



## Ban-the-Box and Criminal Records in Employment



# BUILDING A STABLE WORKFORCE



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## LETTER FROM THE COMMISSIONER

### DEAR STAKEHOLDERS,

The United States faces an unprecedented labor shortage as the percentage of working age adults in society will decrease from 62% to 57% in the next 10 to 15 years as the wave of baby boomers continue to retire. Compounding the impending labor shortage is the exclusion of millions of Americans with a criminal history who are seeking a second chance to provide for themselves and their families.

According to the Pew Center on the States, the United States has 5% of the world's population, but 25% of the world's prison population. Annually, more than two million people are incarcerated in the United States, disproportionately for nonviolent drug offenses. Ensuring successful reintegration of these individuals into society is important economically and as a matter of public safety.

During the 2013 legislative session, the Minnesota Legislature amended the Criminal Offenders Rehabilitation Act to prohibit private employers from seeking criminal history information prior to interviewing a candidate or extending a conditional job offer. This legislative effort known as ban-the-box builds upon the tradition in Minnesota to provide grace and redemption to those who seek to fully rejoin society.

The Department has prepared this report to set forth the challenges ahead of us, the history of the Criminal Offenders Act, the efforts of MDHR to enforce the law, answers to common questions facing employers, and to provide guidance on how employers can avoid claims of employment discrimination if they choose to use criminal history information during their hiring process. As evidenced by prior legislative efforts in Minnesota, we as a society believe that offering second chance opportunities for gainful employment to all people in our society ultimately creates safe, strong and prosperous communities.

We look forward to building upon the existing work between community organizations, businesses and criminal justice advocates to create employment opportunities, and to combatting collateral consequences in education, civic engagement, housing, and voting.

Sincerely,

A handwritten signature in black ink that reads "Kevin M. Lindsey". The signature is written in a cursive style.

Kevin M. Lindsey  
Commissioner

Minnesota Department of Human Rights





## CRIMINAL OFFENDERS REHABILITATION ACT

In 1974, the Minnesota Legislature passed the Criminal Offenders Rehabilitation Act. As employment is essential to rehabilitation, the policy encourages and contributes to the rehabilitation of people by helping them secure employment. The original law specifically prohibited the disqualification of such individuals from public employment or occupational licensure solely because of their criminal history, unless the crime bore a direct relationship to the particular employment position or occupation the individual was seeking.

Despite passage of the Criminal Offenders Rehabilitation Act, individuals who had been previously convicted still faced significant employment challenges. In the 1980s, states began passing collateral consequence laws restricting the ability of individuals to work. As a result of the proliferation of collateral consequence laws, Congress passed the Court Security Improvement Act of 2007 directing the collection and analysis of collateral consequences. At the time of publication, the Council of State Government Justice Center identified 568 collateral consequences in Minnesota and 50,000 collateral consequences in the United States.

More than 50 organizations and countless individuals, collaborating as Minnesota’s Second Chance Coalition, successfully lobbied the Legislature in 2009 to ban-the-box for public employers. The law made it so that a public employer had to wait to make such an inquiry until after an applicant was interviewed.

During the 2013 legislative session, several individuals and organizations advocated for extending ban the box to private employers. Jason Adkins, the Executive Director for the Minnesota Catholic Conference, provided testimony that “it is unreasonable for society to expect individuals to reenter the community as productive citizens if their job application is dismissed without an opportunity to meet face-to-face and explain why they would benefit the company as an employee.” Later that session, Governor Mark Dayton signed an amendment to the law to extend the reach of the law to private employers. Minnesota became the third state in the nation to expand ban-the-box to private employers. Enforcement of the new law became the responsibility of the Minnesota Department of Human Rights (MDHR).



*Ban-the-Box gives ex-offenders a chance to sit at an opportunity table. Just because a person commits some type of transgression, should not define them as non-human, especially after paying for their mistake. Ex-offenders want to be productive members of society by working, raising their own children, and taking care of their responsibilities.*

– Richard McLemore, Housing Director, Ujamaa Place

## DISPARITIES IN CRIMINAL JUSTICE

In the past few decades, a significant number of Americans have had contact with the criminal justice system.<sup>1</sup> As a result, the estimated number of people with a criminal record in the United States is one in four individuals. By the end of 2007, 3.2% of all adults (1 in every 31) were under some form of correctional control involving probation, parole, prison or jail.<sup>2</sup>

A significant number of arrests that occur in Minnesota are low-level arrests such as gross misdemeanor, misdemeanor, and petty misdemeanor.<sup>3</sup> In 2010, there were approximately 360,000 people under control of the Minnesota Department of Corrections. Felony convictions pose a significant barrier as an estimated 1 in 11 working age adults in Minnesota has been previously convicted of a felony.

In the United States, arrest and incarceration rates are particularly high for people of color.<sup>4</sup> People of color are arrested at a rate that is 2 to 3 times their proportion of the general population.<sup>5</sup>

Although the issue of racial disparities in the criminal justice system is a problem nationwide, it is arguably more prevalent in Minnesota. According to the United States Commission on Civil Rights, “the disparity between Whites and African Americans with criminal records (in Minnesota) is four times higher than the national average.”<sup>6</sup> One recent study found that “black people were 8.7 times more likely to be arrested for a low-level offense than white people, and Native Americans were 8.6 times more likely to be arrested for a low-level offense than white people.”<sup>7</sup> An estimated 1 in 4 working age African American adults in Minnesota has been convicted of a felony.

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1 EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, April 25, 2012.

2 See FN 1.

3 American Civil Liberties Union: Picking Up The Pieces: Policing in America, A Minneapolis Case Study, 2015.

4 See FN 1.

5 See FN 1.

6 Unemployment Disparity in Minnesota, Report of the Minnesota Advisory Committee to the U.S. Commission on Civil Rights, December 2013 citing Minnesota District Court Judge Lucy Wieland, Minnesota’s racial disparities: A judge’s view, Star Tribune, April 17, 2011.

7 See FN 4.

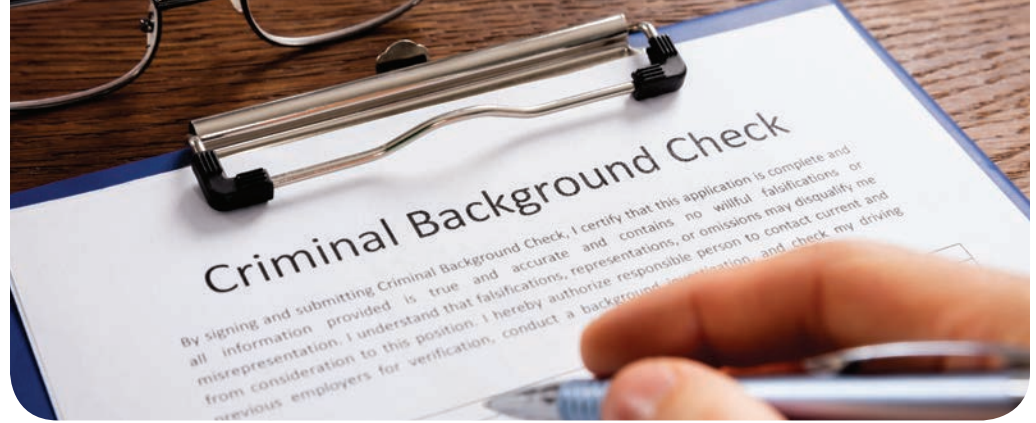
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Incarceration rates are starkest for 20 to 34-year-old men without a high school diploma or GED: Within this group, 1 in 14 Hispanic males, 1 in 8 White males and 1 in 3 Black males are incarcerated.

– Pew Center on the States, Collateral Costs: Incarceration Effect on Economic Mobility (2010)

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## IMPACT OF CRIMINAL HISTORY BACKGROUND INQUIRIES IN EMPLOYMENT

Most research indicates that the majority of employers conduct criminal history background inquiries prior to hiring an individual. In 2010, the Society of Human Resource Management found that approximately 92% of the employers conducted some criminal history background inquiry prior to hiring an applicant. The Department, in reviewing the hiring practices of Minnesota state contractors with a Workforce Certificate of Compliance, found that 74% conducted a criminal history background inquiry.

The economic impact to society, in limiting employment opportunities for individuals with a criminal history, is significant. Cherrie Bucknor and Alan Barber, economists at the Center for Economic and Policy Research, used Bureau of Justice Statistics data to estimate that in 2014, the United States had between 14 and 15.8 million individuals with a felony conviction. The economists calculated that the annual gross domestic product loss to the economy was between \$78 and \$87 billion dollars.

The use of criminal history background inquiries has a disproportionate impact on limiting employment for people of color. Prominent researcher

Devah Pager, Professor of Sociology and Public Policy at Harvard University, studied employers' treatment of job applicants in Milwaukee, Wisconsin. The study focused on the likelihood that an applicant would be called back for a job interview. Not surprisingly, whites without a criminal record were nearly seven times more likely to be invited back than blacks with a criminal record. Most striking, however, was that the study found that only 14% of blacks without a criminal record were called for an interview; whereas, 17% of whites with a criminal record were asked to interview.

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All measures of crime in the United States are projected to decline in 2017. The overall crime in 2017 is projected to decrease by approximately 1.8% and violent crime is projected to decrease by approximately .6%. If this estimate holds, the United States in 2017 will have the second lowest crime rate since 1990.

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# BAN-THE-BOX FOR PRIVATE EMPLOYERS

Private employers are prohibited under ban-the-box from obtaining or requiring applicants to disclose a criminal record or criminal history before the interview or conditional offer stage of the hiring process, unless they are permitted to ask for such information under federal or state law.<sup>1</sup> The law is commonly known as ban-the-box in reference to the elimination of a check box question on a paper application from asking applicants if they have committed a crime. However, the language of the statute is far broader and eliminates any means by which an employer seeks to obtain criminal background information. Employers who violate the law may be subject to a fine.

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## Some of the most common questions identified by MDHR as violations of the law –

- Have you ever been arrested or convicted?
- Have you ever been convicted of a felony?
- Have you been convicted or plead guilty to a crime?
- Have you had any driving violations besides parking tickets?

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The law does not require private employers to hire, give preference or interview an individual with a criminal record. Employers may still conduct a criminal background check before hiring a job applicant provided that it occurs after the job applicant has been interviewed or had a conditional job offer extended.

Compliance with Minnesota’s ban-the-box law does not equate with compliance with federal or state anti-discrimination laws in the application of their criminal background check policy. Also, an employer that is exempt under Minn. Stat. §364.021 is still subject to the jurisdiction of the Equal Employment Opportunity Commission (EEOC) and the Minnesota Department of Human Rights when the employer uses information obtained pursuant to its criminal background check policy.

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<sup>1</sup> Minn. Stat. §364.021.



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The EEOC April 25, 2012, guidance provides that a local unit of government, even when required by statute, may be liable for discrimination under Title VII if the criminal background information is not job related and consistent with business necessity.

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## PRIVATE EMPLOYER VIOLATIONS

MDHR initiates an investigation whenever the Department becomes aware that an employer is requesting criminal history information prior to an interview or conditional job offer. The Department forwards correspondence to the employer identifying the question or inquiry of the employer that suggests a violation of the law and the number of individuals employed.

After receiving the notice, the employer is provided with an opportunity to explain why the question or inquiry identified by the Department does not solicit criminal history information. Alternatively, the employer may also inform the Department as to why they are permitted under federal or state law to ask the question or make the inquiry, at that time in the hiring process.

The employer is informed that they may be subject to a fine if the Department ultimately concludes that a violation of the law has occurred. MDHR informs the employer that the organization may avoid imposition of a fine if they demonstrate they have promptly rectified the problem.

MDHR has sent 291 letters to employers identifying possible violations of the law, since the enactment of ban-the-box. Under Minn. Stat. §364.06, the Commissioner may issue a fine without first providing a warning.

Since 2014, 74% of employers receiving a letter immediately corrected the identified ban-the-box violation without any further investigation by the Department. Additionally, MDHR has recognized six exemptions and has issued four fines, each employer having more than 20 employees, for an average of \$500.

The most common ban-the-box violations involved an explicit question asking for applicants to: identify a prior criminal conviction (79%), identify driving violations (16%), explain their military discharge (12%), or answer a question that could lead to the disclosure of criminal history (10%).

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Since 2016, more than 300 companies and organizations have signed the Fair Chance Business Pledge encouraging companies to take action to ensure all Americans who have had contact with the criminal justice system have an opportunity to succeed by expanding their talent pools by eliminating unnecessary hiring barriers to those with a criminal record.

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# COMMON QUESTIONS FROM PRIVATE EMPLOYERS

## FREQUENTLY ASKED QUESTIONS OF THE DEPARTMENT:

**Q. Can an employer inform job applicants that after interview but prior to hire that they will be subject to a criminal background check?**

Yes. An employer may state in its pre-hire materials that all job applicants will be subject to a criminal background check.

**Q. Can an employer continue to use my multi-state employment application if I indicate on-line that job applicants applying for employment in Minnesota do not have to disclose criminal history information?**

Yes. A best practice for the employer would be for the on-line application to prevent the job applicant from being able to answer the question.

**Q. Can an employer refuse to extend a job offer to a candidate solely on the basis of the information shared by the applicant during their interview about their conviction?**

Yes. The law does not require the employer to extend a job offer, however, employers should ensure that their decisions on when they extend job offers are not influenced on the basis of one of the protected classes within federal and state anti-discrimination laws.

**Q. Can an employer refuse to interview a candidate upon reviewing the candidate's criminal history background information if the decision was made after the candidate's application was screened and the candidate was placed in the pool of candidates to interview?**

No. The employer must interview the candidate to comply with the law. The essence of the law would be defeated if job applicants were not provided with an opportunity to discuss with prospective employers why they would make good employees.



Additional frequently asked questions can be found on MDHR's website at [mn.gov/mdhr](https://mn.gov/mdhr).

## FOUR IN FOUR:

*We Are All Criminals (WAAC) is a story-based nonprofit challenging narratives of criminality, privilege, punishment, and redemption. "Giving people second chances has given me first-rate employees," said one WAAC participant, a café owner. He also noted that had he not first recalled his own mistakes, crimes he got away with years ago, he would be less likely to hire people with criminal records—and would have missed out on some of his best managers.*

*We Are All Criminals has interviewed hundreds of business owners, lawyers, doctors, professors, policymakers, and more, asking: What crimes have you gotten away with? What have you had the luxury to forget? From shoplifting to joyriding, smoking pot to drinking underage and more, the stories have been pouring in.*

*After all, while one in four people in the US has a criminal record, four in four have a criminal history.*

*So, what's your story?*

Emily Baxter,  
We Are All Criminals





## STATUTORY EXEMPTION LANGUAGE

The law does not apply 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.” Minn. Stat. §364.021 (b).

The above language applies when employers are required under law to conduct a criminal history background check or ask specific questions of job applicants. For example, federal law requires commercial motor vehicle operators to ask job applicants to identify: A list of all violations of motor vehicle laws or ordinances (other than violations involving only parking) of which the applicant was convicted or forfeited bond or collateral during the 3 years preceding the date the application is submitted. - 49 C.F.R. 391.21 (b)(8). Since employers are obligated to ask the above question under federal law, no violation of Minnesota’s ban-the-box law occurs when employers ask this question on the application.

The Department narrowly construes “the statutory duty” language consistent with the goal of the law to provide individuals with employment opportunities. Accordingly, commercial motor vehicle

operators may not ask job applicants to identify all convictions that occurred within the past three years, as the federal law only requires applicants to identify “violations of motor vehicle laws or ordinances.”

In a second example, Minn. Stat. §326.336, Subd. 1 provides that private detective agencies are required to obtain a “full set of fingerprints” and an employee consent form from all job applicants. The information collected from applicants allows the Minnesota Bureau of Criminal Apprehension (BCA) to conduct a criminal background check. The BCA then denies or issues a license to the applicant.

The Department has interpreted that the above and similar legislative language does not create an exemption. First, the language only requires employers to facilitate the collection of information and not to conduct a criminal background check. Second, allowing employers to reject a job applicant before BCA makes its determination is inconsistent with the legislative language that allows BCA to issue a license to an individual who wants a second chance.

## BAN-THE-BOX - BEST PRACTICES

### REVIEW APPLICATION:

Employers should review their employment application to ensure that none of the questions on the application could be construed to require a job applicant to disclose criminal history information. Employers should pay particular attention to questions on the application that ask the applicant to explain an answer. Requiring applicants to explain an answer may force them to divulge criminal history information.

### REVIEW APPLICANT MATERIALS:

Ban-the-box is not limited to the employer's job application. Any information that arguably suggests that an individual needs to disclose criminal history information in answering a question in pre-hire materials should be removed or amended to comply with the law.

- If an employer believes that they are required under federal and state law to request criminal background history information from job applicants, they should carefully review the statute. An erroneous good faith violation of the statute is not a defense to a ban-the-box violation.
- If the statute requires the employer to forward information such as fingerprints or a background history consent form to a licensing agency that will decide whether the job applicant can work for the employer, the statute likely does not exempt the employer from complying with ban-the-box.
- If the statute requires the employer to ask all job applicants specific questions on its application or within its pre-hire materials, the employer should ensure that the questions asked of applicants align with the language of the statute. The Department narrowly interprets statutory exemptions, employers that expand questions beyond the statute will likely face a possible ban-the-box violation.





## REPORTING AND INITIATING BAN-THE-BOX INVESTIGATIONS

Ban-the-box investigations originate in one of three ways for the Department. First, individuals and organizations bring employment application violations to the attention of the Department in person, by phone, or by email.

Violations can be reported to the Department's St. Paul office, located in the Freeman Building, 625 Robert Street North, St. Paul, MN 55155 or by calling the office's main phone number at 651.539.1100. Ban-the-box violations may also be reported on-line through the ban-the-box Submission Form at: [mn.gov/mdhr/employers/criminal-background/ban-the-box-form.jsp](https://mn.gov/mdhr/employers/criminal-background/ban-the-box-form.jsp). Additionally, violations can be reported to the Department's St. Cloud regional office, located at the St. Cloud City Hall Building, 400 2nd Street South, St. Cloud, MN 56301 or by calling St. Cloud's phone number at 320.407.8288.

Second, the Department annually investigates several hundred employment discrimination complaints. During the course of investigating employment discrimination complaints, the Department will review the employment application and the pre-hire materials that are provided to job applicants. If the job application or pre-hire materials suggest a possible ban-the-box violation, the Department will initiate a separate ban-the-box investigation.

Third, MDHR also regularly initiates several hundred employment audits of contractors with Workforce Certificates. During the course of auditing the equal employment opportunity hiring practices of contractors, the Department reviews the job applications and pre-hire materials that individuals are asked to complete during the hiring process.

If the Department concludes that a violation may have occurred, MDHR will begin an independent ban-the-box investigation. If that investigation concludes that a violation has occurred, the Department will take into consideration the violation in evaluating the good faith efforts of the contractor and whether their Workforce Certificate should be renewed.





## TITLE VII AND MHRA - BEST PRACTICES

Employers should take care in their use of criminal history information during the employment process to avoid a possible violation of federal and state anti-discrimination laws.

Those organizations that allow hiring managers to use criminal history information should make sure that decisions are made in a consistent manner. Failure to make decisions in a consistent manner may result in a finding of disparate treatment.

Disparate treatment may occur on the basis of race when an employer treats an African-American candidate less favorably to a white candidate with similar educational background, skills and work experience. If an employer would consider a marijuana possession conviction in high school as a youthful indiscretion that does not define one candidate, the employer should afford the same discretion and hire the African-American candidate.

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In *Connecticut v. Teal*, the United States Supreme Court held that a “bottom line” racial balance in the workforce does not preclude employees from establishing discrimination, nor does it provide employers with a defense.

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Disparate treatment may also occur on the basis of national origin when an employer treats a Latino candidate less favorably to a white candidate with similar work experience. For example, if an employer would not withdraw a conditional job offer for a conviction that occurred more than five years ago for white candidates, the employer should afford the same discretion and hire the Latino candidate.

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In 2012, a local Minneapolis business agreed to pay \$3.13 million and provide job offers and training after the EEOC found reasonable cause to believe that it had excluded African American applicants who had been arrested even if they had never been convicted of a crime.

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Employers should also make sure that their policies do not have the effect of disproportionately screening out racial or ethnic groups, are job related for the positions in question, and are consistent with business necessity.

In 1971, the United States Supreme Court in *Griggs v. Duke Power Company* held that anti-discrimination employment laws prohibit “practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude [African Americans] cannot be shown to be related to job performance, the practice is prohibited.”

The Eighth Circuit in *Green v. Missouri Pacific Railroad* held that it was discriminatory for an employer to “follow the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense.” The Eighth Circuit identified three factors for employers to consider in assessing whether an exclusion is job related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct,
- The time that has passed since the offense or conduct and/or completion of the sentence, and
- The nature of the job held or sought.

Employers should seek to consistently meet the “job related and consistent with business necessity” defense which can be accomplished when the:

- Employer validates the criminal conduct screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards.
- Employer develops a targeted screen considering at least the nature of the crime, the time elapsed, the nature of the job (Green Factors), and then provides an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.



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The United States government offers a federal tax credit of up to \$2,400 for employers who hire individuals from nine targeted groups of job seekers, which includes individuals who have been convicted of a felony.

Additionally, the United States Department of Labor in 1966 created the Federal Bonding Program to provide employers with free no deductible bond insurance in the amount of \$5,000.

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## TITLE VII AND MHRA - BEST PRACTICES

Employers who decide to use criminal history background information in their hiring decision making process should be cognizant of the following:

- Senior management should understand how the employer has used the Uniform Guidelines on Employee Selection Procedures or developed a targeted screening process when deciding who to hire for a particular job.
- There should be a clear written policy on how the employer determines when to hire a person with a criminal history background. The policy, at a minimum, should address how to weigh the nature and gravity of the offense, the length of time since the act was committed, and the nature of the job sought.
- Hiring managers should be trained on how to evaluate evidence of rehabilitation and mitigating factors during the hiring process. A decision not to hire should not be based solely on the fact the candidate was arrested.
- The hiring process should provide all job applicants with an opportunity to explain to the hiring manager why the criminal history information is inaccurate or why the applicant should not be excluded as a candidate for the position.
- The employer should periodically review and analyze the hiring decisions made by hiring managers to ensure that reviewing criminal history information is occurring consistent with the employer's policy and implicit bias is not occurring when hiring decisions are being made.

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Twin Cities R!SE has recently published the Minnesota Employers Guide which provides best practices and information for employers who are interested in strengthening their workforce by providing second chance opportunities to individuals ready, willing and able to work.

<http://www.twincitiesrise.org>

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## SECOND CHANCE OPPORTUNITIES

By offering second chance opportunities, employers diversify their candidate pool and hire some of their greatest employees. In educating the public about ban-the-box, the Department has partnered with organizations such as We Are All Criminals, Ujamaa Place, and Goodwill Easter Seals to educate employers about the benefits of hiring people who are ready for a second chance to succeed.



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*We must change our attitude and biases towards ex-offenders that have had contact with the penal system. Ex-offenders are our nation's emerging workforce. They were not born to be criminals and should not have their life permanently taken away. Creating permanent pathways by eliminating laws that prevent successful re-entry into society must be a priority through changes in legislation, policies and practices.*

– Otis Zanders, President and CEO, Ujamaa Place



# BUILDING SAFER AND STRONGER COMMUNITIES



# Ban-the-Box and Criminal Records in Employment

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