




Minnesota Department of **Human Services**

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**DATE:** December 5, 2013

**TO:** Toby Pearson  
Care Providers of Minnesota

**FROM:**   
Jerry Kerber, Inspector General  
Minnesota Department of Human Services (DHS)  
[Jerry.Kerber@state.mn.us](mailto:Jerry.Kerber@state.mn.us)  
651-431-6597

**SUBJECT:** Ban the Box Impact on 245C Background Studies

As you know, effective January 1, 2014, new employment-related legislation goes into effect. The new law is referred to as the "Ban the Box" law, and it is codified under Minnesota Statutes, chapter 364. In July, you asked DHS about the impact of the recently-passed Ban the Box law, and we provided you with some incorrect information.

As long term care providers, most of your member employers are required to initiate DHS background studies on all employees who provide direct contact services in some settings, and on all employees, regardless of their duties, in other settings. The specific requirements and procedures for these background studies are detailed in Minnesota Statutes, chapter 245C, the Human Services Background Study Act.

This summer, we mistakenly informed you that that the new Ban the Box law does not affect employers that participate in the DHS background study process under chapter 245C. The basis for this misunderstanding was the general exception section under Minnesota Statutes, chapter 364.09, paragraph (a), which states, in part:

**364.09 EXCEPTIONS.**

(a) This chapter does not apply to . . . background study process under chapters 245A and 245C;

On November 1, 2013, the DHS Office of Inspector General received an email from DHS Continuing Care Administration staff with your concerns that the Minnesota Department of Human Rights (DHR) website provided information that was contrary to the information that DHS had shared with you in July. Specifically, the DHR website states that the Ban the Box law "does not preclude an employer [who is required under law to conduct background studies] from asking about an applicant's criminal history, it merely changes the timing of when that request can be made."

Prompted by the apparent inconsistent interpretations of the Ban the Box law, DHS and DHR met to clarify answers to the questions you raised. As a result of this meeting, I can now inform

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you that the information on the DHR website is the correct interpretation of the Ban the Box law. While the *process* for DHS's completion of background studies according to Minnesota Statutes, chapter 245C, remains unaffected, the timing of when and how background studies can be used for the purposes of employment will change on January 1, 2014, with the enactment of the Ban the Box law.

In January, all the same employers will still be required to initiate background studies under Minnesota Statutes, chapter 245C, however, employers will not be allowed to have a "box" on the application that asks if an applicant has a criminal history or has committed a specific crime or specific level of crime. Similarly, under the new law, employers will not be able to use a background study conducted by DHS (or other criminal history reviews conducted by another entity) as the first stage of screening applicants for a position.

DHR shared an example case where a hypothetical employer received 20 applications for a position. As of January 1, 2014, it will be illegal to have a box on the application asking about criminal history for purposes of screening these applications. The employer will also be prohibited from initiating DHS background studies on all 20 of these applicants for purposes of screening the applications. However, if the employer uses non-criminal history factors to reduce the pool of applicants to five, then a DHS background study could be performed on all of them. The practice of using background studies or other criminal history screens/reviews as a secondary or tertiary filter is consistent within the law.

According to the DHR, employers may include a statement on applications informing applicants of the possible future implications that certain crimes could have on eligibility for employment, but again, employers are not allowed to ask about the applicant's criminal history on the application.

We apologize for providing you with inaccurate information in July about the impact of the Ban the Box law on your members, and also for any inconvenience and confusion it has caused. Thank you for your patience in waiting for a response from DHS and we appreciate you sending us your questions and concerns.

If you have specific questions about the implementation and enforcement of the Ban the Box law, please contact Scott Beutel at DHR (651-539-1104, [scott.beutel@state.mn.us](mailto:scott.beutel@state.mn.us)).

Please feel free to contact me if you have any future questions about background studies or licensing requirements.

cc: Scott Beutel, Department of Human Rights

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## 2013 Minnesota Statutes

### **364.021 PUBLIC AND PRIVATE EMPLOYMENT; CONSIDERATION OF CRIMINAL RECORDS.**

(a) A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.

(b) This section does not apply to the Department of Corrections or to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process.

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

**History:** 2009 c 59 art 5 s 11; 2013 c 61 s 3

## 2013 Minnesota Statutes

### 364.03 RELATION OF CONVICTION TO EMPLOYMENT OR OCCUPATION.

Subdivision 1. **No disqualification from licensed occupations.** Notwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment, nor shall a person be disqualified from pursuing, practicing, or engaging in any occupation for which a license is required solely or in part because of a prior conviction of a crime or crimes, unless the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.

Subd. 2. **Conviction relating to public employment sought.** In determining if a conviction directly relates to the position of public employment sought or the occupation for which the license is sought, the hiring or licensing authority shall consider:

- (1) the nature and seriousness of the crime or crimes for which the individual was convicted;
- (2) the relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;
- (3) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.

Subd. 3. **Evidence of rehabilitation.** (a) A person who has been convicted of a crime or crimes which directly relate to the public employment sought or to the occupation for which a license is sought shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought. Competent evidence of sufficient rehabilitation may be established by the production of the person's most recent certified copy of a United States Department of Defense form DD-214 showing the person's honorable discharge, or separation under honorable conditions, from the United States armed forces for military service rendered following conviction for any crime that would otherwise disqualify the person from the public employment sought or the occupation for which the license is sought, or:

- (1) a copy of the local, state, or federal release order; and
- (2) evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole; or
- (3) a copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision.

(b) In addition to the documentary evidence presented, the licensing or hiring authority shall consider any evidence presented by the applicant regarding:

- (1) the nature and seriousness of the crime or crimes for which convicted;
- (2) all circumstances relative to the crime or crimes, including mitigating circumstances or social conditions surrounding the commission of the crime or crimes;
- (3) the age of the person at the time the crime or crimes were committed;
- (4) the length of time elapsed since the crime or crimes were committed; and
- (5) all other competent evidence of rehabilitation and present fitness presented, including, but not limited to, letters of reference by persons who have been in contact with the applicant since the applicant's release from any local, state, or federal correctional institution.

(c) The certified copy of a person's United States Department of Defense form DD-214 showing the person's honorable discharge or separation under honorable conditions from the United States armed forces ceases to qualify as competent evidence of sufficient rehabilitation for purposes of this section upon the person's conviction for any gross misdemeanor or felony committed by the person subsequent to the effective date of that honorable discharge or separation from military service.

**History:** 1974 c 298 s 3; 1986 c 444; 2013 c 142 art 4 s 9

## 2013 Minnesota Statutes

### **364.06 VIOLATIONS; PROCEDURE; REMEDIES.**

Subdivision 1. **Public employers.** Any complaints or grievances concerning violations of sections 364.01 to 364.10 by public employers shall be processed and adjudicated in accordance with the procedures set forth in chapter 14, the Administrative Procedure Act.

Subd. 2. **Private employers.** (a) The commissioner of human rights shall investigate violations of section 364.021 by a private employer. If the commissioner finds that a violation has occurred, the commissioner may impose penalties as provided in paragraphs (b) and (c).

(b) For violations that occur before January 1, 2015, the penalties are as follows:

(1) for the first violation, the commissioner shall issue a written warning to the employer that includes a notice regarding the penalties for subsequent violations;

(2) if a first violation is not remedied within 30 days of the issuance of a warning under clause (1), the commissioner may impose up to a \$500 fine; and

(3) subsequent violations before January 1, 2015, are subject to a fine of up to \$500 per violation, not to exceed \$500 in a calendar month.

(c) For violations that occur after December 31, 2014, the penalties are as follows:

(1) for employers that employ ten or fewer persons at a site in this state, the penalty is up to \$100 for each violation, not to exceed \$100 in a calendar month;

(2) for employers that employ 11 to 20 persons at a site in this state, the penalty is up to \$500 for each violation, not to exceed \$500 in a calendar month; and

(3) for employers that employ more than 20 persons at one or more sites in this state, the penalty is up to \$500 for each violation, not to exceed \$2,000 in a calendar month.

(d) The remedies under this subdivision are exclusive. A private employer is not otherwise liable for complying with or failing to comply with section 364.021.

**History:** 1974 c 298 s 6; 1982 c 424 s 130; 2013 c 61 s 4