3.

Economic Impact Statement

Office of Legislative Oversight

Montgomery County Council. Bill 10-19 Legislative Branch – Economic Impact Statements – Amendments. Enacted on July 30, 2019. Montgomery County, Maryland.

Montgomery County Council. Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments. Introduced on July 29, 2020. Montgomery County, Maryland.

Samuels, Alana. “When Banning One Kind of Discrimination Results in Another.” *The Atlantic*. August 4, 2016, <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>.

CAVEATS

Two caveats to the economic analysis performed here should be noted. First, predicting the economic impacts of legislation is a challenging analytical endeavor due to data limitations, the multitude of causes of economic outcomes, economic shocks, uncertainty, and other factors. Second, the analysis performed here is intended to *inform* the legislative process, not determine whether the Council should enact legislation. Thus, any conclusion made in this statement does not represent the OLO’s endorsement of, or objection to, the bill under consideration.

CONTRIBUTIONS

Stephen Roblin (OLO) drafted this economic impact statement.

Testimony on behalf of the County Executive on Bill 35-20 - Human Rights and Civil Liberties - Fair Criminal Record Screening Standards – Amendments

President Katz, Vice-President Hucker and distinguished members of Council, I am here to speak on behalf of the County Executive in support of Council Bill 35-20. He supports it for the same reasons he sponsored the Ban the Box legislation in 2014, to provide opportunity to those who have paid their debt to society and who we wish to see successful return to the workforce and our communities. The proposed law would expand the scope of the original Ban the Box legislation by changing the definition of employer from employing 15 or more persons to one or more. It would prohibit an employer from inquiring into an applicant's criminal record or performing a background check until a conditional offer has been extended rather than at the conclusion of the first interview and it would prohibit an employer from inquiring into certain criminal records at all. Further, the proposed measure would prohibit an employer from basing a hiring decision or a promotion decision upon any item in an arrest or conviction record outlined in the bill. Lastly, the bill adds to the existing requirement that employees and employers be informed of their rights and requirements to comply with regulations and procedures.

While there are some legal considerations, the Executive believes such concerns can be addressed in Committee work session. This new law will increase the number of employers covered. We believe this law will help provide a workplace free of discrimination by allowing an environment that is productive for employers and the thousands of potential willing and able employees who may have been previously incarcerated or may have had or been accused of minor offenses; or otherwise with criminal records or convictions.

If approved, the Office of Human Rights would address complaints would provide support for technical questions that might arise. This additional responsibility and potential increase in number of complaints will put additional strain on the agency's current staffing levels. Please include consider the potential for additional staff resources being needed to implement and enforce this law.

We are in support of the passage of this law. Thank you for the opportunity to share these comments and observations

TESTIMONY: Albert Delon Reed Jr.

RE: County Council Bill 35-20- Human

Rights and Civil Liberties- Fair Criminal

Records Screening Standards

Tuesday, September 15, 2020

Good Day President Katz, and Councilmembers, my name is Albert Delon Reed Jr. CEO and Founder of Albert Reed and Associates. I was recently released from federal prison after serving almost 25 years on what was originally a life term of imprisonment, for a nonviolent drug offense. Upon release, I was blessed to obtain employment and housing within a thriving and safe community. The pressing need to obtain employment for formerly incarcerated people is essential to one's self-esteem. Having a place to call home within a healthy, thriving, and safe community is also essential to one's self-esteem. It is hard to build a successful life without an education, job, and safe place to call home. These basic things are often out of reach for formerly incarcerated people. Barriers to employment combined with explicit discrimination have created a time of intense difficulty, trouble, and danger.

As a community what are we to do? What are we to do when the most vulnerable need solutions? We cannot continue to take human capital out of these vulnerable communities and not put anything back. 75% of the violence we see today is economically based. The need for employment and the ability to seek a decent wage without discrimination is vital and is a step in the right direction in addressing a myriad of interrelated social equity issues.

Ban the Box Bill 35-20 is a start towards a solution which is why I ask the Council to pass this bill. It is critical that policymakers develop comprehensive solutions to this problem for all people- and particularly those carrying the stigma of criminalization- need these solutions. In such an affluent county it's time we get this done to disrupt the revolving door of release and re-incarceration and rebuild and uplift people and communities that are most vulnerable and in need of solutions. Thank you for your time and consideration.

**BILL 35-20, HUMAN RIGHTS AND CIVIL LIBERTIES –
FAIR CRIMINAL RECORD SCREENING STANDARDS - AMENDMENTS
SEPTEMBER 15, 2020
PUBLIC HEARING**

While the Gaithersburg-Germantown Chamber of Commerce understands the rationale behind the proposed Bill 35-20 addressing the Fair Criminal Record Screening Standards, there are some concerns we would like to see addressed prior to any final legislation. The Chamber worked closely with the County Council in 2014 on Bill 36-14 and two the same issues still apply.

1. The primary concern is the timing of when an employer is allowed to ask the question. We strongly believe that the question should continue to be allowed at the conclusion of the first interview. Eliminating the question from the application and from the first interview allows an individual the opportunity to be screened without bias. Waiting until a conditional offer puts an undue burden on the employer. Hiring staff is a costly, timely endeavor. The longer it takes to hire someone the more expensive it is and the greater the risk that qualified candidates will find other jobs during the lengthy process. Requiring a conditional offer be made prior to asking the candidate for the information or doing a criminal background check on convictions is too late in the process. We recommend leaving timing of the question as it is currently stated in Bill 36-14.
2. The size of employer impacted by this Bill is way too small. Most companies of less than 10 or 20 employees do not have a Human Resources Department or even an HR Manager. The function is typically done by the CEO or Office Manager. The process needs to be efficient, not only because it takes time away from running the business, but because having an open position can greatly impact productivity. The timing of hiring decisions is much more critical in a small company, particularly in positions that require financial bonding. There will be scenarios where someone with a criminal background cannot meet the certification requirements for that job. It is counterproductive for both parties to go through the selection process if a candidate is ultimately restricted from the job.

Thank you for your consideration.



**National Association for the Advancement of Colored People
Montgomery County Branch
Testimony- MC EXPEDITED Bill 35-20, Human Rights and Civil Liberties – Fair
Criminal Record Screening Standards – Amendments
Tuesday, September 15, 2020**

Good afternoon, Council President Katz, and Members of the County Council. Thank you for holding this hearing to receive comments on the expedited Council Bill 35-20 Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments. Introduced by Councilman Jawando.

On behalf of the Montgomery County Maryland Branch of the National Association for the Advancement of Colored People (NAACP); and as chair of the Political Action Committee for the branch, we submit this testimony in support of Bill 35-20.

For 110 years the NAACP has been in the forefront of securing racial equality and civil rights for all. Here in Montgomery County Maryland, the NAACP has forged relationships with community and county leaders to protect and promote the civil rights of every resident of the county, particularly African Americans and communities of color.

The path to employment can sometimes be daunting for the average person, but for those who have had a brush with the law it can be overwhelming and exasperating, especially when filing out your application. In some cases, applicants are faced with the fear of possible rejection if they answer the dreaded question of their criminal history truthfully, therefore leaving their self at greater risk of not being hired.

In 2014, the Montgomery County Council passed and enacted “Ban the Box” legislation, Bill 36-14, which prohibited employers of 15 or more Full Time Employees (FTE) in the County from conducting a criminal background check. Bill 35-20 would go a step further to expand the scope of the original legislation by prohibiting background checks until after a conditional job offer has been extended. The bill also would prevent inquiries about certain crimes altogether. In addition, it would redefine “employer” to include any employer with one or more full time employees (FTE) in the County.

As of January of 2020, 35 U.S. states and more than 150 cities and counties have passed Ban the Box laws. Montgomery County is one of three jurisdictions in Maryland where the law is more restrictive than the state law.

The Montgomery County NAACP branch’s interest in this bill and our support of its enactment is based on over 50 years of advocacy on behalf of people who are often marginalized in this county. As well as to ensure that the path to self- sufficiently is unencumbered. While this legislation does not guarantee an applicant will get the job in which they applied for, it will provide for a more equitable opportunity in the hiring/ interviewing process.



September 11, 2020

Montgomery County Council
Hon. Sidney Katz; President
100 Maryland Avenue,
Rockville, Maryland 20850

RE: PBSA COMMENTS ON BILL 35-20; “BAN THE BOX” AMENDMENTS

Dear President Katz and Members of the Montgomery County Council,

On behalf of the Professional Background Screening Association (PBSA), whose members include Montgomery County and greater Maryland residents and businesses, we write to you with concerns regarding Bill 35-20. We support the intent of the original Ban the Box ordinance to provide those with criminal histories a fairer chance at employment by removing questions about prior convictions from the initial employment application, and understand why the Council would look to expand it, but we would caution against changes that could pose risk to the public or confusion and delayed hiring of applicants due to variation from recently enacted state standards.

As a nonprofit organization consisting of over 900 small and large companies engaged in the background screening profession, PBSA has been dedicated to providing the public with safe places to live and work since 2003. The PBSA member companies conduct millions of employment and tenancy-related background checks each year, helping employers, staffing agencies, and nonprofit organizations make more informed decisions regarding the suitability of potential employees, contractors, tenants, and volunteers. We have worked diligently alongside communities and states to assist in crafting fair and workable fair chance legislation that equitably protects the interests of both applicants and businesses.

Millions of background screening reports are requested in the United States each year. Our members are hired to verify the education, employment, financial, and criminal histories of applicants. There are a number of important reasons for conducting these searches, including: (i) ensuring a safe working environment by reducing the likelihood of workplace violence; (ii) ensuring property managers have the ability to provide safe living environments for tenants, including where housing is provided for vulnerable populations;

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(iii) reducing employee theft; (iv) reducing the hiring of individuals based on fraudulent credentials; (v) avoiding legal exposure for negligent hiring and (vi) meeting state law requirements designed to protect vulnerable populations like the elderly, disabled, and children.

As it has existed since 2015, the current ban the box ordinance for Montgomery County is straightforward and easy to understand for applicants and businesses alike. Additionally, it largely comports with the Maryland state ban the box law that went into effect in February. By maintaining a high degree of consistency with the state, the county would avoid positioning applicants unequally based on their application with a businesses outside the county and placing employers at risk of unintentionally and unavoidably running afoul of varying requirements merely by crossing the county line. We believe a much-simplified measure expanding existing ban the box to all employers would accomplish the intent of Bill 35-20 while protecting the interests of applicants, employers, and the county.

That said, while you consider this measure in greater detail, we would note specific the flaws within Bill 35-20 that, while well meaning, could do harm to an applicant awaiting hiring or to an employer's business, employees, or customers due to the use of incomplete information. For example:

- Delaying background screening until a conditional offer – While we understand and appreciate the function of the ordinance to provide those with criminal histories a fair chance at employment by removing questions about prior convictions from the initial employment application, we believe that the requirement that an employer should be required to provide a conditional offer of employment prior to screening provides no marked improvement in the hiring process over the current standard of waiting until the completion of the initial interview. In fact, refraining from background screening until a conditional offer likely results in undue delays during the hiring process, negatively impacting both employers and applicants.

The requirement to provide applicants with a conditional offer before permitting a background check to be done will force employers to conduct background checks on applicants one-by-one (after each conditional offer is made), rather than permitting the employer to conduct checks on multiple qualified applicants at the same time, and then selecting the best applicant for the job. This delay can prove costly should an employer make a conditional offer to an applicant who subsequently may be disqualified for employment due to their criminal history. The employer would then have to begin the employment process all over again with a new applicant, leaving the position unfilled for longer periods of time.

In addition, applicants who receive a conditional offer may defer accepting other positions which they have applied for and may be offered (in the hopes that the conditional offer will granted), only to find out that the conditional offer must be rescinded following the results of the background check. This would have the unintended effect of keeping convicted persons out of the workforce for longer periods of time. Again, permitting employers to conduct background checks earlier in the employment process, as currently codified, both preserves the ability of an applicant to build rapport with an employer while avoiding unnecessary delays in the hiring process.

- Clarifying arrest record data – Bill 35-20, as written, leaves potential ambiguity as to the treatment of “open” arrest records that have not been adjudicated. As the bill states in Section (C)(1) an employer may not inquire if:

(1) *the applicant has been arrested for, or has an arrest record for, a matter that did not result in a conviction;*

As written, the ordinance could be interpreted to require an employer to ignore an applicant's open arrests, with no guidance on what would occur if that open arrest resulted in a conviction – most especially a conviction that would disqualify them for a position under normal circumstances - after the conditional offer or hiring. This would leave employers in an unenviable situation: maintain the employment of someone despite of the new conviction or terminate them and risk running afoul of the black letter of the law. We would highly encourage clarifying this language to specifically the consideration of the open arrest charges OR, if it is the intent of Bill 35-20 to disallow the consideration of an open arrest, clearly outline how an employer can react should that arrest ultimately result in conviction. We believe this is an important change to ensure fairness for both job applicants and employers.

- Excluding certain convictions from employment screening – While PBSA understands and supports the exclusion of sealed or expunged records, we would caution at limiting offenses that can be considered or included in employment screening. The current draft of Bill 35-20 would essentially eliminate employers from considering several offenses (most notably second degree assault) which could or would have direct bearing on one's ability to do a job without incurring civil liability for their employer or potential endangerment of the public. PBSA opposes efforts to make employers even more vulnerable to lawsuits in our already over-litigated society and we believe openness and transparency between employers and employees can help mitigate that vulnerability – which is why we would encourage the Council to amend Bill 35-20 to remove the excluded offenses.

In summary, PBSA supports the intent of the bill to expand the opportunities for those with criminal histories a fair chance at employment. However, we have concern with the adverse impacts that would occur if the bill were enacted as currently drafted.

We thank you for taking the time to hear our concerns and consider our comments. We hope to be able to work with you as this measure advances to ensure it achieves its intended goals while protecting the interests of employers and applicants alike. PBSA and its members are prepared to discuss any questions you may have and look forward to working with you further. Please feel free to contact me directly with any questions at 402-957-1179 or brent.smoyer@thepbsa.org.

Sincerely,



Brent Smoyer, JD
PBSA State Government Relations &
Grassroots Director





Montgomery County Community Action Board Testimony
County Council Bill 35-20 – Human Rights and Civil Liberties – Fair Criminal Records Screening
Standards – Amendments
Tuesday, September 15, 2020

Good afternoon. My name is Zelda Wafer-Alonge and I am a member of the Community Action Board Executive Committee. As advocates for the low-income community, the Community Action Board strongly supports Bill 35-20. We applaud the Council’s efforts to expand the protections outlined in the 2014 “ban the box” bill, which our board proudly supported.

The Community Action Board advocates for policies and programs that help lower-income people move towards self-sufficiency. Considering the high cost of living in Montgomery County, our board recognizes that lower-income community members already face numerous challenges simply paying for the basic necessities. We strongly believe that the Council should make every effort to *remove* barriers to employment, thereby increasing the chances that someone may find a living wage job that offers critical work supports.

As you know, those with criminal records face many barriers and encounter discrimination on a regular basis. The National Employment Law Project found that a “conviction record reduces the likelihood of a job callback or offer by nearly 50%.” It can also have a “chilling effect” by discouraging those with criminal records from even applying to certain jobs.¹ By expanding our County’s “ban the box” protections to smaller employers, prohibiting employers from asking about criminal history before a job offer is extended, and banning employers from asking about certain crimes all together, this bill will increase opportunities for people who are hoping to improve their situations.

¹ <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-Fact-Sheet.pdf>

The needs of those exiting the Criminal Justice System were recently brought to light for our Board by a graduate of our advocacy training program, the Community Advocacy Institute. This graduate, Albert Reed, was released from federal prison after serving 25 years for a nonviolent offense. Albert was fortunate enough to have the support of his family to help him during this transition and he was able to establish his own Criminal Justice consulting firm, Albert Reed and Associates. He is now using his voice to advocate for others who struggle upon their release – people who face challenges obtaining stable housing, basic necessities, and adequate employment to become self-sufficient. Mr. Reed also submitted testimony in support of this bill and we hope that you will review his personal story very closely in considering this bill.

The Community Action Board strongly encourages the Council to continue to explore policy changes that will expand opportunities for all County residents. We applaud the Council's work to reduce the gender wage gap, prohibit discrimination based on hairstyle, and increase the County's minimum wage and other work supports. We look forward to working with the Council to support innovative policies that will help community members move towards self-sufficiency.

Fiscal Impact Statement
Bill 35-20, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards – Amendments

1. Legislative Summary

Bill 35-20 would expand the scope of the original legislation, Bill 36-14, Human Rights and Civil Liberties – Fair Criminal Record Screening Standards (known as the “Ban the Box” ordinance), by prohibiting background checks on job applicants before a conditional job offer has been extended. In accordance with Section 27-72(c) of the Montgomery County Code, the bill would prevent inquiries about a job applicant's arrest or conviction record. In addition, the bill would define an "employer" under Section 27-71(c) of the County Code to have one or more full-time person(s) in the County. Finally, any person aggrieved by an alleged violation of this law may file a complaint with the Director of the Office of Human Rights.

2. An estimate of changes in County revenues and expenditures regardless of whether the revenues or expenditures are assumed in the recommended or approved budget. Includes source of information, assumptions, and methodologies used.

Changes to County expenditures is dependent on the number of complaints of alleged violations of the law that are received, reviewed, and determined that such violations should be investigated. The Office of Human Rights does not currently have available staff to conduct investigations of such complaints. Additional resources may be required to support the enforcement of this legislation. Six months after the enactment of this legislation, the Office of Human Rights will evaluate the need for additional staffing resources. Changes in County revenues are not expected.

3. Revenue and expenditure estimates covering at least the next 6 fiscal years.

It is difficult to project the expenditure estimates over the next 6 fiscal years due to the number of complaints that will be received, reviewed, and investigated. The proposed legislation is not expected to impact revenues.

4. An actuarial analysis through the entire amortization period for each bill that would affect retiree pension or group insurance costs.

Not Applicable.

5. An estimate of expenditures to County’s information technology (IT), including Enterprise Resource Planning (ERP) systems.

Not Applicable.

6. Later actions that may affect future revenue and expenditures if the bill authorizes future spending.

Not Applicable.

7. An estimate of the staff time needed to implement the bill.

See Question #2.

8. An explanation of how the addition of new staff responsibilities would affect other duties.

An increase in complaints due to the implementation of the proposed legislation will strain current staffing levels in the Office of Human Rights. The implementation of new human rights legislation continues to present workload challenges at the current staffing levels.

9. An estimate of costs when additional appropriation is needed.

If the number of complaints does not increase after the enactment of the legislation, then no additional appropriation would be needed to implement Bill 35-20.

10. A description of any variable that could affect revenue and cost estimates.

Not Applicable.

11. If a bill is likely to have no fiscal impact, why that is the case.

See Question #2.

12. Other fiscal impacts or comments.

Not Applicable.

13. An explanation of the staff time needed to implement this bill.

See Questions #2 and #8.

14. Ranges of revenue or expenditures that are uncertain or difficult to project.

See Question #2.

15. The following contributed to and concurred with this analysis:

James Stowe, Office of Human Rights
Phil Weeda, Office of Management and Budget



Jennifer Bryant, Acting Director
Office of Management and Budget

9/18/20

Date