

“Ban the Box” and FCRA Notification Requirements Are Not the Same

As fragmented “Ban the Box” policies continue to be adopted in hundreds of jurisdictions across the U.S., employers must now be vigilant of the recently developed “Ban the Box” pre-adverse and adverse action notification requirements that are separate and apart from Fair Credit Reporting Act (FCRA) requirements.

Local cities have recently begun to adopt “Ban the Box” policies that go far beyond requiring private employers to remove criminal history questions from employment applications and to delay such inquiries until later in the application process.

Recently, cities such as Philadelphia, New York, San Francisco and Portland, Oregon, have adopted policies that require employers to notify applicants before and/or after an

adverse employment decision is made based in whole or part on criminal history information. These requirements are completely separate from and in addition to any FCRA pre-adverse and adverse action requirements that may apply, and in some instances, go further than the FCRA’s notification requirements.

The following charts and FAQ documents outline the new requirements in these various jurisdictions. Please note that your compliance with the FCRA’s pre-adverse and adverse action requirements does not ensure your compliance with these recent “Ban the Box” pre-adverse and adverse action notification requirements. Please review your policies and procedures to ensure that you are in full compliance with all notification requirements.

PHILADELPHIA, PA effective March 14, 2016	
APPLICABILITY	Any employer within the City of Philadelphia.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	After a conditional offer of employment is made, employers may consider convictions that occurred less than seven years from the date of the inquiry only.
ADDITIONAL PRE-ADVERSE ACTION REQUIREMENTS	None
ADDITIONAL NOTICE/DISCLOSURE REQUIREMENTS	If decision not to hire is based on criminal record, employers must provide applicants with written notice of the employment decision and the fact that it was based on the applicant’s criminal history. The employer must also provide the applicant with a copy of the criminal history report that affected the employer’s decision, and “allow the applicant 10 business days to provide evidence of the inaccuracy of the information or to provide an explanation.”
FULL TEXT OF THE POLICY	Click Here
FAQs	Philadelphia “Ban the Box” FAQs

NEW YORK CITY, NY effective October 27, 2015

APPLICABILITY	Employers with four or more employees, and only for positions in New York City.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	After a conditional offer of employment, the employer is permitted to inquire into an applicant's pending arrest or conviction record.
ADDITIONAL PRE-ADVERSE ACTION REQUIREMENTS	<p>If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the "Fair Chance Process":</p> <ol style="list-style-type: none"> 1) Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history; 2) Provide the applicant with a copy of the Article 23-A analysis using the Commission's Fair Chance Notice; and 3) Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns.
ADDITIONAL NOTICE/DISCLOSURE REQUIREMENTS	After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A analysis. If, after communicating with an applicant, the employer decides not to hire him or her, it must relay that decision to the applicant.
FULL TEXT OF THE POLICY	Click Here
FAQs	New York City "Ban the Box" FAQs

PORTLAND, OR effective July 1, 2016

APPLICABILITY	Any employer with six or more employees who perform a majority of their work within the City of Portland.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	After a conditional offer of employment is made.
ADDITIONAL PRE-ADVERSE ACTION REQUIREMENTS	None
ADDITIONAL NOTICE/DISCLOSURE REQUIREMENTS	If after consideration, an employer chooses to rescind a conditional offer, it is required to notify the applicant in writing and identify the relevant criminal convictions on which the decision is based. This may be as simple as including a print out of the background check, with the relevant convictions highlighted.
FULL TEXT OF THE POLICY	Click Here
FAQs	Portland, Oregon "Ban the Box" FAQs

SAN FRANCISCO, CA effective August 13, 2014	
APPLICABILITY	<p>An employer must comply if:</p> <ol style="list-style-type: none"> 1) it is located or doing business in the city of San Francisco; 2) it employs at least 20 employees (in the city or elsewhere); and 3) the employment (virtually any kind – paid, unpaid, seasonal, temporary, part-time, etc.) is physically located “in whole or substantial part, within” the city.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	After the first live interview or after a conditional offer of employment is made, the employer may consider pending arrests or convictions within the last seven years.
ADDITIONAL PRE-ADVERSE ACTION REQUIREMENTS	<p>Prior to making any criminal record inquiry or conducting a criminal background check, employers must provide a specific notice prescribed by the Office of Labor Standards (Section 4905(b)).</p> <p>Before taking any adverse action against an employee or applicant because of criminal history, an employer must provide the applicant or employee with a copy of the background report (if any) and notify the applicant/employee of the prospective adverse action, explain to the applicant which aspect of his/her unresolved arrest or conviction history is motivating the adverse action and give the applicant/employee at least seven days to respond.</p> <p>If, within seven days, the applicant gives the employer notice (orally or in writing) of evidence of the inaccuracy of the conviction history or provides evidence of rehabilitation or other mitigating factors, the employer must delay the adverse action for a reasonable period and reconsider the prospective adverse action in light of the information provided.</p>
ADDITIONAL NOTICE/DISCLOSURE REQUIREMENTS	If the employer takes an adverse action based on conviction history, the employer must notify the applicant of the final adverse action. While the ordinance does not indicate that the notice must be in writing, employers should provide the notice in writing to show compliance with the ordinance.
FULL TEXT OF THE POLICY	Click Here
FAQs	San Francisco “Ban the Box” FAQs

Current as of January 14, 2016. Subject to change.