

A Guide to Criminal Background Screening and Philadelphia's Ban the Box Ordinance

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Thanks to the internet, employers have access to far more information about both applicants and current employees than ever before. Employers are even engaging outside vendors to provide detailed background check information to assist with the screening of applicants. These background checks can include criminal history record information, credit history, financial information, and other personal information.

Employment Discrimination

From an employment law perspective, access to this information is a mixed bag. Certainly, it makes good business sense for an employer to carefully screen applicants before making a hiring decision. Many employers are rightly concerned about the possibility of being sued for negligent hiring in the event they fail to screen out an applicant with a criminal history who later goes on to commit a crime in the workplace. However, if an employer's background check provides more information than is necessary to assess an applicant's suitability for the job in question, the employer could be vulnerable to a discriminatory hiring lawsuit.

The possibility of being sued for employment discrimination based on overly-extensive background checks is not the only threat. Many jurisdictions have enacted laws to limit an employer's access to background information in the hiring process. For example, the Pennsylvania Criminal History Record Information Act prohibits employers from considering an applicant's arrest record if the arrest did not lead to a conviction, and also prohibits employers from considering convictions that are not job-related.

Ban the Box

An increasing number of jurisdictions have enacted "Ban the Box" laws, including Delaware and Philadelphia.

Although specific requirements can vary, these laws prohibit employers from asking applicants about criminal history in the preliminary stages of the hiring process. Concerns about the inability of formerly incarcerated individuals to find gainful employment after their release due to prevalent use of criminal background checks have led to the implementation of these laws with the goal of allowing such individuals to at least get a foot in the door.

The City of Philadelphia enacted its own Ban the Box Ordinance in 2012. Philadelphia's Fair Criminal Records Screening Standards Ordinance was amended in December 2015 and the amendments took effect on March 14, 2016. As amended, the Philadelphia ordinance is one of the most restrictive of all the Ban the Box laws enacted to date. A summary of the key provisions follows:

- All private employers are subject to the ordinance, small employers included. Job placement and referrals agencies are also covered.
- "Employment" is defined to include temporary or seasonal work, as well as contracted work. Vocational and educational training is included, regardless of whether the training is paid.
- Any inquiry about criminal convictions during the application process is not permitted. Such inquiry is permitted only *after* an employer has extended a conditional offer of employment to the applicant.

- Employers are not permitted to maintain a policy of automatically excluding any applicant with a criminal conviction from a job or class of jobs.
- Employers are prohibited from rejecting an applicant based on a criminal record, unless the conviction is for an offense “that bears such relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers,” and the exclusion of the applicant is “compelled by business necessity.”
- In making a determination about the exclusion of an applicant based on a criminal conviction, employers are required by the ordinance to conduct an individualized risk assessment, which must include a review of the following factors:
 - 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 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.
- Employers are permitted to consider criminal convictions within seven years of the date of application, not including times of incarceration.
- In the event the employer rejects the applicant in whole or in part on criminal record information, employers are required to provide the applicant written notification, and a copy of the criminal history report. Applicants must be provided ten business days to provide evidence of the inaccuracy of the information, or to provide an explanation.
- The Philadelphia Commission on Human Relations will enforce the provisions of the ordinance.
- The ordinance does not apply “if the inquiries or adverse actions prohibited herein are specifically authorized or mandated by any other applicable law or regulation.”

All Philadelphia employers, with a few, limited exceptions, are subject to the new amended Ban the Box Ordinance. Employers within Philadelphia’s city limits that conduct criminal background checks must review their policies and procedures to ensure compliance. Outside of Philadelphia, all employers must be fully aware of the laws that apply in their jurisdictions that limit the use of background checks.

For questions or guidance with any of these regulations, please contact Tanya Salgado (215.864.6368; salgadot@whiteandwilliams.com) or another member of our Labor and Employment Group.

This correspondence should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only and you are urged to consult a lawyer concerning your own situation and legal questions.

