

Employers Beware: Newark Passes “Ban the Box” Legislation Limiting Pre-Employment Criminal Background Checks

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By Maxine H. Neuhauser and Stephanie R. Carrington

With the passage of a new municipal law (“Ordinance”)¹ that becomes effective November 18, 2012, the City of Newark, New Jersey, will join more than 40 other municipalities (including Atlanta, Baltimore, Chicago, Detroit, Philadelphia, and Seattle) in limiting an employer’s right to inquire into a job applicant’s criminal history. In addition to generally prohibiting criminal background inquiries before extending a conditional offer of employment, the Ordinance limits the criminal background information about which an employer may inquire and that an employer may use in making a hiring decision.²

This limitation on employer hiring practices has been referred to as the “ban the box” movement and has been gaining momentum nationwide. Newark’s Ordinance is one of the most expansive and one of just two “ban the box” ordinances (Philadelphia having the other) to cover nearly all private employers doing business in the city. However, nine other cities, including Boston, New Haven, and Detroit, have adopted “ban the box” ordinances that cover private employers that do business with their respective municipality.

Covered “Employers”

The Ordinance applies to any “employer” that “does business, employs persons, or takes applications for employment within the City of Newark” and that has at least five employees. The Ordinance includes job placement, referral agencies, and “other employment agencies” within the meaning of “employer.”

Covered “Employment”

The Ordinance applies to “employment” that is physically located, “in whole or in substantial part, within the City of Newark.”

¹The Ordinance is titled “[Ordinance to Assist the Successful Reintegration of Formerly Incarcerated People into the Community by Removing Barriers to Gainful Employment and Stable Housing After Their Release From Prison; and to Enhance the Health and Security of the Community by Assisting People with Criminal Convictions in Reintegrating into the Community and Providing for Their Families.](#)”

² The Ordinance also applies to criminal history background inquiries in connection with certain housing.

Covered “Candidates”

A “candidate” covered by the Ordinance means any person considered by an employer when identifying potential employees, including persons who ask to be considered for employment or who request information from an employer regarding potential employment.

Prohibited and Permitted Inquiries

The Ordinance generally prohibits employers from conducting “pre-application criminal history inquiries” and from making any inquiries regarding a candidate’s criminal history during the application process. Thus, with limited exception, such as inquiries or disqualifications mandated by state or federal law, covered employers may not directly or indirectly (e.g., through recruiters) use applications, interviews, background checks, or other means to obtain criminal history information before making a conditional offer of employment.

The general prohibition against pre-application and application inquiries does not apply where the employer can demonstrate that “the relevant position is of such sensitivity that a criminal history inquiry is warranted.”

When a candidate volunteers information about his or her criminal history, the employer may discuss the disclosed information with the candidate but cannot use the information in deciding whether to make a conditional offer of employment.

After a candidate has received a conditional offer of employment, the employer may then obtain a criminal background check, upon written notice and consent. The employer may also conduct criminal background checks on employees after giving notice and obtaining consent. The candidate or employee must be told, in writing, of his or her right to request a review of an adverse decision because of information received in the background check.

The Ordinance limits employers’ permissible inquiries to (i) indictable offense convictions for eight years following sentencing, including the termination of any period of incarceration; (ii) five years following the sentencing of disorderly persons convictions or municipal ordinance violations, including the termination of any period of incarceration; and (iii) pending criminal charges. Employers are, however, permitted to inquire without limitation about convictions for murder, voluntary manslaughter, and certain sex offenses.

The Ordinance prohibits employers from asking about, or taking an adverse employment action, on the basis of convictions that fall outside the permitted scope of inquiry. In addition, employers may not make a decision based on arrests or criminal accusations (unless pending), juvenile adjudications, sealed records, and records that have been erased, expunged, pardoned, or otherwise nullified.

Required Considerations and Notifications

Before making a hiring decision after receiving a criminal background check that discloses criminal offenses, the Ordinance requires employers to consider (i) the nature of the crime and its relationship to the job; (ii) information as to rehabilitation and good conduct, including government-issued certificates of rehabilitation and information produced by or on behalf of the candidate; (iii) the potential for recurrence; and (iv) the amount of time that has passed since the offense.

The Ordinance creates various requirements for an employer that rescinds an offer of employment, or terminates an employee, based on information disclosed in the criminal background check. First, the employer must complete an “Applicant Criminal Record Consideration” form specifying the reasons for revoking the employment offer or terminating employment. A model of this form has not yet been issued.

Next, the employer must give the rejected candidate (i) a copy of the form; (ii) a copy of the criminal background report indicating the particular convictions for which the person has been rejected; and (iii) written notice of the opportunity for review, stating the type of evidence that the candidate may present to the employer. The notice and accompanying information must be sent in a single package by registered mail.

Rejected candidates and employees have 10 business days after receipt to respond, and employers must review all information and documentation that they receive. The employers must provide the candidate with a final decision within a “reasonable period of time.”

Penalties for Violation of the Ordinance

Initial violations, or violations that occur three or more years after a prior violation, are subject to a fine of up to \$500.

Subsequent violations that occur less than three years after a prior violation are subject to a fine of up to \$1,000.

What Should Employers Do Now?

Aside from continuing to comply with the applicable requirements (including notice requirements) of the federal Fair Credit Reporting Act and the New Jersey Fair Credit Reporting Act pertaining to background checks, Newark employers should consider making the following changes to their hiring procedures:

- At the application stage:
 - Revise job application forms to remove questions asking about convictions (at least as those inquiries pertain to applicants in Newark).
 - Do not ask about a candidate’s criminal history during job interviews.
 - Do not conduct a criminal history check on a candidate until after making a conditional offer of employment.

- After making a conditional job offer:
 - Provide written notice of the background check with a statement of the candidate or employee's right to review.
 - Obtain the candidate or employee's written consent to the background check.
- When inquiring into the candidate or employee's criminal history:
 - Ask only about permitted offenses.
- After receiving a criminal history report:
 - Consider the above-summarized factors in making an employment determination.
 - If, based on the information received, you are contemplating an adverse employment decision (such as not to hire the candidate):
 - Note on the report the conviction(s) constituting the reason for the decision.
 - Complete the Applicant Criminal Record Consideration form.
 - Provide the candidate or employee with the following items, in one package, via registered mail:
 - Notification of the adverse employment determination;
 - Completed Applicant Criminal Record Consideration form;
 - Annotated photocopy of the criminal history inquiry results; and
 - Information regarding the candidate or employee's opportunity for review, and what information the candidate or employee may provide in support of reconsideration.
 - Give the candidate or employee 10 business days after receipt to present information, including mitigating factors, for you to consider.
 - Document the consideration provided to the candidate or employee.
 - After receiving any pertinent information, notify the candidate or employee of the final decision, in writing, and include a list of the evidence and information considered.

Conclusion

With the adoption of its “ban the box” Ordinance, Newark has joined many other local governments in prohibiting employers from asking prospective employees about their conviction history.³ While the laws vary—and currently, most existing laws apply to public employers only—as a general matter, they establish parameters for when, and to what extent, an employer may ask about a prospective or current employee’s criminal background. Employers may expect the trend to continue, with more and more municipalities signing on.⁴

For more information about this Advisory, please contact:

Maxine H. Neuhauser
Newark
(973) 639-8269
mneuhauser@ebglaw.com

Stephanie R. Carrington
New York and Newark
NY: (212) 351-4718
NJ: (973) 639-8264
scarrington@ebglaw.com

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³ The federal Equal Employment Opportunity Commission (“EEOC”) has also given attention to the issue of criminal background checks. The EEOC’s recent [enforcement guidance](#) discourages blanket exclusions of individuals who have been convicted of crimes and encourages employers to carefully assess whether the employer’s criminal conduct exclusion is job-related and consistent with business necessity. See also the Epstein Becker Green *Act Now* Advisory entitled “[EEOC Propounds Guidance on Use of Arrest and Conviction Records in Employment Decisions](#).”

⁴ Aside from the recent focus on *criminal* background checks, several states, including [Illinois](#) and [Connecticut](#), have recently passed laws limiting the circumstances under which employers may perform *credit* checks on employees and applicants for employment. In light of the recent focus on these issues, employers may wish to review and perhaps overhaul their application, background checking, and hiring procedures in order to consider whether and to what extent their current practices should be modified, taking into account both public policy reasons and recent state and federal scrutiny towards background check procedures.