



**Governor's Advisory Council for Exceptional Citizens (GACEC) 516 West Loockerman St., Dover,  
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### **MEMORANDUM**

**DATE: March 7, 2014**

**TO: The Honorable Members of the Delaware General Assembly**

**FROM: Terri Hancharick, Chairperson  
GACEC**

**RE: House Bill No. 167 (Public Employment: Consideration of Criminal Record)**

The Governor's Advisory Council for Exceptional Citizens (GACEC) has reviewed House Bill No. 167, which as amended, would make it unlawful for "any public employer to inquire into or consider the criminal record, criminal history, or credit score of an applicant for employment during the initial application process, up to and including the first interview." "Public employer" means "the State of Delaware, its agencies, or political subdivisions." Employers could consider criminal history and credit information after the first interview and disqualify an applicant "where the exclusion is job related for the position in question and consistent with business necessity." Vendors doing business with the State would be encouraged to adopt similar policies. Some entities are exempt, including police agencies, the Department of Correction, Department of Justice, Office of the Public Defender and the Courts. The legislation would be effective 180 days after enactment. The GACEC **strongly endorses** the proposed legislation subject to consideration of two amendments.

The stimulus for this legislation is compelling. As the preamble recites, at least 40 cities, seven counties, and seven states have passed similar measures. The seven states are Massachusetts, Connecticut, Hawaii, California, Minnesota, Colorado, and New Mexico. The City of Wilmington has also adopted a conforming ordinance as noted in the November 11, 2012 News Journal article, "Baker gets rid of felon job box". "Ban the box" legislation is pending in New Jersey, Michigan, North Carolina, and Ohio. See January 14, 2014 CNN article, "A growing movement to protect convicted job applicants". New Castle County Executive Tom Gordon adopted a "ban the box" policy through Executive Order No. 2014-03 on January 28, 2014.

Federal statistics show that one in three black men and one in six Hispanic men will be incarcerated during their lifetime compared to one in 17 white men. See April, 2012 News Journal article, "Criminal

background check policy updated”. One of the results of disproportionate representation of minorities in the criminal justice system is high rates of unemployment upon release based on a criminal record. The prime sponsor of the proposed legislation, Representative J.J. Johnson, offered the following perspective in the Delaware House Democrats Newsletter (January 17, 2014):.

House Bill 167 is not a “hire the felons” bill, but a “foot in the door” bill. He noted that more than two-thirds of the men and women released from prison end up back there within three years, and the lack of a stable job contributes greatly to that recidivism.

Similar views are shared in the attached excerpt from the recent State of the State address by Governor Markell and the June 6, 2013 News Journal editorial, “Public robbed of a reformed employee”. Given the high correlation between mental illness and substance abuse, criminal history checks also disproportionately impact persons with disabilities convicted of drug possession.

Delaware has implemented other initiatives in recent years to remove barriers to employment by those with criminal histories. See Senate Bill No. 59, enacted in 2011, which reduced or eliminated waiting periods for persons convicted of crimes to obtain restoration of a professional license.

Our suggested amendments to the proposed legislation are as follows:

First, Council would suggest clarification that the bill establishes minimum protections for job applicants which local governments may exceed by ordinance or executive order. For example, the amended legislation literally permits consideration of three factors in the hiring decision: 1) nature and gravity of offense or conduct; 2) time that has passed....; and 3) nature of job held or sought. A local government might wish to include other considerations. For example, the New Castle County executive order requires consideration of “remorse” and “evidence of rehabilitation”. Furthermore, a local government might prefer to categorically disallow consideration of misdemeanors more than five years old (similar to the original version of House Bill No. 167). Local governments should not be restricted in their authority to adopt standards offering greater protection to job applicants.

Second, the original bill (lines 32-36) limited consideration of criminal histories to convictions. The amended legislation however, apparently authorizes exclusion of applicants based on arrest record. House Amendment No. 2 allows a public employer to disqualify an applicant from employment based on “criminal history” (which would include arrests without conviction). This is contrary to Equal Employment Opportunity Commission (EEOC) guidance. See January 12, 2012 EEOC press release and News Journal article, “Pepsi Beverages settles race discrimination case”, describing a \$3.1 million settlement when the company policy of not hiring individuals with arrest records pending prosecution disproportionately excluded black applicants. See also EEOC guidance (pp 12-14) holding that an arrest without conviction is generally not an acceptable reason to deny employment. Thus the bill would benefit from a conforming amendment limiting consideration to convictions.

Thank you for your time and consideration of our position. Please feel free to contact me or Wendy Strauss should you have questions or concerns.

Attachment