

New York City Council Passes Ban-the-Box Legislation

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Joining many other jurisdictions, the New York City Council has passed the Fair Chance Act, an ordinance restricting when employer inquiries about applicants' criminal histories may be made during the application process and imposing significant obligations on employers who intend to take action based on such information.

The Council passed the ordinance on June 10, 2015. The ordinance will become effective 120 days after receiving Mayor Bill de Blasio's signature, which is expected shortly, as the Mayor has expressed support for the legislation.

Like other ban-the-box laws, the ordinance generally prohibits an employer with at least four employees from making an inquiry about an applicant's pending arrest or criminal conviction record until after a conditional offer of employment has been extended. Limited exceptions are provided.

Under the ordinance's definition of inquiry, employers are prohibited not only from asking an applicant prohibited questions — verbally or in writing — but also are prohibited from searching publicly available sources to obtain information about an applicant's criminal history.

Exceptions

The main exception applies when an employer, under applicable federal, state, or local law, is required to conduct criminal background checks for employment purposes or to bar employment in a particular position based on criminal history.

Other exceptions remove prospective police officers, peace officers, and law enforcement agency and other law-enforcement-related employees from coverage. Therefore, these are unlikely to affect positions and employers in the private sector.

Notification Process

Employers who make inquiries into an applicant's criminal history after a conditional offer of employment has been extended and determine that the information warrants an adverse employment action must follow a rigorous process. Specifically, employers must:

Provide the applicant with a "written copy of the inquiry" which complies with the City's Commission on Human Right's required (but not-yet-issued) format;

Perform the analysis required by Article 23(a) of the New York Correction Law, "Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses";

Provide the applicant with a copy of its analysis, also in a manner which complies with the Commission's required format, which includes supporting documents and an explanation of the employer's decision to take an adverse employment action; and

Allow the applicant at least three business days to respond to the written analysis by holding the position open during this time.

Of course, for employers who conduct background checks through consumer reporting agencies, if such information

is obtained from a background check, the above process must be integrated with the Fair Credit Reporting Act (FCRA) pre-adverse action requirements.

Supporters view the ordinance as ending discrimination against applicants with low-level arrests and providing assurance that applicants will be considered solely based on their qualifications. Critics see the ordinance as adding to the already-onerous mandates imposed on employers in New York City by favoring ideology over practicality, sending a bad message to employers doing business — or desiring to do business — in New York City.

The one undeniable fact is that all covered New York City employers must develop measures to ensure compliance with the ordinance.

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