

**ADMIN RULES FOR CODE 23.10 "REMOVING BARRIERS TO EMPLOYMENT"
& IGA WITH BUREAU OF LABOR & INDUSTRY (BOLI)**

IF YOU WISH TO SPEAK TO CITY COUNCIL, **PRINT** YOUR NAME, ADDRESS, AND EMAIL.

NAME (PRINT)

ADDRESS AND ZIP CODE (Optional)

Email (Optional)

✓ Charles JOHNSON	enFyle	uKnow

May 31, 2016

VIA HAND DELIVERY

AUDITOR 05/31/16 PM 5:03

Hon. Charlie Hales
Mayor
City of Portland
1221 SW 4th Avenue, Room 340
Portland, OR 97204

Re: Income Property Management Co.
Draft Administrative Rules for Removing Barriers to Employment

Dear Mayor Hales:

Please accept this letter on behalf of Income Property Management Co. ("IPM"), a Portland-based employer of 225 employees. Jeff Reingold is President of IPM.

At your office's direction, a copy of this letter is being provided to the email address cctestimony@portlandoregon.gov so that IPM's concerns can be made a part of the official record regarding the City's consideration of this ordinance and enacting rules.

I. THE DRAFT ADMINISTRATIVE RULES APPROPRIATELY PERMIT IPM TO MAKE DECISIONS WITH REFERENCE TO THE CRIMINAL HISTORY MATRIX

City Code Section 23.10.040(B) provides that when an employer seeks to fill "Positions which have been determined by administrative rule to present heightened public safety concerns or business necessity," that employer "may use the City Criminal History Matrix provided by administrative rule to screen applicants." Thus, the ordinance intends that an employer use a matrix to screen applicants for sensitive positions.

The draft rules correctly designate a master key-holder as one such "sensitive position." RBE 2.04(4)(c). In the property management context, a master key holder is capable of opening the door and entering every apartment under their management. Thus, a master key affords the key-holder "direct access" to the residents of the apartment.

IPM does not discriminate on the basis of age or disability, or any other protected class. Therefore, every one of IPM's units may periodically house a person under the age of 18, a person with a disability, a person over 65, a person with a mental illness, or a person with a substance abuse disorder. For positions involving "direct access" to these vulnerable populations, the draft matrix allows employers to deem applicants ineligible for hire—either permanently (Category A and B convictions) or

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for ten years (Category C convictions). Accordingly, in order to safely manage properties and ensure that IPM can continue to refrain from housing discrimination, IPM must view its master key-holders as having “direct access” to vulnerable persons and make employment decisions with reference to and reliance on the matrix.

Deputy City Attorney Judy Prosper confirmed in her recent comments to the City Council that employers, such as IPM, who are filling a sensitive position are entitled to rely on the matrix. Ms. Prosper stated:

If you do fall under an exception under [City Code Section 23.10.040](B) that’s capital B—there is a criminal history matrix that can guide you in making your decision. The criminal history matrix is not a bar. The criminal history matrix is a guide. It is a way that you can look...something you can look to to say ‘if the crime falls in this category I do not have to hire this person and I would not violate...I also don’t have to do a nature time nature test for those convictions.

Presentation by Judy Prosper to City Council, May 25, 2016 (video available at: <https://www.youtube.com/watch?v=g-Uc81mN-4>, at 40:50). IPM appreciates this confirmation and the existence of this safe harbor.¹

II. THE “CONVICTIONS LIST” SHOULD INCLUDE VARIATIONS ON THE LISTED CRIMES

IPM respectfully suggests to the City Council that the “Convictions List” associated with the matrix should be modified to include reference to variations on types of convictions: attempt, conspiracy, and solicitation. I understand that the matrix was based on the Department of Human Services’ list of convictions, which is specified by state law, ORS 443.004. By statute, that list of convictions encompasses all three variations noted above. ORS 443.004(3)(e). So, too, should the City’s convictions list.

We understand the City Council has requested that “attempts” be added. However, it makes no sense to not add the other variations. Failure to do so would lead to absurd results. For example, a school would be compelled to conduct a “nature time

¹ In an email exchange on this topic on May 24, 2016—prior to Ms. Prosper’s remarks—Rachael Wiggins from your office disclaimed this interpretation of the draft rules. I cannot reconcile Ms. Wiggins’s explanation with Ms. Prosper’s remarks. Ms. Wiggins’s explanation to me cannot trump the plain language of the rules, and the documented “legislative history” associated with this rule.

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nature” evaluation of an individual convicted of conspiracy to commit a crime under ORS 163.670 (“using child in display of sexually explicit conduct”). One might respond that an evaluation under such circumstances would not be difficult. However, that response belies the common-sense conclusion that under *no* circumstances should that person be hired for that position, so the “individualized assessment” (aka “nature time nature” test) in that circumstance would be a sham.

IPM understands the City’s goal to be achieving voluntary compliance by employers. That goal is best furthered by drafting rules that do impose logical requirements, and the convictions list in its current form is deficient in this regard.

III. REASON FOR IPM’S SUBMISSION AT THIS TIME

IPM is providing input at this time because the City has failed to follow through with its promise to provide IPM’s counsel with timely notice of the original draft rules.

In December 2015, I spoke with Judy Prosper regarding the Office of the City Attorney’s work concerning the drafting of administrative rules related to the RBE ordinance. I provided my email address to Ms. Prosper, and she advised that this action would suffice to ensure that my office was provided an opportunity to review a copy of the draft rules as part of the review and comment process.

My office then heard nothing until May 2016. On May 12, 2016, I emailed Ms. Prosper to inquire about the status of the draft rules, and she did not respond. On May 18, 2016, Rachael Wiggins called and informed me that draft rules were complete. Later that day, Ms. Wiggins provided the draft rules via email. Ms. Wiggins explained during our call that the City Council would consider the rules on the morning of May 25—less than a week later.

Through our subsequent telephone calls and email exchange on May 24, Ms. Wiggins confirmed that “there was a serious miscommunication” between the Mayor’s office and the City Attorney’s office “regarding who would follow up with individuals who reached out to the City Attorney’s office regarding the rules.” When the City pledges to provide notice to a stakeholder or their representative and then fails to do so, any notice period is illusory and due process is lacking.

We urge the City to consider whether it has offered due process to all interested parties. By its terms, the ordinance will be enforced by BOLI. In light of the foregoing, does BOLI agree that the City has complied with the letter and spirit of legal requirements regarding notice and comment? *See, e.g.,* ORS 183.335.

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IV. CONCLUSION

IPM's reading of the draft rules and matrix is logical and was confirmed through Ms. Prosper's explanation to the City Council. If the City desires a different result, it should draft different rules. If that process occurs, I look forward to being involved.

IPM's owner would be happy to discuss this ordinance with you, any members of the City Council, and/or their staff. The detailed policy considerations associated with this type of ordinance are not well-suited for soundbites of three minutes or less in the City Council Chamber.

Please let us know if you have any questions.

Sincerely,



Benjamin P. O'Glasser

BPO/ser

cc: Portland City Council Clerk Testimony (cctestimony@portlandoregon.gov)

Parsons, Susan

From: Washington, Mustafa
Sent: Tuesday, May 24, 2016 3:49 PM
To: Council Clerk – Testimony
Subject: FW: Portland Business Alliance letter re: Ban the Box
Attachments: MayorHales.banthebox.05_24_16.pdf

From: Sandra McDonough [mailto:SMcDonough@portlandalliance.com]
Sent: Tuesday, May 24, 2016 3:41 PM
To: Hales, Mayor <mayorcharliehales@portlandoregon.gov>
Cc: Commissioner Fish <nick@portlandoregon.gov>; Commissioner Fritz <amanda@portlandoregon.gov>; Commissioner Novick <novick@portlandoregon.gov>; Commissioner Saltzman <dan@portlandoregon.gov>; Dietz, Susan <Susan.Dietz@portlandoregon.gov>; Lawrence, Asena <Asena.Lawrence@portlandoregon.gov>; Salazar, Goldann <Goldann.Salazar@portlandoregon.gov>; Hanson, Laura <Laura.Hanson@portlandoregon.gov>; Martin, Lyne <Lyne.Martin@portlandoregon.gov>
Subject: Portland Business Alliance letter re: Ban the Box

Mayor Hales,

Attached please find a letter from the Portland Business Alliance regarding Ban the Box. Please don't hesitate to contact me if you have questions. Thank you for your consideration.

Sandra McDonough

Sandra McDonough
President & CEO
Portland Business Alliance
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Portland, Oregon 97201
(503) 552-6762 (direct)
(503) 224-8684 (general)
(503) 323-9186 (fax)
www.portlandalliance.com

connect with the Alliance on:



and on the PBA [Blog](#)

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**PORTLAND
BUSINESS ALLIANCE**
Commerce • Community • Prosperity

May 24, 2016

The Honorable Charlie Hales
1221 SW 4th Avenue, Room 340
Portland, Oregon 97204

Dear Mayor Hales:

The Portland Business Alliance (Alliance), which represents 1,850 small and large employers, has indicated from the start of discussion related to Ban the Box that we support the goal of increased access to employment the policy seeks to achieve. However, we have always maintained that some flexibility and discretion on the part of employers, who know their workplaces, customers and requirements better than anyone else, is important in making a workable policy. That is why the Alliance supported the state statute passed in the 2015 legislative session, and we continue to urge the city to allow time for the state law to work. Despite this significant new state law, the city forged ahead with a new policy that will create a patchwork of rules with which employers must comply.

The Alliance appreciates that staff shared an early version of the draft rules, and the rules under consideration by City Council reflect many of our comments, some of which sought to ensure the rules and the ordinance are consistent. In particular, the addition of positions under RBE 2.04 Exceptions that are defined sensitive and subject to different timing on the criminal background history are welcomed. As noted above, employment environments and job requirements are unique, and the employer is in the best position to know those details, so we are hard pressed to comment on whether the positions listed as sensitive in the rules are sufficient. If this policy is implemented, we ask that you require a six-month review to determine if there are additions to the sensitive positions list that warrant inclusion or other necessary modifications.

Finally, the Alliance is very concerned about what appears to be a new element in the rules. The ordinance states that, pursuant to an agreement, the Bureau of Labor and Industries (BOLI) shall have the same enforcement powers and remedies contained in ORS 659A.820 through 659A.865, which specifies that a civil penalty not to exceed \$1,000 may be assessed if an unlawful practice is found. The rules now authorize BOLI to assess a penalty of up to \$5,000 in addition to the remedies identified in ORS 659A.820 through 659A.865. The Alliance objects to this additional penalty, which was not discussed during the adoption of the ordinance, and urges Council to remove this provision from the rules.

Thank you for the opportunity to comment.

Sincerely,

Sandra McDonough
President & CEO

cc: Portland City Council