

New York's Suffolk County Enacts "Ban the Box" Law

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Effective August 25, 2020, Suffolk County, New York, will become the state's fifth locality to enact a "ban the box" law. Similar to measures adopted by Buffalo, Rochester, and [Westchester County](#), Suffolk County's [Fair Employment Screening law](#) ("Law") will prohibit employers from inquiring into a job applicant's criminal convictions before completing the "application process" and job interview. The Law, however, is not as broad as [New York City's Fair Chance Act](#), which bars such inquiries until after the employer has made a conditional offer of employment. The Law will apply to all Suffolk County employers with 15 or more employees.

When Employers May Inquire into an Applicant's Criminal History

The Law permits inquiry into a job candidate's prior criminal convictions only after the applicant has completed the application process and the prospective employer has conducted a first interview. The "application process" begins when the applicant inquires about employment and ends when the employer "has accepted an employment application." An "interview" is defined as "any direct contact by the employer with the applicant, whether in person or by telephone, to discuss the employment being sought or the applicant's qualifications." If an employer does not conduct an interview, the employer must inform the applicant whether a criminal background check will be conducted before employment is to begin.

Definition of "Applicant"

The Law broadly defines an "applicant" as "any person considered or who requests to be considered for employment by an employer," and includes applicants for temporary or seasonal work, "contracted work, contingent work, and work through the services of a temporary or other employment agency." "Employment" also includes any form of vocational or educational training, with or without pay.

Exceptions to the "Ban the Box" Law

The Law contains a number of exceptions to the prohibition on making criminal history inquiries before completing the application process and interview, including the following:

- An employer hiring for licensed trades or professions, including positions such as interns and apprentices for licensed positions, may ask applicants the same questions that the trade or professional licensing body is permitted to ask, pursuant to New York law.
- Where federal or New York law bars employment for a particular position due to specified convictions or violations, employers may inquire about the possible existence of such convictions or violations at any point in the hiring process.
- Criminal conviction inquiries are permitted for employment at (i) any public or private school; (ii) a provider of direct care or supervision to children, young adults, senior citizens, or individuals with physical or mental disabilities; (iii) a governmental law enforcement agency; (iv) the Suffolk County Police Department or the Suffolk County Department of Fire, Rescue, and Emergency Services; or (v) “any other employer hiring for ‘police officer’ and ‘peace officer’ as defined by the Criminal Procedure Law.”
- Criminal conviction questions are permitted at any point in the hiring process where such inquiries are specifically authorized by any applicable law.

Compliance with Article 23-A Mandates

The Law expressly reiterates a covered employer’s obligation to comply with Article 23-A of the New York State Correction Law (“Article 23-A”) when considering an applicant’s prior criminal convictions in determining suitability for employment. Generally, Article 23-A makes it unlawful for covered private employers to deny an applicant employment or to take an adverse action against an applicant (or employee) because of the applicant’s (or employee’s) prior criminal conviction(s) or a finding that the applicant/employee does not have “good moral character” as a result of his or her previous criminal conviction(s). The Law also reiterates the two exceptions to this general rule. First, employment may be denied under Article 23-A if there is a *direct relationship* between one or more of the prior criminal offenses and the specific employment sought or held by the person. Second, employment may be denied if the granting or continuation of the employment would involve an *unreasonable risk* to property or to the safety or welfare of specific persons or the general public.

Article 23-A lists eight factors that an employer must consider in determining whether employment may be denied or an adverse action may be taken based on an individual’s past criminal conviction(s). These factors are:

- the public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses;
- the specific duties and responsibilities necessarily related to the employment sought;
- the bearing, if any, the criminal offense(s) for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
- the time that has elapsed since the occurrence of the criminal offense(s);

- the age of the person at the time of occurrence of the criminal offense(s);
- the seriousness of the offense(s);
- any information produced by the person, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct; and
- the legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

Enforcement

Any person who believes he or she has been discriminated against under the Law may file a complaint with the Suffolk County Human Rights Commission or bring a civil lawsuit for injunctive relief, damages, and other appropriate relief, as well as reasonable attorneys' fees.

What Employers Should Do Now

Covered employers in Suffolk County, New York, should do the following:

- Review, and if necessary revise, employment applications to ensure that they do not require or request that job applicants provide any information concerning their criminal conviction history.
- Change the interview process as may be warranted to ensure that interviewers conducting the first interview of an applicant do not make inquiries into an applicant's criminal conviction history, unless an exception applies. To avoid improperly timed criminal history inquiries, consider conducting background checks after a conditional offer of employment is made and, in any case, after the first job interview.
- If no interview is to be conducted but a background check is, ensure a proper process for so advising applicants.

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