

New York City Is Expected to Become the Latest Jurisdiction to “Ban the Box”

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On the heels of [banning credit checks for most applicants for employment in New York City](#), on June 10, 2015, the New York City Council passed citywide ban-the-box legislation, formally titled the “[Fair Chance Act](#)” (“Act”). The Act joins legislation in six [states](#) and [Washington, D.C.](#), as well as laws in many other cities and [counties](#) that have “banned the box” for most private employers under their jurisdiction.

The Act, like other ban-the-box laws, restricts when employers may inquire about applicants’ criminal histories during the application process and imposes significant obligations on employers that intend to take action based on such information. The Act will become effective 120 days after Mayor Bill de Blasio signs the bill, which is expected soon, as he has expressed support for the legislation.

The use of criminal records in the hiring process has received a great deal of attention in recent years. For example, in 2012, the Equal Employment Opportunity Commission issued [guidance](#) requiring employers to demonstrate that conviction records upon which they rely in making hiring decisions are directly job-related, and that applicants are individually assessed with respect to the position for which they are applying. The premise underlying the ban-the-box movement is that eliminating criminal history questions from the preliminary stage of the application process provides applicants with a fair chance at consideration based on their qualifications, rather than solely upon their criminal background.

The Act’s Restrictions and Requirements

The Act prohibits New York City employers with four or more employees from inquiring about an applicant’s pending arrest or criminal conviction record until *after* a conditional offer of employment has been extended. Thus, unless an exception applies, employers may not ask about criminal background history on an employment application or during the interview process. This restriction includes both (i) asking an applicant about his or her criminal history, and (ii) searching publicly available sources to obtain information about an applicant’s criminal history.

After a conditional job offer has been extended, however, an employer may ask about an applicant's criminal record and conduct a criminal background check.

The Act also prohibits employers from advertising for jobs and indicating in such advertisements that an applicant's arrest or criminal conviction record will in any way limit the applicant's eligibility for the position.

Rescinding an Offer of Employment

If an employer decides to withdraw an offer of employment based on information obtained in connection with a criminal background check, additional requirements apply, similar to those under the federal Fair Credit Reporting Act ("FCRA"). Specifically, when the employer withdraws an offer based on criminal history information, it must provide the applicant with a written explanation of its decision and must hold the position open for three business days after providing such explanation.

Under existing New York State law, employers must analyze an applicant's criminal background record using the eight-factor balancing test set forth in New York Correction Law Article 23-A. The written explanation required by the Act must include an analysis under this balancing test. The Act provides that the New York City Commission on Human Rights will determine the manner in which the analysis must be presented to the applicant.

During the three-business-day period referenced above, the applicant is provided with a chance to respond to the employer or background screening company to explain any inconsistencies in the report or any evidence of rehabilitation that could affect the employer's decision.

Whether or not an applicant decides to provide information in response to the written explanation, the Act does not require an employer to hire someone with a criminal history. Finally, and as always, if an employer uses a third-party consumer reporting agency to obtain criminal background history, the employer must comply with the requirements of the FCRA, including providing both a "Notice of Intent to Take Adverse Action"¹ and a "Notice of Adverse Action."

Exceptions

Limited exceptions to the Act apply to particular jobs in which criminal background checks would bar employment, such as police officers, law enforcement agencies (e.g., the Division of Youth and Family Services), and certain positions susceptible to bribery

¹ The FCRA requires employers to provide a Notice of Intent to Take Adverse Action to the affected applicant and then hold the position for a "reasonable time" prior to actually taking the adverse action. In a Federal Trade Commission ("FTC") [opinion letter](#), the FTC found that five business days was a reasonable period of time.

or other corruption.² Additionally, the Act does not apply to actions taken by an employer pursuant to any state, federal, or local law (including rules or regulations promulgated by a “self-regulatory organization,” as defined in the Securities Exchange Act of 1934) that requires criminal background checks for employment purposes or bars employment based on criminal history.³

What Employers Should Do Now

Ban-the-box laws are quickly growing in popularity. Employers should review their hiring practices to ensure compliance in states, municipalities, and cities with ban-the-box laws.

In New York City, although the precise date on which the Act will be signed into law and take effect is uncertain, once the Act becomes law, employers should:

- revise job applications used in New York City to remove questions seeking criminal background information for all positions that are covered by the Act and, if a multistate application is used, either:
 - clarify that applicants for a position in New York City should not respond to questions seeking criminal background information (unless an applicable exception applies), or
 - remove the criminal conviction question altogether, in light of the growing success of the ban-the-box movement (and the number of exceptions that may be necessary to maintain an up-to-date multistate application);
- revise job postings used in New York City to remove information that limits or specifies that employment will be based on a person’s arrest or criminal conviction history;
- review the individual positions for which they hire to determine whether any of those jobs would fall within an exemption to the applicability of the Act;
- train recruiters, hiring managers, human resources personnel, and others who conduct interviews not to ask about criminal history or conduct criminal background checks until after a conditional offer is extended;
- revise offer letters, if necessary, to confirm that the offer is contingent upon the successful completion of a criminal background check;

² The NYC Council Committee on Civil Rights identified additional positions, such as those that “entail the provision of services to or safeguarding of people who, because of age, disability, infirmity or other conditions, are vulnerable to abuse.” [Committee Report](#) from June 9, 2015.

³ For example, the Act would not apply to actions taken by employers that are required to perform criminal background checks or ask about arrest history based on the rules of the Financial Industry Regulatory Authority (“FINRA”).

- train recruiters, hiring managers, human resources personnel, and others who may be involved in deciding whether a criminal record should result in withdrawing a conditional offer of employment (or other adverse action) that their decision must be based on an evaluation of specific statutorily defined factors for legitimate business reasons; and
- confirm that employment agencies and background check providers are aware of the Act and have revised their forms and procedures accordingly.

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