



## OUR INSIGHTS

### Philadelphia Goes Beyond Ban the Box

**Authors:** Jacqueline R. Barrett (Philadelphia), Julie A. Donahue (Philadelphia), Emily K. O'Brian (Greenville)

**Published Date:** December 21, 2015

On December 15, 2015, Mayor Michael Nutter signed a bill amending Philadelphia's "ban the box" law, formally titled the Fair Criminal Records Screening Standards Ordinance, which was enacted in 2011. With these amendments, Philadelphia's ordinance joins [New York City's Fair Chance Act](#) as one of the most expansive and restrictive ban the box laws in the country. The legislative intent of the ordinance is to mandate that employers consider the whole person and the relation of the offense to the duties of the position sought before making a hiring decision. In furtherance of this goal, the amendments expand the ordinance's scope and add a number of requirements and prohibitions with which employers must comply. The amendments will become effective on March 14, 2016 and will be enforced by the Philadelphia Commission on Human Relations.

#### Overview

While there are many substantive changes to the ordinance, some of the key changes and processes that employers will have to implement include:

1. Removing questions about an applicant's criminal history entirely from the employment application;
2. Delaying asking about an applicant's criminal history, procuring a background check, and obtaining authorization to conduct a background check until after a conditional offer of employment has been made;
3. Ensuring that their consumer reporting agency (CRA) does not provide criminal history information concerning convictions over seven years old in a background check;
4. Providing a notice to applicants containing a copy of the criminal history report (as required by the federal Fair Credit Reporting Act (FCRA)) and the basis for adverse action, and then keeping the job open for 10 business days for the applicant to provide further information;
5. Ensuring an individualized assessment process is in place (as it already should be pursuant to [the U.S. Equal Employment Opportunity Commission's guidance](#)); and
6. Posting a summary of the law (to be provided by the Commission) conspicuously on the employer's website and premises where applicants and employees will be most likely to notice and read it.

#### Definitions and Scope of the Ordinance

Before the amendments, the ordinance did not apply to private employers with fewer than ten employees. Now, the ordinance will cover a private employer employing *any* persons within the City of Philadelphia.

Additionally, the law now defines a “conditional offer of employment” as an offer to hire an applicant that may only be withdrawn for two reasons:

(1) an applicant has a conviction record, which, based on an individualized assessment, would reasonably lead an employer to conclude that the applicant would pose an unacceptable risk in the position for which he or she applied, or

(2) the applicant does not meet other legal or physical requirements of the job.

The individualized assessment requirement is new to the ordinance, which now sets forth specific requirements when considering adverse action based in whole or in part on a conviction record. The full requirements of the process are discussed in more detail below.

### **Employment Application**

Previously, the ordinance prohibited employers from inquiring regarding or requiring disclosure of an applicant’s criminal history in an employment application. Now, the amendments explicitly prohibit employers from including a question about an applicant’s criminal history on the employment application *even if the applicant is told not to answer the question*. Employers will either have to eliminate the question entirely from the application or have a separate application for Philadelphia positions (as is the case in New York City).

Employers must also post a summary of the law (in a form to be provided by the Philadelphia Commission on Human Relations) in a conspicuous place on the employer’s website *and* premises, where applicants and employees will be most likely to notice and read it. Employers using third-party sites to access employment applications should consider providing the notice in the application or providing applicants with a hyperlink to access the form.

### **Application Process**

During the application process—which now begins when an applicant inquires about employment and ends when the applicant is extended a conditional offer of employment—employers are prohibited from inquiring about or requiring an applicant to disclose or reveal any criminal convictions. This prohibition also prevents an employer from asking an applicant any question regarding his or her willingness to submit to a background check. Employers may not ask applicants to complete background check disclosures or authorization forms prior to receiving a conditional offer of employment.

An employer may, however, give notice to applicants of its intent to conduct a background check. This notice must be concise, accurate, and made in good faith, and must include the statement that “any consideration of the background check will be tailored to the requirements of the job.” If an applicant voluntarily discloses criminal history information without prompting by the employer prior to a conditional offer of employment, the employer is permitted to discuss the revealed convictions with the applicant. However, this does not open the door for the employer to inquire about any other criminal convictions. The employer’s inquiries must be limited to

the items voluntarily disclosed by the applicant.

### **Consideration of Criminal History Information and the Adverse Action Process**

The amendments also limit employers from considering older convictions. Employers may only consider convictions if the release from incarceration occurred fewer than seven years from the date of the inquiry. Periods of incarceration are not required to be included in the calculation of the seven year period.

Other states have similar seven-year look-back periods, but the majority of these prohibit *consumer reporting agencies* from *providing* records more than seven-years-old in a report to the employer. The amendments put the burden on the *employer* not to *consider* the information. Employers should discuss this requirement with their CRAs to ensure that the information that may not be considered does not show up in relevant criminal background check reports.

Under the amendments, if an employer rejects an applicant for a job opening based in whole or in part on criminal record information, the employer must notify the applicant in writing of the decision and its basis, and provide the applicant with a copy of the criminal history report. Once this notice is sent, the ordinance then requires that an employer wait 10 business days, leaving the position open, for the applicant to respond with evidence of inaccuracy or an explanation.

### **Individualized Assessment**

The amended ordinance also addresses how employers may utilize criminal convictions in the hiring process. The ordinance prohibits employers from adopting a blanket policy that automatically excludes an applicant with a criminal conviction from a particular job or class of jobs. Instead, employers must evaluate the relationship between the conviction and the job sought to determine whether exclusion of the applicant is required by business necessity and whether excluding the applicant would present an unacceptable risk to the operation of the business, to coworkers, or to customers. This determination requires the employer to review the applicant's record and the particular job sought and to conduct an individualized assessment of the risk. The individualized assessment must consider:

- the nature of the offense;
- the time that has passed since the offense;
- the applicant's employment history before and after the offense and any period of incarceration;
- the particular job duties of the job being sought;
- any character or employment references provided by the applicant; and
- any evidence of the applicant's rehabilitation since the conviction.

Based on this assessment, an employer may reject an applicant based on his or her criminal record if the

employer reasonably concludes that the applicant presents an unacceptable risk to the operation of the business, to coworkers, or to customers, *and* if exclusion of the applicant is compelled by business necessity.

### Enforcement and Penalties

The ordinance is enforced by the Philadelphia Commission on Human Relations. The Commission was previously authorized to impose fines on employers for violating the ordinance. With the amendments, the Commission may order other remedies, which include:

- an order requiring the employer to cease and desist such unlawful practice;
- performance of any injunctive or other equitable relief;
- payment of compensatory damages;
- payment of punitive damages, not to exceed \$2,000 per violation; and
- payment of reasonable attorneys' fees.

The amendments to amending Philadelphia's ban-the-box law and the ban-the-box laws in other jurisdictions, including all federal and state background check requirements, are summarized in the firm's *O-D Comply: Background Checks and O-D Comply: Employment Applications* subscription materials, which are updated and provided to *O-D Comply* subscribers as the law changes.

---

### Jacqueline R. Barrett (Philadelphia)



Ms. Barrett represents employers in a broad spectrum of employment-related matters including wage and hour disputes, Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Pennsylvania Human Relations Act, the Family and Medical Leave Act, as well as many other federal and state employment laws. She also focuses on matters relating to wrongful discharge, breach of contract, and labor disputes. Ms. Barrett practices before...

---

### Julie A. Donahue (Philadelphia)



Julie A. Donahue is an Associate in the firm's Philadelphia office. Ms. Donahue received her law degree from the Temple University James E. Beasley School of Law where she was a member of the Temple Law Review. While in law school, Ms. Donahue served as judicial intern for the Honorable Petrese B. Tucker of the United States District Court for the Eastern District of Pennsylvania. Ms. Donahue represents

employers in a broad spectrum of employment-related matters including matters involving Title...

---

## Emily K. O'Brian (Greenville)



Emily O'Brian is an attorney in Ogletree Deakins' Greenville, South Carolina office. Emily is a native of Athens, Georgia. She graduated with honors from Furman University in 2011, where she majored in Business Administration. After Furman, Emily attended the University of Georgia School of Law, where she was a member of the *Georgia Law Review* and was named to the Order of Barristers for her involvement in advocacy programs. She graduated with honors in 2014.

...

---

© 2015, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.