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New York City “Ban the Box” Law Restricts Employers’ Use of Criminal History

New York City has, in recent months, adopted legislation limiting the information that employers can seek out and use in employment decisions. Read our alert on the Stop Credit Discrimination in Employment Act, which took effect September 3, [here](#)). The “Fair Chance Act,” which went into effect October 27, is the most recent of these laws.

The Fair Chance Act (Local Law No. 63) prohibits nearly any New York City employer with four or more employees from inquiring into a job applicant’s arrest or criminal history *prior to extending a conditional employment offer*. (Independent contractors can count as employees for purposes of determining an employer’s size.) Dubbed “ban the box,” the law makes it illegal to include questions about criminal history on a written job application form or, before a conditional offer is extended, to ask a candidate verbally for the information and even to use publicly available sources to conduct a background check. Employers may also violate the law if they discriminate against an individual or take an adverse employment action based on (i) arrest records, (ii) criminal accusations or (iii) without following the below-described state law requirements, actual criminal convictions. The Fair Chance Act, however, does not require that employers hire people with criminal records or prevent employers from

running criminal background checks after they extend a conditional employment offer.

The Fair Chance Act incorporates state law requirements on the use of criminal records in employment decisions. If an employer wishes to make an adverse employment decision against an applicant based on the results of a criminal background check, the employer must provide a written copy of the results to the applicant in an approved format and go through the multi-factor analysis set forth under Article 23-A of New York Correction Law, which prohibits an employer from making an adverse decision based on a prior criminal conviction absent a direct relationship between the criminal conduct and the specific position sought, or if the applicant’s employment would create an unreasonable risk to the property, safety and welfare of certain individuals or to the general public.

The law requires the employer to consider the following eight factors:

- the amount of time since the conviction;
- the applicant’s age at the time of the offense;
- the seriousness of the conviction;

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- any evidence of rehabilitation and good conduct;
- the specific duties and responsibilities necessarily related to the position;
- what bearing, if any, the offense has on the applicant's fitness or ability to perform the job duties and responsibilities;
- the legitimate interest of the employer in protecting the property, safety and welfare of specific individuals or the general public, and
- New York's public policy of encouraging the employment of individuals with a criminal record.

If the employer, after evaluating the factors, determines that a sufficient nexus exists between the position and the candidate's history to warrant rescinding the offer, the employer must first provide the applicant with the analysis, in writing, and allow the applicant no less than three business days to respond (keeping the job open in the meantime).

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The law provides limited exceptions, including when an employer is required under by federal, state or local law to conduct criminal background checks for employment purposes or to bar employment in a particular position based on criminal history, as well as the screening of prospective police officers, peace officers and law enforcement agency and law-enforcement-related employees.

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