

NYC to “Ban the Box” for Private Employers

In 2011, New York City barred city agencies from asking about an individual’s criminal history on job applications and during the early stages of the hiring process. Now, New York is poised to join a growing number of cities that have imposed similar restrictions on private employers. On June 10, the city council passed the Fair Chance Act prohibiting inquiries into an applicant’s criminal history before a conditional offer of private employment is made. If, as expected, Mayor Bill de Blasio signs the so-called “ban-the-box” measure into law, employers may need to modify when and how they employ criminal background checks to ensure compliance.

Background

Both New York City and New York state laws prohibit employers from taking adverse employment actions based on an applicant’s or employee’s criminal past unless it is directly related to the job sought or held or would pose an unreasonable risk to property or to the safety of individuals or the general public. By [executive order](#) in 2011, then New York Mayor Michael Bloomberg prohibited city agencies from asking about an individual’s criminal history on job applications and during initial employment interviews.

What began as an effort to modify public-sector hiring practices has expanded to the private sector. A growing number of states and major cities — such as San Francisco, Philadelphia, and Seattle — have adopted so-called “ban-the-box” laws that restrict criminal history inquiries by private employers during the application process. (See our [October 8, 2014](#) *For Your Information*.)

New Restrictions for NYC Employers

On June 10, the New York City Council passed the Fair Chance Act ([Int. 0318-A](#)) prohibiting private employers from asking about an individual’s criminal background on a job application or before a conditional offer of employment is made. The mayor is expected to sign the Act into law shortly. When the new law takes effect 120 days after signing, the city will join a growing number of jurisdictions that now restrict — or are considering restricting — employers’ use of criminal history and background checks for employment purposes.



Comment. NYC employers will soon face other limitations on their ability to vet job applicants and employees. Last month, Mayor de Blasio signed into law a bill prohibiting most employers from running credit checks or considering an applicant's or employee's consumer credit history in making employment decisions. That law will take effect on September 3. (See our [May 12, 2015 For Your Information.](#))

Background Screening Companies

Because the law covers employers and their agents, the new limits on employment-related criminal checks would extend not only to employers but also to the background screening companies they often use to vet job candidates.

The new ban-the-box law would amend the NYC Human Rights Law (NYCHRL) to make it an unlawful discriminatory practice for an employer, labor organization, employment agency, or agent thereof to "make any inquiry or statement" about a job applicant's pending arrest or criminal conviction record until after a conditional offer of employment has been extended. The law would also prohibit employers from expressing any limitation or specification in job advertisements based on an individual's criminal history. The new restrictions would apply to employers with four or more employees (including independent contractors who are not themselves employers).

What constitutes an "inquiry" or a "statement" is broadly defined under the new law. The term "inquiry" includes any written or verbal question communicated to an applicant and any searches of publicly available records or consumer reports. "Any statement" means a written or non-written statement to the applicant to secure criminal background information on an arrest or conviction record or a criminal background check.

The law would permit inquiries into an applicant's criminal background once a conditional offer of employment has been extended, but it would also impose a number of requirements on an employer that intends to base a hiring decision on the information it receives. Before taking an adverse employment action, an employer generally would have to:

- Provide the applicant with a written copy of the inquiry in a manner to be determined by the New York City Commission on Human Rights
- Perform the analysis required by Article 23 of the New York Correction Law, and provide a written copy to the applicant (including all supporting documents and the employer's reasons for taking the adverse action)
- Hold the position open for at least three business days to allow the applicant to respond

Exemptions for Certain Employers

The new law generally restricts an employer's ability to run criminal checks or consider an applicant's or employee's criminal history in making employment decisions. It does, however,

Article 23-A Analysis

Under the [NY Correction Law](#), employers may consider criminal conviction records only if the employer establishes: (1) a direct relationship between the criminal offenses and the job sought or held by the individual; or (2) the continuation of employment would involve an unreasonable risk to property or the safety of others.

In making that determination, employers must consider: (a) New York public policy to encourage employment of those previously convicted of criminal offenses; (b) specific job duties and responsibilities; (c) the bearing the criminal offense(s) would have on the individual's fitness or ability to perform job duties or responsibilities; (d) time elapsed since the offense; (e) age of the person at the time of the offense; (f) seriousness of the offense; (g) any information regarding his rehabilitation and good conduct; and (h) the legitimate interest of the employer in protecting property, safety and welfare.

contain a narrow exception for employers that are required under federal, state or local law to conduct criminal background checks for employment purposes or bar employment based on criminal history. For this purpose, federal law includes the rules and regulations of a self-regulatory agency as defined by the Securities Exchange Act of 1934 such as the Financial Industry Regulatory Authority (FINRA).

Enforcement and Remedies

Because the new law will be incorporated into the NYCHRL, aggrieved individuals would be able to enforce the restrictions on employment-related criminal checks either by filing a complaint with the NYC Commission on Human Rights or by filing suit in state court. Employers that violate the new proscriptions may be liable for the full range of damages available under the NYCHRL, including back pay, front pay, punitive damages and attorneys' fees.

In Closing

The new law will substantially alter the way many NYC employers screen job applicants. When the local law takes effect, most employers will be barred from conducting pre-hire criminal background checks or taking an applicant's or employee's criminal history into account until a conditional offer of employment has been made. Employers will have to carefully consider whether, and how, such information may be factored into employment decisions. Employers with employees who work in NYC will want to review their job application forms, postings and screening practices, and make any needed changes to ensure compliance.

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