

Philadelphia Expands Ban-the-Box Restrictions as NYC Considers Changes

Both Philadelphia and New York City have so-called “ban-the-box” or “fair chance” laws that curb the use of criminal history and background checks for employment purposes. Amendments to Philadelphia’s law took effect March 14, placing new constraints on employers’ hiring and screening practices. New York is poised to amend the rules governing employer obligations, enforcement and dispute resolution under its law. Employers should review their background screening programs and hiring protocols to ensure compliance.

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Background

Philadelphia’s [Fair Criminal Record Screening Standards Ordinance](#), which took effect in 2012, restricted when an employer could inquire about a person’s criminal history and how the information could be used in making employment decisions. The law, enforced by the Philadelphia Commission on Human Relations (PCHR), generally made it illegal for employers with 10 or more employees to ask about criminal backgrounds on job applications but allowed employers to ask about criminal convictions after an applicant’s first interview. It barred employers from asking at any time about arrests or criminal accusations that did not lead to conviction, and from taking adverse action against current employees based on arrests.



Last year, New York City’s [Fair Chance Act](#) amended the city’s Human Rights Law (HRL) to prohibit most private employers from conducting criminal background checks or inquiries concerning a job applicant prior to a conditional job offer. (See our [June 18, 2015 For Your Information](#).) While the city’s ban-the-box law allows criminal background checks and inquiries later in the hiring process, it also imposes a number of requirements on an employer that seeks to base a hiring decision on the information it receives. Previously issued enforcement

guidance by the New York City Commission on Human Rights (NYCCHR) clarified employer obligations and employee rights both before and after a job offer is made. (See our [December 1, 2015 For Your Information](#).)

Philadelphia's New Hiring Restrictions

On December 15, 2015, Philadelphia enacted sweeping changes to its Fair Criminal Record Screening Standards Ordinance. [Amendments](#) to the city's ban-the-box law created new requirements and hiring restrictions for employers, effective March 14, 2016. The ordinance, as amended, significantly expands employer coverage, extends restrictions on securing criminal histories until later in the hiring process, requires the use of a Philadelphia-specific application form, and places new limitations on rescinding conditional offers of employment.

Expanded Coverage. The amendments significantly expand the scope of the ordinance's hiring restrictions by reducing the coverage threshold from employers with 10 or more employees to employers with any employees in Philadelphia.

Application Form and Process. Importantly, the amended ordinance expressly prohibits the use of an application form that includes a question regarding criminal convictions, even though it directs Philadelphia applicants not to answer. Thus, multi-jurisdictional employers will no longer be able to use a standard form that contains criminal records questions along with state-, county-, or municipal-specific instructions. Rather, employers will either have to remove those questions from the multi-state application or use a form tailored for Philadelphia.

The amendments also made clear that the prohibition against criminal inquiries that applies during the early stages of the hiring process covers asking about an applicant's willingness to submit to a criminal background check. However, employers may notify applicants that they would perform a check if a conditional employment offer is made.

After a Conditional Offer. The amended ordinance generally extends the prohibition on asking about criminal background beyond the initial application phase and into the later stages of the hiring process — barring criminal inquiries from the time an applicant first inquires about employment until a conditional job offer is made. Although the employer may perform a criminal background check following a conditional offer, the law limits the inquiries that may be made and the use of any criminal history information received.

Importantly, employers cannot ask about arrests or criminal accusations that did not lead to conviction, and may only consider criminal convictions that occurred fewer than seven years from the date of the inquiry (not including times of incarceration). Further, employers must screen applicants individually and make individualized assessments of criminal records, weighing the type of offense, when it occurred and the connection to the job. Employers must also consider the applicant's job history, character or employment references, and any evidence of rehabilitation.

Ban-the-Box Trends

More than 100 cities and counties across the country have adopted so-called ban-the-box laws. Early adopters simply required employers to modify their employment applications to remove or qualify any criminal background inquiries. Additional restrictions followed that limited inquiries at various stages of the application process. While both Philadelphia and New York laws impose greater limitations, the majority of ban-the-box laws preclude employers from inquiring about a candidate's criminal background until after the first interview.

Rescinding a Conditional Offer of Employment. While the ordinance prohibits the blanket exclusion of applicants with a criminal conviction from a job or class of jobs, employers are not altogether barred from rejecting applicants based on criminal records. However, they may do so only if the individual would:

- Pose an unacceptable risk to business operations, co-workers or customers, or
- Fail to meet legal or physical job requirements.

Employers that rescind a conditional offer of employment must do so in writing and include a copy of any criminal history report it relied on in making the decision. Further, employers must allow rejected candidates 10 days to rebut or otherwise respond to the results of the background check.

Notice. Employers in Philadelphia must post the PCHR's new informational [poster](#) in a conspicuous place on the employer's website and premises. The poster summarizes the ordinance's key requirements.

Enforcement and Penalties. The amended law revises its enforcement mechanisms, giving the PCHR jurisdiction over administration and enforcement, and increases the penalties and remedies for violation. Among other things, it gives individuals a private right of action under the following circumstances. The individual must file a complaint with the PCHR within 300 days of the alleged violation. Within one year of the filing, the PCHR must conclude its investigation, enter into a conciliation agreement, or dismiss the case. Within two years of receiving a notice of dismissal from the PCHR, a complainant may bring an action in court to recover compensatory damages, punitive damages, attorneys' fees, court costs, injunctive relief, and any other relief the court deems appropriate.

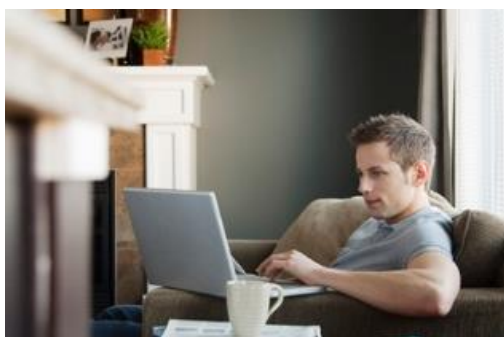
NYC Proposes Changes to Fair Chance Act Rules

The NYCCHR is [proposing](#) to amend its rules that govern the use of criminal background checks and inquiries in making employment decisions. The proposal includes additional definitions and provides other important clarifications to the city's Fair Chance Act.

New and Revised Definitions

Proposed definitional changes would expand employer obligations and impose additional restrictions on background screening under the city's ban-the-box law. Among the more significant changes are:

Applicants. The proposal makes clear that the term "applicants" applies to both external and internal job candidates. Thus, the law's hiring restrictions extend not only to potential new hires but also to "current employees who are seeking or being considered for positive changes to the terms and conditions of their employment, including, without limitation, promotions."



Adverse Employment Action. Any action that negatively affects the terms and conditions of employment would constitute an "adverse employment action." For fair chance purposes, terms and conditions would include, for example, hiring, termination, transfers, promotions, privileges, compensation, benefits, professional development and training opportunities, and job duties.

Conditional Offer of Employment. Under the proposed definition, a “conditional offer of employment” is an employment offer or “an offer to positively change the terms and conditions of employment” revocable only because of:

- Criminal background check results following application of the Fair Chance process described below
- Results of medical examinations permitted by the Americans with Disabilities Act (ADA)
- Discovery of material information the employer could not reasonably have known before extending the conditional offer that would have altered the employment decision

For temporary help firms, an offer to place an applicant in the firm’s labor pool for possible job assignments with its clients is deemed a conditional offer.

Conviction and Criminal History. An individual’s “criminal history” includes records of criminal convictions, non-convictions, and/or currently pending criminal cases. “Conviction history” includes convictions of a felony or misdemeanor or an unsealed violation under New York or federal law, or a felony or misdemeanor committed out-of-state. “Non-convictions” include arrests or criminal accusations that are not currently pending and ended in one of the following ways: (1) termination in favor of the individual; (2) adjudication as a youthful offender; (3) sealed conviction of a non-criminal offense; or (4) conditional sealing of certain controlled substance, marijuana or specified offense convictions.

Criminal Background Checks and Inquiries. A “criminal background check” occurs when an employer, orally or in writing, asks an applicant or employee whether he or she has a criminal record, or conducts a public records search for an applicant’s criminal history (including through a third party, such as a consumer reporting agency). The term “inquiry” refers broadly to any question asked for the purpose of obtaining an applicant’s or employee’s criminal history. Such inquiries may include, for example, questions in a job interview and searches for an applicant’s or employee’s criminal history directly or through a third party.

Statement. The term “statement” includes any oral or written communication to an applicant or employee for the purpose of obtaining criminal history, including advising that a background check is required for the job.

Per Se Violations and Exemptions

The proposal establishes that certain actions or inactions will automatically create employer liability. The following employer actions will be deemed “*per se* violations” of the Fair Chance Act, regardless of whether an adverse employment action is taken or an applicant or employee suffers an actual injury:

- Declaring, printing, or circulating an employment solicitation, advertisement, or publication that directly or indirectly expresses a limitation or specification regarding criminal history — such as “no felonies,” “background check required,” or “must have clean record.”
- Using employment applications that require applicants to provide criminal history information or give employers permission to run a background check.
- Making a statement or inquiry relating to an applicant’s pending arrest or criminal conviction prior to a conditional offer of employment.

- Using a standard job application across multiple jurisdictions that requests or refers to criminal history. Importantly, employers that use such standardized forms will be liable for *per se* violations, even if they include disclaimers or other language advising applicants not to answer specific questions if applying for a position in NYC.
- Failing to: (1) provide the applicant or employee a written copy of any criminal history inquiry; (2) share a written copy of the employer's Article 23-A analysis; or (3) hold the position open for at least three business days from the applicant's or employee's receipt of both the inquiry and analysis to allow time to respond.

Although the law exempts certain employer actions from the prohibitions on discrimination based on criminal history, the exemptions are limited. While the prohibitions do not apply to positions where federal, state or local law requires criminal background checks or bars employment based on criminal history, exemptions do not extend to employers that are authorized — but are not required — to check for criminal backgrounds, or to positions that require licensure or approval by a government agency. In such circumstances, the employer may only ask prior to a conditional job offer whether an applicant has the necessary license or approval or can obtain it within a reasonable period.

Notably, the proposed rules would expand the exemption for positions regulated by self-regulatory organizations, where the organization's rules require criminal background checks or bar employment based on criminal history. They would extend the exemption to cover applicants for, or employees in, positions that are not required to be registered with the organization, if the individual chooses to become registered while in the position or elects to maintain a prior registration.

Criminal Background Checks

Whether an employer may inquire about an applicant's conviction history or conduct a criminal background check under the city's laws is largely determined by when in the hiring process it occurs. While an employer may *never* seek or consider information pertaining to a non-conviction, an employer generally may seek to obtain or consider an applicant's criminal history once a conditional offer of employment is made.

Prior to a Conditional Offer. An employer may not inquire about criminal history or seek the applicant's permission to run a criminal background check until it has extended a conditional job offer. While an employer will not automatically be liable for inadvertently discovering that information or for the applicant's unsolicited disclosure of criminal history pre-offer, the employer will be liable if it uses the opportunity to explore that history.

In addition to the *per se* violations discussed above, an employer also may not make any inquiry or statement related to an applicant's criminal history during a job interview. Nor may an employer indicate that it will not hire or

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 individual at the time of the offense; (f) seriousness of the offense; (g) any information regarding the individual's rehabilitation and good conduct; and (h) the legitimate interest of the employer in protecting property, safety and welfare.

consider individuals with a criminal history or certain convictions. Disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about criminal history is similarly proscribed.

Pre-offer, employers may not conduct public records or internet searches into an applicant's criminal history. The proposal expressly bars searching for terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail" or "prison" or searching websites that claim to provide information about arrests, warrants, convictions or incarceration for the purpose of obtaining criminal history.

After a Conditional Offer. After a conditional job offer is extended, an employer may make inquiries into or statements about the applicant's conviction history or any pending criminal cases. An employer may:

- Ask, orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case
- Run a background check or, with the applicant's permission, use a consumer reporting agency to do so
- Ask the applicant about a conviction or pending criminal case and gather information relevant to the Article 23-A factors

Comment. Although Article 23-A analysis applies to employment decisions based on conviction records, the proposal would extend the requirement to pending criminal charges as well.

The proposal makes clear that an employer need not engage in the Article 23-A analysis if it opts to go forward with the hire after receiving an applicant's conviction history or information about a pending criminal case.

Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action. Once a conditional offer is made, it can only be revoked in very limited circumstances. If an employer decides to withdraw the offer or take adverse employment action based on conviction history or a pending criminal case, the employer must first engage in an Article 23-A analysis and then follow the process required by the ban-the-box law.

To avoid potential liability, the employer must first determine that either the direct relationship or unreasonable risk exemption applies. The employer must then take certain steps before revoking a conditional job offer or taking an adverse employment action. The employer must follow the Fair Chance Process by: (1) providing the applicant or employee with a written copy of any inquiry made to collect information about criminal history or pending criminal cases and any information on which it relied in making the decision; (2) providing the applicant or employee with a written copy of the Article 23-A analysis it performed; (3) allowing the applicant or employee at least three business days to respond to its concerns; and (4) considering any additional information the applicant or employee provides.

Errors, Discrepancies, and Misrepresentations. The proposal clarifies how to handle mistaken criminal history information that was used for employment purposes. If an applicant or employee discovers an error on a background check, he or she must inform the employer and ask for additional time to correct it. If the applicant or employee can show that he or she has no criminal record or the conviction history resulted in a non-conviction, the employer may not revoke the job offer or take adverse employment action. If the applicant or employee can show that the conviction history or pending case information differs from the background report, the employer must conduct a new Article 23-A analysis. If, however, a background check reveals that an applicant or employee intentionally misled the employer about conviction history or a pending criminal case, the conditional job offer may be revoked or adverse employment action may be taken.

Enforcement and Penalties

The proposal clarifies that the NYCCHR may assess penalties for violation as part of a conciliation agreement, and in decisions and orders. In assessing penalty amounts, it will consider: the severity of the violation; prior or other contemporaneous violations of the HRL; employer size in terms of workforce and revenue; and other mitigating factors. Importantly, the proposal establishes a presumption that an employer was motivated by an applicant's or employee's criminal history if it revokes a conditional job offer without following the Fair Chance Process. The presumption may be rebutted by showing that the revocation was based on: the results of medical examinations permitted by the ADA; material information that the employer could not have reasonably known before extending the conditional offer and that would have altered the employment decision if known; and evidence that the employer had no knowledge of the applicant's or employee's criminal history before it revoked the offer.

Early Resolution Process. The proposal also creates an expedited settlement process for NYCCHR-initiated complaints of *per se* violations. The discretionary process will only be available to employers that have 50 or fewer employees at the time of the alleged violation, no other pending or current allegations of HRL violations, and one or fewer previous violations in the past three years. To resolve claims, employers will have to admit liability and agree to affirmative relief and penalties that will be assessed according to the employer's size and frequency of violation.

In Closing

Both Philadelphia and New York City employers already face restrictions on the use criminal history and background checks for employment purposes. Recent amendments to Philadelphia's ban-the-box law and proposed rules governing NYC's law, if adopted, would place additional constraints on employers' hiring practices. Employers will want to review their background screening programs and hiring protocols to ensure compliance.

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