

Municipality and County Restrictions on Use of Criminal Records

There are a number of municipal and county entities with restrictions applicable to employers and landlords on the use of criminal records.

Below are explanations for extensive restrictions in place for selected major cities of Los Angeles, San Francisco, New York, Boston, Madison, Philadelphia and Seattle. This is followed by a list of major municipalities and counties with known "ban-the-box" restriction laws. Most cities and counties laws restrict only to city-hired employees and sometimes vendors hired by that city or county. But the list notes where the ban applies on private employers.

Los Angeles, CA

Effective January 22, 2017 Los Angeles join the long list of cities (Including San Francisco) that have enacted their own version of Ban-the-Box. In general, an employer [located or doing business within Los Angeles and has 10 or more employees] cannot inquire into the applicant's criminal history until after a conditional offer of employment has been made. The ordinance defines a conditional offer of employment as: "an Employer's offer of Employment to an Applicant conditioned only on an assessment of the applicant's Criminal History, if any, and the duties and responsibilities of the employment position. In the real world, a conditional offer may be "conditioned" on many factors beyond criminal history.

The ordinance adopts a similar process as did New York City requiring a "Fair Chance Process" wherein the employer must assess the criminal record history to the job in question. However, Los Angeles desires to out-do New York City as it requires employers to go through this process twice. The first round is after the employer receives the criminal record information. The employer is to consider the criminal record in conjunction with the factors announced by the EEOC when determining of relevance of a criminal record to a job. We assume that these are the eight factors listed in the 2012 EEOC Guidance, but the ordinance does not spell this out. This requires a written assessment of that analysis. At the first stage it is likely that an employer would not have all the information necessary to do such a complete analysis of the 8 factors. Also provided in the ordinance is that the city may in the future add additional or replacement criteria upon which the employer must make its written assessment. There is no form for the assessment provided at this time. Functionally, the first assessment is at the pre-adverse action stage of the FCRA process [include written assessment with Pre-Adverse Action Notice], but these requirements exist whether or not the employer is using a CRA or other third party to obtain criminal record information.

See *The State Rules Register Alerts* of January 10th and February 8th, 2017 for extensive descriptions.

Regarding San Francisco - Effective August, 2014 for the city and county of San Francisco: Per ordinance an Employer may not require applicants or potential applicants for employment or employees to disclose, and shall not inquire into, the person's conviction history or an unresolved arrest until either after the first live interview with the person (via telephone, video-conferencing, use of other technology, or in person) or after a conditional offer of employment. Restrictions are also placed on landlords of Affordable Housing.

New York City, NY

All New York City employers with four or more employees, either inside and/or outside of the city, are soon faced with a new Ban-the-Box law. The New York City Fair Chance Act went into effect on October 27, 2015. The new law prohibits private employers in New York City from inquiring about applicants' past criminal convictions until a conditional offer of employment has been made. The employer may conduct a criminal background check, but only after extending the conditional offer. If the employer withdraws the offer, the employer must explain its decision to the applicant in writing and hold the position open for three (3) business days so that the applicant can respond.

The law does not apply when federal, state or local laws require criminal background checks, or to positions where a criminal conviction precludes employment.

After the conditional offer is made, employers who do obtain criminal background information about the applicant must comply with a detailed notice procedure before taking adverse action based upon the information. The employer must:

1. Provide a written copy of the relevant inquiry to the job applicant (in a form to be determined by the New York City Commission on Human Rights);
2. Perform the analysis required by New York State Correction Law Article 23-A to determine whether there is a direct relationship between the prior criminal history and the position.
3. Provide a written copy of the multi-factor Article 23-A analysis that the employer undertook. Further, such copy must state the reasons for the decision to withdraw the conditional offer and provide any supporting documentation.
4. Hold the position open for not less than three business days after giving the applicant the inquiry and analysis so that the applicant can respond with additional or mitigating information.

Additional Restrictions on Use of Credit History:

On May 6, 2015 the Mayor of New York City, Bill de Blasio, signed Enactment: 2015/037, banning the use of credit reports by some employers. This ordinance will go into effect on or about September 3, 2015. The ordinance contains numerous and complicated exceptions, some of which require a familiarity with the functions of New York City government.

See *The State Rules Register Alert of May 29, 2015* for an extensive description.

Portland, OR Portland passed their own ordinance restricting the consideration of a criminal record.

When can a criminal record be considered? This is permitted only after a conditional job offer. Employers cannot inquire about or access criminal record information prior to this time.

What cannot be considered by an employer?

1. Arrests not resulting in a conviction. However pending charges and charged not “resolved” may be considered. Unresolved charges are not defined but could refer to charges that are dismissed with the possibility of being refiled. Sometimes charges are dropped due to missing witnesses, etc. and the case is dismissed to avoid “speedy trial” violations. This is just an educated guess.
2. Expunged and “voided” convictions. Voided charges are not defined. Voided could refer to cases reversed on appeal or set aside for some reason, again an educated guess.
3. Deferred adjudications, except for crimes of physical harm or attempted physical harm to another person. So crimes of murder, manslaughter, rape, assaults of all types, and the like, may be considered. This is interesting because the FCRA would likely prohibit reporting such cases that are older than 7 years. Note: when the 7 year clock begins for non-convictions is uncertain at this time. Is it from when the case was originally filed or when it was dismissed?

Individual assessment is required, but it only entails the 3 classic considerations – seriousness of the offense, how long ago it occurred and its relationship to the job. **However, the employer must send a notice to the applicant** that he/she did not get the job due to the criminal record and provide a copy of the record(s) in question that resulted in the decision not to hire. The Mayor’s office has stated that the employer can simply “highlight” the relevant record or records when dealing with multiple records.

No explanation or justification is required in the notice, e.g.:

Dear Applicant,

We did not hire you based upon the enclosed criminal record that we received.

Updated June 4, 2017

Sincerely,
Employer

This is in addition to the FCRA notice of adverse action.

What employers are exempt?

1. Those with fewer than 6 employees. For over 6 at least one employee must perform a majority of their time within Portland.
2. Federal government.
3. State government.
4. Political subdivisions of the State of Oregon, but Portland city employment is covered.
5. Law enforcement agencies.
6. The criminal justice system.
7. When a law/regulation requires the employer to consider an applicant's criminal history.

There is an additional exemption for volunteers.

Enforcement: by administrative action – no private right to sue is included.

Law was effective July 1, 2016.

The City is to create its own hiring matrix that will match certain disqualifying offenses for particular jobs. This will not be an exclusive list. Rather it appears to be an attempt to provide relief to employers regarding certain offenders. This is unique at this time with Ban the Box laws. The process is quite involved; so it likely will be sometime before the first matrix model is available.

Philadelphia, PA

In December 2015 we provided a short notice that Philadelphia had amended its Ban-the- Box ordinance: Chapter 9-3500 of the Philadelphia Code. These changes became effective on March 14, 2016. The following are bullet points regarding the changes in this ordinance:

- The prior law restricted inquiries into the criminal history of an applicant until after the first interview. The amendment restricts the inquiries further, being moved back to after a conditional job offer has been made.
- Prior law covered employers with 10 or more employees. The new ordinance covers all employers within the city of Philadelphia regardless of size. The ordinance does not further define whether that means the employer's location is within the city limits of Philadelphia or just has employees within the city limits. Most likely it only applies to employers physically located within the city. The law does now exclude domestic servants that work in and about a private home in which the employer resides, as well as continuing the exemption for law enforcement.
- An employer cannot ask whether an applicant is willing to submit to a background check prior to a conditional offer of employment.
- The disclosure notice that criminal records will be sought must contain a statement such as: "consideration of a criminal record will be tailored to the requirements of the job". Thus, the standard disclosure and authorization form normally used by CRAs will not work for Philadelphia employers. If a CRA has furnished disclosure and authorization forms to its clients' it needs to modify those forms or tell them to no longer use them after March 14, 2016 so their Philadelphia clients will be in compliance with this new requirement.
- The ordinance now outlines, much like New York City, what factors must be considered by the employer when assessing the criminal record of the applicant. These are: (a) the nature of the offense; (b) the time that has passed since the offense; (c) the applicant's employment history before

and after the offense and any period of incarceration; (d) the particular duties of the job being sought; (e) any character or employment references provided by the applicant; and (f) any evidence of applicant's rehabilitation since the conviction.

- Employers may only consider convictions or release from confinement within the last seven (7) years. By implication non-conviction information cannot be considered.
- Notice of rejection. The ordinance uses confusing language regarding whether this is intended to be a pre-adverse action or adverse action notice, but it would seem that this is intended to be part of the pre-adverse action notice because the ordinance requires that the applicant be informed that he/she be allowed ten (10) days to provide evidence of inaccuracy of the information or provide an explanation. The notice, like the FCRA, requires a copy of the report be provided to the applicant with the notice.
- Right to sue. The ordinance now permits private lawsuits for the violation of this ordinance if the individual follows the required administrative steps. Violation of the ordinance, a Class III offense, is subject to a fine of up to \$2,000 per violation.
- Posting notice. The Philadelphia Commission on Human Relations will create a notice of rights which each employer must post at their place(s) of employment. A check of the Commission's website indicates that no notice has been posted as of yet. However, note that the ordinance does not become effective until mid-March, so checking with the Commission's website as that date approaches may yield results. Once on the website click on "law and regulations", then click on "Posters" mid-page.
- As always, Ban-the-Box laws apply to employers/end-users. Technically they do not restrict what a CRA can report. However, many employers prefer not to receive information they are prohibited from considering.

Boston, MA

Boston Municipal Code §12-9.3 prohibits discrimination based upon "ex-offender" status. The exception to prohibition of the use of such information is if an employer shows a bona fide occupational qualification that will disqualify a person based upon this criminal record. However, an ex-offender status is limited to the following:

Ex-Offender status shall mean (i) the condition of having been arrested, detained, or accused of any violation of law which no conviction resulted, or (ii) a final conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbing the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or completion of any period of incarceration resulting therefrom, whichever date is later, occurred five (5) or more years prior to the date of the exercise of any right or privilege under this Chapter, unless such person has been convicted of any offense within five (5) years immediately preceding the exercise of any right or privilege under this Chapter.

This municipal ordinance basically tracks the restrictions found MGLA 151B §4(9), however the state statute only relates to the first conviction for drunkenness, simple assault, speeding, affray or disturbance of the peace. This is a slight difference in the language between the ordinance and the state's statute that might make the Boston Ordinance more restrictive.

Dane County (Madison), WI

Employers in Madison have these restrictions pursuant to municipal code §39.03(8).

1. Employer may not require disclosure of an applicant's SSN if disclosure is not required by law.
2. Employer may consider a pending charge if the charge is substantially job related.
3. Employer may consider convictions for felonies or misdemeanors within three (3) years of the disposition, parole, or release from confinement, if the conviction is substantially job related.

4. An employer may consider a criminal record if such affects the bondability of the employee required by state, local, or federal law or regulation, or “previously established business practice of the employer”.
5. Employer may consider a criminal record if it will affect the employees ability to obtain a license or permit to perform the job.
6. Employers engaged in private investigation and installing burglar alarms are exempted from the ordinance.

Additional Restrictions on Use of Credit History:

1. Employer may not use credit information unless it is substantially job related or it is necessary to establish the bondability of an applicant or employee.

Seattle, WA

Effective November 1, 2013, the Seattle City Council extended an existing ban-the box policy on hiring city employees to also include private employees. The ordinance restricts employers from inquiring about an applicant's criminal history until after the employer has identified qualified applicants. Before rejecting an applicant based solely on criminal history information, employers must consider all the circumstances, including mitigating factors such as the type of offense and duration of time since the underlying criminal conduct.

The law affects a new employee working at least 50 percent of the time in Seattle regardless of the employer's location of their employer including those who employees who make business stops in Seattle as well as temporary and seasonal employees. Employees already subject to existing criminal background check processes under state or federal law are not affected.

Cities and Counties with Ban-the-Box Public Employment Laws

Most of the entities on this list have restrictions applicable only on applicants (or vendors) hired by that city or county. Restrictions beyond city or county employees are noted. A number of cities have passed laws similar to aspects of FCRA but do not have a Ban-The-Box are omitted.

If a state has passed a statewide measure, then the cities or counties in that state are not listed below.

State	Jurisdiction	Comments
AL	Birmingham	
AR	Pulaski County	
AZ	Glendale	
AZ	Phoenix	
AZ	Pima County	
AZ	Tempe	
AZ	Tucson	
CA	Alameda County	
CA	Berkeley	
CA	Carson	
CA	Compton	Includes city contractors
CA	East Palo Alto	
CA	Los Angeles	Includes private employers and vendors
CA	Oakland	
CA	Pasadena	
CA	Richmond	Includes city vendors
CA	Sacramento	City Contactors Only if at least 20 employees
CA	San Francisco	Includes private employers and vendors

State	Jurisdiction	Comments
CA	Santa Clara County	
CT	Bridgeport	
CT	Hartford	Includes city vendors
CT	New Haven	Includes city vendors
CT	Norwich	
DE	New Castle County	For non-uniformed
DE	Wilmington	
FL	Broward County	
FL	Clearwater	
FL	Daytona Beach	
FL	Fort Myers	
FL	Gainesville	
FL	Jacksonville	
FL	Miami-Dade County	
FL	Orlando	
FL	Pompano Beach	
FL	Sarasota	
FL	St. Petersburg	
FL	Tallahassee	
FL	Tampa	
GA	Albany	
GA	Atlanta	
GA	Augusta	
GA	Cherokee County	
GA	Columbus	
GA	Fulton County	
GA	Macon-Bibb County	
IN	Indianapolis	Includes city vendors
KS	Johnson County	
KS	Kansas City	
KS	Topeka	
KS	Wichita	
KY	Louisville	Includes city vendors
LA	Baton Rouge	
LA	New Orleans	
MA	Boston	Includes city vendors. Also includes other restrictions on private employers; see above
MA	Cambridge	Includes city vendors
MA	Worcester	Includes city vendors
MD	Baltimore	Includes private employers and vendors
MD	Montgomery County	Includes private employers and vendors
MD	Prince George County	Includes private employers and vendors
MI	Ann Arbor	
MI	Detroit	Includes city vendors
MI	East Lansing	
MI	Genesee County	
MI	Kalamazoo	Includes city vendors
MI	Muskegon County	
MN	Minneapolis	
MN	St. Paul	
MO	Columbia	Includes private employers
MO	St. Louis	

State	Jurisdiction	Comments
Mo	Jackson County	
MO	Kansas City	
NC	Asheville	
NC	Buncombe County	
NC	Carrboro	
NC	Charlotte	
NC	Cumberland County	
NC	Durham City and County	
NC	Mecklenburg	
NC	Spring Lake	
NC	Wake County	
NV	North Las Vegas	
NY	Buffalo	Includes private employers and vendors
NY	Dutchess County	
NY	Ithaca	
NY	Kingston	
NY	Newburgh	
NY	New York City	Includes private employers and vendors
NY	Rochester	Includes private employers and vendors
NY	Syracuse	Includes vendors
NY	Tompkins County	
NY	Ulster County	
NY	Woodstock	
NY	Yonkers	
OH	Alliance	Policy only, not a law
OH	Akron	
OH	Canton	
OH	Cincinnati	
OH	Cleveland	
OH	Cuyahoga County	
OH	Dayton	
OH	Franklin County	
OH	Hamilton County	
OH	Lucas County	
OH	Massillon	
OH	Newark	
OH	Stark County	Administrative Policy regarding felonies
OH	Summit County	
OH	Youngstown	
PA	Allegheny County	
PA	Allentown	
PA	Bethlehem	
PA	Lancaster	
PA	Philadelphia	Includes private employers and vendors
PA	Pittsburgh	Includes city contractors
PA	Reading	
RI	Providence	
SC	York County	
TN	Chattanooga	
TN	Hamilton County	
TN	Memphis	
TN	Nashville	

State	Jurisdiction	Comments
TX	Austin	Includes private employers with at least 15 employees if employer's primary working location is in Austin. Administrative penalties against employers will not be assessed before April 4, 2017.
TX	Dallas	
TX	San Antonio	
TX	Travis County	
VA	Alexandria	
VA	Arlington County	
VA	Blacksburg	
VA	Charlottesville	
VA	Danville	
VA	Fairfax County	
VA	Fredericksburg	
VA	Harrisonburg	
VA	Henry County	
VA	Montgomery County	
VA	Newport News	
VA	Norfolk	
VA	Petersburg	
VA	Portsmouth	
VA	Prince William County	
VA	Richmond	
VA	Roanoke	
VA	Staunton	
VA	Virginia Beach	
WA	Pierce County	
WA	Seattle	Includes private employers
WA	Spokane	
WI	Dane County	Includes other restrictions on private employers
WI	Madison	Includes city contractors
WI	Milwaukee City & County	

Additional Resource Documentation:

The National Employment Law Project (NELP) maintains a free web resource with information and a downloadable document analyzing most of the cities and counties that have "banned the box." The link below is provided for informational purposes only. Note this document's content has not been thoroughly reviewed by the author of the State Rules Register.

See <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>