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**UNIVERSITY OF ILLINOIS
URBANA-CHAMPAIGN SENATE**
Senates Executive Committee
(Final; Information)

SC.15.13 Report in Response to the University Policy on Background Checks

In response to resolution RS.16.02 that was approved by the full Senate on September 21, 2015, the Senate Executive Committee (SEC) referred the University Policy on Background Checks to the Senate Committee on General University Policy (GUP) and the Senate Committee on Equal Opportunity and Inclusion (EQ) for review. Attached are response documents from GUP and EQ.

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Senate Committee on General University Policy
Suggested Revisions to the University Policy on Background Checks

University Policy
On Background Checks

I. Purpose

In an effort to provide a safe and secure environment for all students, employees and visitors at the University of Illinois, to safeguard the University's ~~reputation~~, property and resources, and to promote sound hiring decisions, the University has established the following policy and guidelines for conducting background checks.

II. Overview

Commencing on October 5, 2015, offers of employment to prospective new hires, as well as offers to current employees who are seeking to transition into a position that requires a background check, will be made contingent upon the results of the criminal background check and other pre-employment assessments. The purpose of these background checks is to ascertain the suitability for employment.

The University may revoke any conditional offer of employment to an individual who refuses to consent to a background check and individuals whose criminal record or history creates an unacceptable level of risk to ~~(1) maintaining a safe and secure University environment, or (2) the University's reputation, property or resources~~. If an individual's background check indicates a criminal record or history, the University may conduct an individual assessment of the criminal record or history, which may include asking the individual about his/her criminal record or history. A criminal record or history will not automatically exclude an individual from being considered for or being offered employment with the University, as consideration is given to such factors as, but not limited to, the nature and seriousness of the underlying offense/conduct, the relatedness of the offense/conduct to the position being sought, the length of time that has elapsed since the conviction/end of sentence/conduct, and demonstrated rehabilitative efforts.

Senate Committee on Equal Opportunity and Inclusion Advice on Background Check Implementation Plan

Committee Statement on Background Check Policy

We make these recommendations with the caveat that the currently formulated background check policy undermines the University's stated commitment to diversity and the best way to address the safety concerns stated as the policy's primary motivating focus. A policy that examines, and an implementation plan that considers, the relation of previous convictions to suitability for positions in the context of a system of mass incarceration that implicates people of color at vastly higher rates than the rest of the population cannot be anything but discriminatory no matter how carefully the implementation plan is designed. Such a policy compounds burdens already placed on those with convictions and makes their hiring contingent on subjective evaluations of "rehabilitation" that their very availability to apply for a job has already satisfied.¹ The likely result of such policies is to discourage people with criminal convictions from even applying for jobs, when their experience and persistence in the face of hurdles might bring vitally important perspectives into our academic discussion and the university community as a whole. This complicates efforts of units that seek ways to make their own faculties and student populations as diverse as possible, at the very levels of institutional initiative that matter most in such efforts. Inasmuch as already financially strapped departments will be responsible for paying for mandatory checks, the policy also represents a financial burden. For the university, as well, the policy runs the risk of generating greater costs than implementing it alone will entail. Because people of color carry conviction and incarceration records disproportionately in this society, the policy opens the university to vulnerability to lawsuits based on the policy's likely disparate impact.²

If one of the main objectives is to protect safety, moreover, the implementation of a fundamentally discriminatory policy seems a poor choice of allocation of scarce University funds. When recent safety reports for the campus indicate increasing numbers of on-campus rapes over the last 5 years, coupled with a growing problem with alcohol use, statistically related to acquaintance rape, it seems to us that the safety of many students could be much better addressed by devoting funds to these important issues. Instead we are developing a kind of policy that has been criticized as ineffectual.³ This is likely to achieve "safety" protection in name only, leaving many of the actual sources of vulnerability for students, employees and visitors unaddressed. This misallocation of funds is an issue because women, LGBTQ community members and others rendered vulnerable are thereby deprived of the equal opportunity it is our committee's role to promote.

Finally, we are concerned that the timing of the policy indicates an effort to react to recent cases where hires of controversial faculty rendered the "reputation" of the campus and University vulnerable in the eyes of the popular media. We are relieved to note that the policy does not propose to extend checks to social media in such a way as to pose further threats to academic freedom. In 2014, an individual with a conviction history whose hire caused controversy had never hidden his background from hiring units,

¹ See especially Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: New Press, 2010).

² See Ann Springer, "Background Checks, When the Past Isn't Past," *Academe* (2003), Issue 2.

³ Note that this problem is addressed even by people who favor background checks, as in D. Frank Vinik, "Why Background Checks Matter in Academe," *Chronicle of Higher Education* May 27, 2005, p. B. 13.

and later investigation into the controversy deemed the process of his hire legitimate. Under these circumstances it cannot be said that the policy addresses problems of “unknown” histories that had actually been disclosed.

We recognize that, irrespective of these problems, we are being asked by campus administrators in charge of implementing the policy to advise their efforts to develop an implementation plan for a policy they did not create. We are therefore offering specific recommendations about the proposed plan with the caveat that there is likely no implementation plan that can truly overcome the discriminatory character of the entire policy itself. We suggest that our critique of the policy be forwarded by the Senate to the proposed ad hoc committee to be formed to examine the policy at the level of University Administration. We offer the following advice and recommendations on the implementation plan in the hope of minimizing the harm that a flawed policy will do.

Comments and Recommendation Implementation Procedures for Background Check Policy, referring the DRAFT-Revised 9-30-15

Objectives:

With regard to the objective to “Embody a process that confirms the commitment that a conviction history is NOT an automatic bar to employment and requires an individualized assessment”:

The commitment to a statement that the University does not discriminate in hiring due to “prior conviction history” (along with other federally mandated dimensions of non-discrimination: “equal opportunities for employment, without regard to race, color, religion, sex, national origin, disability, sexual orientation, gender identity or status as a Vietnam era or special veteran”) must be clearly stated in job announcements along with any statement of the necessity of complying with a background check.

We note that the parameters along with the “individualized assessment” will necessarily be subjective and will only propose a reconsideration of rehabilitation already addressed by the criminal justice and/or penal systems through which anyone with a conviction and/or incarceration record will have passed.

Applicability

In addition to the listing of those current University Employees to whom the policy does apply, the plan should specify in writing that the policy does not apply to current university employees who may seek promotions in their present units in the future.

Standard Background Check Components

Do criminal records include juvenile records? Though usually we expect these to be expunged upon completion of a sentence/rehabilitation, we understand that this requires initiative of the individual or her/his family, and without that initiative a criminal conviction check may pick them up. Given that the background check look-back time frame is indefinite, how will juvenile records be handled?

Notification to Candidates

1. Notice in Job Advertisement:

Clarity about the university’s commitment to non-discrimination against people with prior convictions must balance the statement about conducting background checks. See “Objectives” above.

Proposed language: *The University of Illinois conducts criminal background checks on all job candidates upon acceptance of a contingent offer. In complying with this University-wide policy, the Urbana-Champaign Campus handles background check information through a process informed by our commitment to equal opportunities for employment without regard to race, color, religion, sex, national origin, disability, sexual orientation, gender identity or status as a Vietnam era or special veteran, or prior conviction history.*

2. Offer Letter:

If offer letters are to specify the “contingency” of any offer based on a background check (along with the contingency of BOT approval already rendered highly problematic by recent cases), the letter must also specify the full time frame in which this contingency will be cleared in relation to the full approval of the offer.

3. Consent and Disclosure Requirement:

We note that inasmuch as failure to consent amounts to withdrawal of a candidate’s application, we continue to have reservations about the discriminatory nature of this policy in the context of affirmative action practices that militate against broad-based questioning of conviction histories.

Cost

Burdening hiring units that are already actively trying to recruit diverse candidate pools with the cost of a policy that is likely to compromise those efforts is inappropriate. Since this is a University-wide policy the funds should come from University administrative sources.

Process:

1. “Upon selection of the preferred candidate, unit extends a written offer to candidate, clearly stating the offer is contingent upon the candidate successfully completing the background check process”.

Language about the process and time frame of this contingency must be formulated for the aid of departments and candidates, so that candidates have a clear framework for resigning from existing positions in relation to the time this process might take.

9. Illinois HR reviews the background check results:

As with other “reviews” of results and determinations of their implications for hiring, there must be clear indication to applicants of the number and specific role of individuals who will be handling these records. In addition, there must be transparency to candidates and units about the flow of decision making indicating what happens and exactly who is informed in the event of reports 1) with no conviction information, 2) with conviction information that is subsequently deemed by the HRARC not to be an obstacle to hiring, 3) with conviction information that is deemed by the HRARC to be an obstacle to hiring. See discussion of the need for an appeal process, below.

1. When the background check returns a criminal conviction history report:

a. Communication of inaccuracies or “additional information”:

At some point prior to this point in the process, the candidate needs to have been given an opportunity to specify to HR how they would like to receive any information about a criminal history report. There is no indication prior to this point of HR interacting with the candidate to find out how they would want

this material conveyed. The candidate should have the choice of not having the material, or any indication about a positive report, e-mailed.

a and e: HRARC review:

There is NO indication in these descriptions of the process of how much time the candidate will have to provide information. Since this is likely to take considerably more than the “3-5 day” time frame indicated in FAQ #12 the full time frame must be specified, both in fairness to the candidate (if 3-5 days is the imagined time frame in which to provide information this would be grossly unjust), and to hiring units (since if there is a conviction revealed by the process units must understand that the time frame for their hiring process will take considerably longer than it has in the past). Simply assuming that the process, with this new policy implementation included, must be speedily resolved to ensure efficient hires does not adequately address these issues. There should be a very clear set of guidelines to the candidate on the process for correcting inaccuracies or supplying additional information, along with a transparent flow chart indicating the procedure going forward for different kinds of decisions that may be made.

e. HRARC review: Both here and in the “definitions” of the HRARC there should be indications of the likely size of the committee in addition to the two faculty members. In order ensure a diversity of possible faculty input, the eight faculty members selected by the Provost office should include associate as well as full faculty. While allowing that there may be different cases that require different committee compositions, some range of numbers of HR personnel, academic or staff, University law enforcement representatives, and Legal Counsel that will make up the committee must be specified. In addition, there should be some specification about what kind of representation will be available for the cases of specialized faculty, academic professionals, civil service employees, etc. Consideration must also be given to how the committee can consider demonstration of “rehabilitative efforts” in a way that is not a subjective reassessment of processes already overseen by justice and penal procedures.

e. HRARC Review: In order to minimize subjective judgments as far as possible, we recommend that cases be referred to the committee anonymously, with names or any other identifying characteristics redacted..

f. HRARC Recommendations

i. “HRARC recommendations for faculty and specialized faculty candidates are provided to the Provost or her/his designee” and “the Provost Office will make the decision.” These identifiers lack specificity. Candidates and units need more specific indication of the responsible parties making decisions.

h. Illinois Human resources retains all conviction history: The following questions need to be addressed:
For how long will they be retained?
Who can access these records? This needs to be specified
Will the records be supplied to other agencies requesting them?
In what form will they be retained? If retained in digital form, what safeguards will be in place regarding platform change, security, etc.? A clear data management plan must be in place and published as part of this procedure.

Appeal

There is no process of appeal for the decisions being made by HRARC and the Provost Office (within which deciding officials need to be more carefully specified). In implementing a policy that already

renders candidates vulnerable to subjective judgments and discriminatory application because of the wider impact of conviction and incarceration on communities of color, this strikes us as unjust. “Efficiency” in hiring is not an adequate exigency weighing against a process of appeal. It is possible that in the course of the appeal not only the candidate but also hiring unit should be engaged. Without such provisions, the entire process risks a wholesale abrogation of recommendations on the primacy of faculty involvement in hiring recently adopted by the Senate.

Recommendation: That in the event of a negative decision regarding hiring by the HRARC and the Provost, the candidate should be informed of the reasons for the decision and given the opportunity to provide additional information regarding questions of “nexus” and other mitigating circumstances. The appeal should be heard by a reconstituted HRARC that has different faculty representatives in the case of faculty candidates, as well as the Dean and EO supervising the hiring unit. The candidate should be made aware of the inclusion of the Dean and EO in the event that they would elect not to have their history shared with members of their potential unit.

Monitoring

Presentations about implementation to the EQ Committee and the SEC have indicated that there will be ongoing monitoring of its potentially adverse effects on the diversity of candidate pools. We recommend specific wording about the conduct of such monitoring and reporting of the results, including how often and for how long monitoring will be done and to whom the results will be reported. There should also be clearly outlined procedures for making decisions about the policy and its implementation in the event that applicant pools

FAQs

The FAQs in general do not indicate how confidentiality will be kept for the candidate. They need to spell out who will have access to these records and what training they will have in protecting confidentiality. Provision needs to be made for conducting this training.

FAQ 12. 3-5 day time frame: This is unrealistic, especially in situations where there is a positive result of a criminal conviction. A candidate cannot possibly put together the suggested materials in this period of time, which will already have begun to elapse by the time s/he is notified of the result. To represent the process as involving this time frame is misleading to candidates and hiring units.

FAQ 15. Question on whether candidates “have an opportunity to provide information to the University regarding convictions or the situations around convictions”:

Some consistency of language about who receives this information (more specific than “campus” or “university”) and the time frame needs to be observed. Otherwise the FAQs foster further uncertainty as to where the information should go and who will be seeing it. Moreover, a time frame within which candidates will need to meet needs to be indicated.

FAQ 18. “What role will faculty play...”

We question the limitation of faculty to “two tenured full professors.” Considering only full professors limits the expertise and diversity of faculty who might be included on the committee. We agree that untenured faculty should probably be protected from what might become contentious discussions, but suggest that tenured professors regardless of rank should be included.

FAQ, 19. “Will information received from GIS be kept in the personnel file if the candidate is hired? If not, why not?”

Answer to this question needs to indicate where the information will be kept, why, for how long, who has access to it, and whether it is subject to distribution on request to other agencies (it should not be).

FAQ, 22. Regarding the final decision, there is no discussion of appeal or what information will be given to the candidate about the reasons. See our recommendation on an Appeals process, above.

BENCHMARKS

Given the preponderance of benchmark schools who use a 7-year review period we do not recommend an indefinite review period.