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Job App Compliance As State Fair Hiring Laws Proliferate

By **Carly Baratt and Nancy Popper** (September 23, 2021, 4:59 PM EDT)

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The employment application is a long-standing tool utilized by most employers to collect a consistent set of wide-ranging data from prospective employees in order to effectively and efficiently compare applicants' credentials and identify which candidates to move forward in the hiring process.

To that end, many employment applications seek information about a candidate's education, prior employment and skills, and may encourage employees to self-identify their race/ethnicity and sex.

However, to promote fair hiring practices, a number of states and localities have passed legislation specifically prohibiting employers from soliciting certain information from candidates at the prehire stage, including on an employment application.[1]

This article highlights recent laws that require employers to review and potentially update their employment applications by eliminating certain questions around age, criminal history records, prior salary, salary expectations, Social Security numbers and the like, depending on the jurisdictions in which they do business.

Age-Related Questions

At least two states, California and Connecticut, have expanded their definitions of unlawful discrimination to include preemployment practices designed to screen out applicants based on their age.

Last year, California amended its Fair Employment and Housing Act regulations to prohibit "pre-employment inquiries that would result in the direct or indirect identification of persons on the basis of age," unless age is a bona fide occupational qualification for the position at issue.[2]

Prohibited inquiries on an employment application include requests for age, date of birth or graduation dates.[3]

On June 24, Connecticut Gov. Ned Lamont signed into law Public Act 21-69, or An Act Deterring Age Discrimination in Employment Applications.

Starting Oct. 1, Connecticut employers with three or more employees cannot — either directly or through a third party, such as a staffing vendor — ask applicants about their age, date of birth, dates of attendance at an educational institution or dates of graduation from an educational institution on an initial job application.[4]

Similar to the California law, the Connecticut law does not apply to employers requesting or requiring such information (1) based on a bona fide occupational qualification/need, or (2) when such information is required to comply with state or federal law.

To the extent that an employer only has one employment application for all applicants, then these exceptions may have little practical utility.

While it is a common practice to seek confirmation of a candidate's education history, employment applications should be careful to only request information about whether the candidate graduated, rather than seeking the year of graduation.

Should the year of graduation be necessary as a part of the background screening process, that information can be collected then, and should not be shared with the hiring manager.

Criminal History Questions

Most employers are already aware that a majority of the states, including California, Massachusetts, New Jersey and New York, and over 150 cities and counties have adopted "ban the box" legislation prohibiting private and/or

public employers from inquiring about an applicant's criminal history on an initial employment application.

Many states and localities further restrict employers from performing criminal background checks until after conditional offers to applicants have been made.

As such, many employers have already removed criminal background questions from their employment applications, or had applicants wait to complete their employment applications until after receiving a written offer.

However, states are continuing to refine their ban the box laws to offer greater protections to individuals with criminal histories, which may require further action by employers.

For example, New York City recently amended its Fair Chance Act to:

- Add new protections for individuals with certain nonconvictions, such as unsealed violations and unsealed, noncriminal offenses;
- Cover current employees and pending criminal charges;
- Create a more complex fair chance process for taking an adverse employment action based on an individual's criminal record; and
- Require a two-step background check during hiring, known as a bifurcated screening process.[5]

Unless an exemption applies, per the bifurcated screening process requirement, New York City employers must consider virtually all noncriminal information (e.g., reference checks, confirmation of educational and employment history) prior to issuing a conditional offer of employment.

Then, once a decision is made to move forward with the candidate, a New York City employer may conduct a criminal background investigation and/or review driver's records only after a conditional offer of employment has been extended.[6]

Importantly, in obtaining authorization from an applicant to review noncriminal information under step one of the bifurcated screening process, employers cannot use the term "background check," and must instead use the term "consumer report" and/or "investigative consumer report."[7]

Consequently, since employment applications are typically completed prior to a conditional offer, New York City employers should remove from their employment application any reference to reviewing a candidate's background or criminal information.

This might come up, for example, at the end of an application where candidates sign to indicate they understand and acknowledge, among other things, that their employment is subject to the verification of the information supplied in their application, and that any misrepresentation or omission of any information in their application, resume or any other aspect of the preemployment process, including background/criminal information, may result in refusal of or separation from employment.

Salary Questions

To help eliminate historical pay discrepancies, many states and localities, including California, Massachusetts, New Jersey, New York and Philadelphia, have enacted salary history bans, which prohibit employers from questioning applicants — orally or in writing — about current and/or prior compensation.

Even optional questions about previous pay rates may run afoul of such salary history bans.[8]

However, many of these salary bans include important carveouts.

One such carveout in New York City's salary history ban, as well as in a proposed bill in Illinois,[9] specifically allows employers to ask about any unvested equity or deferred compensation that the applicant would forfeit or have canceled due to their resignation from their current employer.

Another important exception available in many jurisdictions relates to questions seeking salary expectations,

which are deemed permissible.

For example, the New York state salary history ban guidance advises that "[a]n employer may ask an applicant for their salary expectations for the position instead of asking what the applicant earned in the past."[10]

A salary typically includes all compensation and benefits. Consequently, employment applications can include a field for desired salary/compensation or desired salary/compensation range.

But that may soon change, at least in New York.

New York A.B. 6639, which is still in committee, would prohibit New York employers from seeking, requesting or requiring an applicant, whether orally or in writing, to disclose salary expectations as a condition to be interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion.[11]

In other words, if enacted, New York employment applications could not contain a field for desired salary/compensation.

While this appears to be the only legislation of its kind currently pending, it would not be surprising if other states followed suit.

As a practical matter, even if New York becomes an outlier, it may be easier for multistate employers to just have one version of an employment application that is compliant with New York's A.B. 6639 rather than two versions, as multiple versions of an employment document introduces the possibility of inadvertent misuse.

Polygraph Test Notice

Maryland and Massachusetts both have laws that prohibit employers from conducting polygraph or lie detector tests on candidates as a condition of employment.

Further, both laws require that employers include a disclaimer on the employment application that advises prospective employees that they will not be subject to a polygraph or lie detector test.[12]

In a multijurisdiction employment application, employers should ensure that any disclaimers are appropriately identifiable to candidates in those locations.

Social Security Information Questions

In 2006, New York passed the NY Social Security Number Protection Law, which is designed to combat identity theft by, among other things, prohibiting employers from requiring an individual to transmit their SSN over the internet unless the connection is secure or the SSN itself is encrypted.

The statute expressly exempts the collection of a candidate's SSN number if it is required by federal or state law and for a company's general administrative purposes, internal verification or fraud investigation.[13]

Assuming this exemption does not apply, New York employers should consider whether they need SSNs from applicants, particularly before an offer has been made.

For example, if SSNs are being collected for a later criminal background check, an employer could mitigate the risk of an inadvertent violation by collecting the SSN on a separate background check authorization form.

Even outside New York, employers could face liability under a negligence or breach of contract theory in the event of a data breach where SSNs are illegally accessed.[14]

Limiting how and when employers collect personal data, such as SSNs, can help minimize liability.

Conclusion

Employers should reevaluate their employment applications to ensure they are compliant with recent legislation limiting certain types of inquiries, and limit collection of prospective employee information to what is actually needed to review applicants' suitability for a position.

As such, it's advisable for in-house counsel to conduct a frequent review of employment application and prehire paperwork.

Employers should ensure that their hiring team and human resources department know when certain information

may be solicited from a candidate, whether it is on an application or another prehire document.

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[1] This article does not cover federal and state anti-discrimination laws that generally prohibit employers from expressing any limitation, specification or discrimination concerning protected groups absent a bona fide occupational qualification. Employers should be mindful that certain questions, such asking applicants to identify and explain any gaps in employment, may have a disparate impact on a particular protected group (i.e., women); though employers may wish to be careful about such questions as some state and local laws go as far as protecting individuals on the basis of unemployment status.

[2] 2 CCR § 11079(b).

[3] Id.

[4] See Connecticut Public Act. No. 21-69, available at https://www.cga.ct.gov/2021/ACT/PA/PDF/2021PA-00069-R00SB-00056-PA.PDF.

[5] See New York City Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History (updated July 15, 2021), available at https://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

[6] Id. Generally, employers that are legally required to undertake a criminal background check of applicants and/or are legally prohibited from hiring people with certain convictions may conduct a background check prior to a conditional offer. Id. at pp. 24-26.

[7] Id. at p. 13.

[8] See New York State's "Salary History Ban – What You Need To Know" Frequently Asked Questions, available at Salary History Ban - What You Need To Know (ny.gov).

[9] See, e.g., Illinois House Bill 1207, available at https://www.ilga.gov/legislation/fulltext.asp?DocName=&SessionId=110&GA=102&DocTypeId=HB&DocNum=1207&GAID=16&LegID=&SpecSess=&Session=.

[10] Id.

[11] See NY A6639, available at NY State Assembly Bill A6639 (nysenate.gov).

[12] MD Lab & Emp Code §§ 3-702(c)-(d); Ma. Gen. Laws Ch. 149 Section 19B(2)(b).

[13] N.Y. Gen. Bus. Law § 399-ddd.

[14] See, e.g., Sackin v. TransPerfect Global, Inc ., 278 F.Supp.3d 739 (S.D.N.Y. 2017).
