

## Philadelphia Updates Its “Ban the Box” Law

January 12, 2016

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On December 10, 2015, Philadelphia’s Mayor, Michael A. Nutter, signed an [amendment](#) to the city’s ban-the-box legislation (“Amendment”) that places increased restrictions on employers during the hiring process.

The original legislation, titled the [“Fair Criminal Records Screening Standards”](#) (“Standards”), was passed on March 31, 2011. The Standards prohibit private employers that employ 10 or more persons in Philadelphia from asking about the applicant’s criminal conviction history until after the initial interview.<sup>1</sup>

### The Amendment’s Restrictions and Requirements

The Amendment, which takes effect on March 9, 2016, will prohibit all private employers with *any* employees in Philadelphia<sup>2</sup> from requesting criminal conviction history until a *conditional offer of employment* has been extended.<sup>3</sup> This update to the law mimics the recent New York City ban-the-box law with respect to when an employer may request information about criminal conviction history.

Notably, and different from any other ban-the-box law, the Amendment prohibits employers from including the criminal conviction question on an employment application “whether or not certain applicants are told they need not answer the question.” As such, employers that utilize multistate applications will be required to either (i) have a separate application for positions in Philadelphia or (ii) remove the question completely from the multistate application.

The Amendment clarifies that employers are prohibited from even asking about an applicant’s willingness to submit to a background check prior to a conditional offer. An employer may, however, give notice to prospective applicants (or notify such applicants during the application process) of its intent to conduct a criminal background check after any conditional offer is made, provided that such notice is concise, accurate, made in

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<sup>1</sup> The original law also prohibited employers from inquiries regarding non-conviction arrests.

<sup>2</sup> The Amendment exempts employees who perform domestic services in or about the private home in which the employer resides.

<sup>3</sup> The Standards used to prohibit employers for making such inquiries before or during the first interview.

good faith, and states that any consideration of the background check will be tailored to the requirements of the job.

If, however, the applicant divulges his or her criminal record earlier in the process, the employer may discuss the conviction at that time. The Amendment also:

- includes new posting requirements, whereby an employer must post notice of the ban-the-box law on its website and in its offices in a conspicuous location;<sup>4</sup>
- provides remedies in case of violation of the law, including an order requiring the employer to cease and desist from engaging in the unlawful practice, injunctive or other equitable relief, compensatory and punitive damages, and payment of reasonable attorneys' fees; and
- provides for a private cause of action for violations.

### **Rescinding an Offer for Employment**

Similar to other ban-the-box laws, prior to rescinding an offer, Philadelphia employers will be required to (i) examine the risk created by an applicant's criminal conviction to the operation of the business or to coworkers or customers *and* (ii) determine that the exclusion of the applicant is compelled by business necessity. Employers must consider the following six factors when making an individualized determination regarding such risk:

1. the nature of the offense,
2. the time that has passed since the offense,
3. the applicant's employment history before and after the offense and any period of incarceration,
4. the particular duties of the job being sought,
5. any character or employment references provided by the applicant, and
6. any evidence of the applicant's rehabilitation since the conviction.

When making this determination, employers may only consider convictions that have occurred within seven years from the date of the inquiry.<sup>5</sup>

If an employer decides to withdraw a conditional offer to an applicant based, in whole or in part, on criminal record information, the employer must notify the applicant in writing. The notice must include an explanation of the employer's basis for rejecting the applicant, along with a copy of the applicant's criminal history report. The Amendment

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<sup>4</sup> The Philadelphia Commission of Human Rights will supply a form for employers' use in this regard.

<sup>5</sup> Any period of incarceration is not to be included in the calculation of this seven-year period.

requires that employers allow applicants *10 business days* to provide either evidence of the inaccuracy of the information or an explanation as to the criminal conviction.

As a reminder, if an employer uses a third-party consumer reporting agency to obtain the criminal history information, the federal Fair Credit Reporting Act (“FCRA”) already requires that employers wait five business days to permit an applicant or employee to contact the employer regarding information contained in the background check report. These two time periods (i.e., 10 business days under the Amendment and five business days under the FCRA) may run concurrently.

### **What Philadelphia Employers Should Do Now**

- If you use multistate applications, either (i) create a separate application without the criminal history question for positions in Philadelphia or (ii) remove the criminal history question from multistate applications completely.
- Make sure that hiring policies and procedures for jobs in Philadelphia are in compliance with the Amendment.
- Train recruiters, hiring managers, human resources personnel, and others who conduct interviews not to (i) inquire about criminal history or conduct criminal background checks until a conditional offer has been extended or (ii) ask whether an applicant would be willing to submit to a background check.
- Ensure that those in charge of making hiring decisions review the six factors set forth in the Amendment when considering criminal convictions as a potential bar to employment.
- Revise offer letters, if necessary, to confirm that the offer is contingent upon the offeree’s successful completion of a criminal background check.

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