



New York City Bans the Box: Has Your Company Reviewed Its Application Process?

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Recently, New York City enacted the Fair Chance Act, an ordinance that prevents New York City employers with four or more employees from inquiring about, or otherwise considering, a job applicant's criminal history when making employment decisions prior to making a conditional offer of employment. In enacting the Fair Chance Act, New York City joins a growing number of jurisdictions that have passed similar "ban the box" legislation, including the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island.

Under New York City's Fair Chance Act, employers are prohibited from making any inquiry regarding an applicant's arrest or conviction record prior to making a conditional offer of employment. This prohibition precludes asking questions of the applicant (in writing or otherwise), searching publicly available records, or obtaining consumer reports for the purpose of obtaining criminal background information. After the employer has made a conditional offer of employment, the employer may inquire about an applicant's arrest or conviction record. However, before taking any adverse action based on the inquiry, the employer must:

- Provide "a written copy of the inquiry to the applicant," which shall be in a manner that is to be specified in regulations;
- Perform an analysis of the applicant's criminal record consistent with Article 23-A of the New York Correction Law and New York's anti-discrimination laws;
- Provide a written copy of the analysis to the applicant in a manner to be established by regulations, which shall include, at a minimum, the supporting documents that formed the basis for an adverse action and the employer's reasons for taking any adverse action against the applicant; and
- Allow the applicant a "reasonable time" (no less than three business days) to respond after giving the applicant the inquiry and analysis and, during that period, hold the position open for the applicant.
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In addition to restricting criminal history inquiries, the Fair Chance Act prohibits employers from expressing, either directly or indirectly, in any printed or circulated solicitation, advertisement or publication that employment opportunities will be based on a person's arrest or conviction record.

ASK MSK

Q: What should a New York City employer do to comply with the Fair Chance Act?

A: To ensure compliance with the Fair Chance Act, New York City employers should review all hiring forms (e.g., job applications and offer letters) and procedures and, where necessary, eliminate any inquiries or public searches that would reveal arrest or conviction information prior to making a conditional offer of employment. If, after making a conditional job offer, the employer wishes to inquire about arrests or convictions, the employer must follow the above four-step process before making an adverse employment decision. Lastly, employers should review all job advertisements to



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ensure that the advertisement does not state or imply that employment will be based on arrest or conviction history.

Q: Are there any situations or positions to which the Fair Chance Act would not apply?

A: Yes. The Fair Chance Act specifically does not apply when the position: (1) by state, federal, or local law, requires a criminal background check or cannot be held by a person with a criminal history; (2) is in law enforcement; and/or (3) would involve susceptibility to bribery or other corruption, or would involve safeguarding individuals who are vulnerable to abuse because of age, disability, infirmity or other condition.

Q: What do the Fair Credit Reporting Act (“FCRA”) and the New York Fair Credit Reporting Act (“NYFCRA”) require for criminal background checks?

A: In addition to the Fair Chance Act, the FCRA and the NYFCRA establish limitations on an employer’s right to obtain criminal background information on applicants from a consumer reporting agency. Under the FCRA, employers are generally required to notify applicants before conducting a background check, obtain the applicant’s consent to perform the background check, and provide a copy of the background report to the applicant. The FCRA also places limits on the types of criminal records that may be obtained. The FCRA prohibits obtaining records of an arrest that are more than seven (7) years old, although a background check may include records of convictions regardless of the date.

The NYFCRA requires that employers (i) notify applicants in writing that a consumer report may be requested and (ii) inform the applicant if it requests a report and, if so, provide the name and address of the consumer reporting agency furnishing the report. The NYFCRA prohibits consumer reporting agencies from reporting a criminal arrest or a criminal charge that did not result in conviction and is not pending, or convictions more than seven years before the date of the report.