

**Westchester County “Bans the Box”**

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By [Susan Gross Sholinsky](#), [Nancy Gunzenhauser Popper](#), [Ann Knuckles Mahoney](#),  
and [Marc-Joseph Gansah](#)

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Effective March 4, 2019, Westchester County will become the fourth local jurisdiction in New York State to “ban the box”—i.e., prohibit employers from including questions about applicants’ criminal convictions or arrests on employment applications. The Westchester County Board of Legislators approved its ban-the-box [law](#) (“Law”) in December 2018.

**Prohibited Inquiries and Actions**

The Law bars employers in Westchester County from making any inquiry<sup>1</sup> or any statement<sup>2</sup> related to an applicant’s criminal conviction or arrest record on an application for employment. Unlike many other ban-the-box laws, employers in Westchester County are only restricted from asking about criminal history on the employment application itself. After the employment application has been submitted, employers will still be permitted to ask about an applicant’s criminal history, including during an interview or prior to making a conditional offer of employment.<sup>3</sup> This is different from [New York City’s Fair Chance Act](#), which permits such inquiries only *after* the employer has made a conditional offer of employment.

The Law also codifies existing New York State law (Executive Law § 296(16)) prohibiting employers from inquiring (at any time during the hiring process) about certain types of criminal offenses, such as youthful offender adjudications and convictions that have been sealed or expunged.

In addition, employers are prohibited from including limitations or specifications concerning arrest or conviction records in job postings or advertisements, although there are certain exemptions (discussed below) to the Law.

The Law also expressly states that an applicant need not provide information in response to an unlawful inquiry about his or her criminal history on an application, and employers

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<sup>1</sup> “Any inquiry” is defined as “any question communicated to an applicant in writing or otherwise.”

<sup>2</sup> “Any statement” is defined as “a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant’s criminal background information regarding: (i) an arrest record; or (ii) a conviction record[.]”

<sup>3</sup> The Law does not clarify how soon after the employment application has been submitted an employer may seek information about an applicant’s criminal history; however, at a minimum, any inquiry must be made after the application has been submitted.

are prohibited from disqualifying an applicant for failing to respond to such inquiries. Importantly, this prohibition does *not* allow applicants or employees to refuse to answer questions about criminal history *after* submitting an employment application.

## **Exemptions**

The Law expressly does not apply in the following two situations:

- where a federal, state, or county law or regulation requires criminal background checks for employment purposes, and
- to positions in law enforcement agencies, such as police or peace officers.

## **Justifying Adverse Employment Actions**

Westchester County employers must analyze an applicant's criminal background record using the eight-factor balancing test set forth in New York State Correction Law Article 23-A ("Article 23-A"). And if, after applying the test, the employer takes an adverse action against the applicant (e.g., decides not to make a job offer), the employer must, upon request by the applicant, provide him or her with a written explanation of the reasons for its adverse decision. The explanation must be provided to the applicant within 30 days of the request.

Absent such a request, however, the Law does not require that the employer affirmatively provide a written copy of its Article 23-A analysis to an applicant.

## **Additional Information**

The Law does not include any posting or notification requirements.

However, the Law does impose steep civil penalties for violations. Compensatory damages as well as up to \$10,000 in punitive damages (plus reasonable attorneys' fees) may be awarded.

## **What Westchester County Employers Should Do Now**

- Revise job applications to remove any questions seeking arrest or conviction history.
- Alternatively, if using a multistate application, either:
  - consider removing all questions about criminal history, regardless of whether all jurisdictions where the company has offices has enacted a ban-the-box law, or
  - clarify that applicants for positions in Westchester County should not respond to questions seeking criminal background information.

- Consider preparing a criminal background questionnaire seeking the criminal history information typically sought on an employment application, which can be provided *after* the application process, if such an inquiry will be made.
- If criminal background inquiries will be made subsequent to a contingent offer, indicate in the offer letter that the offer is contingent on the successful completion of a criminal background check.
- Train managers, recruiters, and other human resources personnel not to inquire about an applicant's criminal history until after the employment application has been submitted.
- Review job postings and advertisements to ensure that they do not include any information that limits or otherwise specifies that employment will depend on an applicant's criminal history.
- Ensure that those in charge of making hiring decisions review the eight-factor balancing test set forth in Article 23-A prior to taking any adverse action based on an applicant's criminal history.
- Make sure that any vendors acting on your behalf, such as employment agencies and background check providers, comply with the Law.

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For more information about this Advisory, please contact:

**Susan Gross Sholinsky**

New York  
212-351-4789  
[sgross@ebglaw.com](mailto:sgross@ebglaw.com)

**Nancy Gunzenhauser Popper**

New York  
212-351-3758  
[npopper@ebglaw.com](mailto:npopper@ebglaw.com)

**Ann Knuckles Mahoney**

Nashville  
629-802-9255  
[aknuckles@ebglaw.com](mailto:aknuckles@ebglaw.com)

**Marc-Joseph Gansah**

New York  
212-351-4618  
[mjgansah@ebglaw.com](mailto:mjgansah@ebglaw.com)

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