

A 25-year-old **law** banning employers from considering a job applicant's criminal record has re-emerged with a **new** face, and is pushing a hot button in the business community.

The **law** on arrest and court record discrimination was passed in 1973, but only now are **rules** being proposed to define and implement it.

The proposed **rules** state that most Hawaii employers won't be able to ask applicants if they've ever been convicted of a crime - which some in the business community believe was not the **law's** original intent. The Hawaii Civil Rights Commission, which drafted 17 pages of proposed **rules**, is holding a public hearing on them this month.

Only a handful of other states have laws prohibiting employers from making hiring decisions based on arrest records, court records, or both - **New** York, Wisconsin, Connecticut, Massachusetts, Minnesota and Michigan.

Anna Elento-Sneed, a labor employment attorney at Carlsmith Ball Wichman Case & Ichiki, said the **rules** ignore the liability employers face regarding the actions of their workers.

"It's dumping the ills of society on business, and will make Hawaii look even less business-friendly than it is now," said Elento-Sneed, who has researched the issue.

"This is nuts. Employers get squeezed in the middle. If you don't hire, you get sued, but if you do hire and something happens (**to** customers or other workers), you get sued."

Joyce Hedani, managing director for employee relations at Liberty House, said business wants a fair way **to** use background information for hiring.

"We want **to** be able **to** use information in a reasonable way **to** determine whether or not a crime is substantially related **to** the job they're going **to** do," Hedani said.

"Drunk driving has nothing **to** do with a salesperson, but if it's for a driving job, then it certainly has impact. We have a duty **to** our customers as well as other employees."

The proposed **rules** say "rehabilitation of individuals convicted of crimes is essential **to** society, and gainful employment is necessary for rehabilitation."

John Ishihara, the civil rights commission's chief counsel, said the **law** has "conflicting goals."

"On one hand they (criminals) have paid their debt **to** society and should be able **to** get jobs. If they can't, what's left for them might be more crime," he said.

"On the other hand, employers do have legitimate public safety concerns. It's a gray area," he said.

Ishihara said the commission asked for opinions from business two years ago "and they hated the **law**. There have been calls **to** eliminate the protection totally."

One of the most controversial sections would forbid asking if job applicants have been convicted of crimes.

Employers with statutory exemptions, however, can ask.

They include state and county governments, private and public schools, housing co-ops and condominiums, and federally insured financial institutions.

Elento-Sneed doesn't believe the current **law** addresses such questions, and said businesses continue **to** ask

about convictions on applications.

The issue has not been brought before the state courts, she said.

"All the **law** says is, 'Thou shalt not discriminate on court records,'" Elento-Sneed said.

"Whether they have the authority to go beyond that is questionable."

Ishihara disputes Elento-Sneed's interpretation of the **law**, saying the **law** does ban asking about convictions on applications.

The state government has more leeway in asking about and considering court records when hiring, a right that business feels is unfair.

Ruth Tsujimura, the state's supervising deputy attorney general in the Employment Relations Division, said other laws require the state to make extensive background checks of applicants.

The state can consider conviction records for virtually any job where officials feel there is a connection between a specific crime and job performance.

However, Tsujimura said the state has to be "absolutely sure" it is justified in eliminating an applicant because of a court record.

"We should take this responsibility very seriously," Tsujimura said.

There are exemptions

According to the proposed **rules**, employers without statutory exemptions may try to prove a connection between a specific crime and job performance, known as a bona fide occupational qualification.

Even if they prove the connection, they may only ask about conviction records after they have offered a job.

Arrests without convictions can rarely be considered.

There are exceptions: If a bank employee is arrested for a theft crime, for example, the employer has the option to keep the worker off the premises until a conviction is determined.

Asked why it has taken so long to develop **rules**, Ishihara said the commission opened its doors in 1991, and **rules** on housing and disability discrimination took priority.

Earlier enforcement came under the state Department of Labor.

In fiscal year 1995-96, 19 discrimination complaints based on criminal records were filed with the commission, Ishihara said, or 4.6 percent of all complaints.

Enforcement is tough

Advocates for prisoners say the **law** is important, but that it's difficult to catch employers breaking it.

"Generally people will not say that's the reason," said Gerald Reardon, executive director of the John Howard Association, which helps prisoners find jobs when they get out.

"They just say they have a more qualified candidate."

Of the approximately 1,500 people the association helps every year, Reardon said most get jobs if they really want them. But the quality of job can be "insulting or not acceptable xxx People ought to be able to get on with their lives, and most do."

State Sen. Sam Slom, an outspoken advocate for small businesses, said legislation will be introduced this year

to give employers more access to information.

Slom, a Republican, believes Hawaii has more hiring restrictions and employee protection than any other state, but such laws have hurt business as well as workers caught in a stale economy.

"Nobody is concerned about the civil rights of employers and the general public," Slom said.

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