

# Local pre-adverse and adverse action notification requirements – is your organization prepared to comply?

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.

States and local jurisdictions 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, Los Angeles, New York, San Francisco and Portland, Oregon, and states such as California, 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. For example, California’s new law requires employers to notify applicants in writing about the disqualifying conviction or

convictions that are the basis for the preliminary decision to take an adverse action.

The chart below outlines the various notification requirements in several of these 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.

**Truescreen is working on a solution to support our clients’ efforts to comply with these local notification requirements that will be available beginning Jan. 1, 2018. While every organization has its own interpretation of the legal requirements in these jurisdictions, Truescreen’s tool will provide clients with the ability to upload documents and letters to be delivered to the applicant as part of the pre-adverse/adverse action process.**

**For additional information on this service, please contact your account manager or sales executive.**

Austin, TX	
LAW/REGULATION	<a href="#">Fair Chance Ordinance</a>
PRE-ADVERSE ACTION REQUIREMENTS	None
ADVERSE ACTION REQUIREMENTS	An employer who takes adverse action against an individual based on the individual’s criminal history must inform the individual in writing that the adverse action was based on the individual’s criminal history.

California	
<b>LAW/REGULATION</b>	<a href="#">Assembly Bill No. 1008</a> The California Fair Employment and Housing Council (FEHC)’s “Consideration of Criminal History in Employment Decisions” Regulation
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	<p>An employer cannot deny an applicant a position solely or in part because of conviction history until the employer performs an individualized assessment. This assessment must justify denying the applicant the position by linking relevant conviction history with specific job duties of the position sought. In particular, the assessment would have to consider:</p> <ul style="list-style-type: none"> <li>• The nature and gravity of the offense and conduct;</li> <li>• The time that has passed since the offense or conduct and completion of the sentence; and</li> <li>• The nature of the job held or sought.</li> </ul> <p>The law provides that the employer “may, but is not required to, commit the results of this individualized assessment to writing.”</p> <p>Once the employer makes a preliminary decision that the applicant’s conviction history is disqualifying, the employer must notify the applicant of this preliminary decision in writing. The employer must:</p> <ul style="list-style-type: none"> <li>• Provide written notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;</li> <li>• Include a copy of the conviction history report, if any;</li> <li>• Provide an explanation that the applicant has the right to respond to the notice within at least five (5) business days, and that the response may include submission of evidence challenging the accuracy of the conviction record, or evidence of rehabilitation or mitigating circumstances or both.</li> </ul>
<b>ADVERSE ACTION REQUIREMENTS</b>	<p>The employer cannot make any final determination based on conviction history during the five (5) business day period. If the applicant timely notifies the employer in writing that he or she is disputing the conviction history and is taking steps to obtain evidence to support this, the employer must provide five (5) additional business days for the applicant to respond to the notice. The employer must also consider any additional evidence or documents the applicant provides in response to the notice before making a final decision.</p> <p>If the employer ultimately decides to take the adverse employment action based on the conviction history, the employer must notify the applicant of this in writing, and include notification of any existing procedure the employer has to challenge the decision, as well as notification of the applicant’s right to file a complaint with the Department of Fair Employment and Housing.</p>

Los Angeles, CA	
<b>LAW/REGULATION</b>	Fair Chance Initiative for Hiring, <a href="#">Ordinance No. 184652</a> (and <a href="#">FAQS</a> )
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	<p>Before an employer can take an “adverse action,” including a withdrawal or cancellation of the employment offer, the employer must first perform “a written assessment that effectively links the specific aspects of the applicant’s criminal history with risks inherent in the duties of the employment position sought by the Applicant.” At a minimum, the employer must consider factors identified by the EEOC and any other factors as may be promulgated by the Department of Public Works.</p> <p>The employer must then provide the applicant with written notification of the proposed adverse action, a copy of the performed written assessment, and any other information supporting the proposed adverse action, and must also provide the applicant with a “Fair Chance Process,” allowing the applicant to provide information regarding the accuracy of the criminal history information, evidence of rehabilitation or other mitigating factors.</p> <p>The employer may not take adverse action or fill the employment position for at least five business days after the applicant has received this notification. If the applicant provides the employer with additional information or documentation, the employer must consider the new information and perform a written reassessment.</p> <p><b>Note: The Department has provided a sample form for the assessment and re-assessment that employers should use. That form is available <a href="#">here</a>.</b></p>
<b>ADVERSE ACTION REQUIREMENTS</b>	<p>If the applicant provides a response to the written assessment, after the employer performs the reassessment of the proposed adverse action, if it decides to take the adverse action against the applicant, then the employer must notify the applicant of the decision and provide that applicant with a copy of the written reassessment.</p> <p><b>Note: The Department has provided a sample form for the assessment and re-assessment that employers should use. That form is available <a href="#">here</a>.</b></p>

Portland, OR	
<b>LAW/REGULATION</b>	<a href="#">Ordinance No. 187459</a> (and <a href="#">Administrative Rules</a> )
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	None
<b>ADVERSE ACTION REQUIREMENTS</b>	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.

New York, NY	
<b>LAW/REGULATION</b>	The Fair Chance Act ( <a href="#">Int. 0318-2014</a> ) (and <a href="#">Enforcement Guidance</a> )
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	<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"> <li>1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant’s criminal history;</li> <li>2. Provide the applicant with a copy of the Article 23-A analysis using the Commission’s Fair Chance Notice; and</li> <li>3. Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer’s concerns.</li> </ol> <p>The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer.</p> <p>Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA’s report on the applicant, provided the consumer report is the only information relied upon.</p>
<b>ADVERSE ACTION REQUIREMENTS</b>	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.

Philadelphia, PA	
<b>LAW/REGULATION</b>	<a href="#">Bill No. 150815</a>
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	None
<b>ADVERSE ACTION REQUIREMENTS</b>	If the decision not to hire is based on a 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.”

San Francisco, CA	
<b>LAW/REGULATION</b>	The Fair Chance Ordinance (“FCO”), <a href="#">No. 17-14</a> (and <a href="#">FAQs</a> )
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	<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)). That notice is available <a href="#">here</a>.</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>
<b>ADVERSE ACTION REQUIREMENTS</b>	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.

Vermont	
<b>LAW/REGULATION</b>	<a href="#">Act 81 of 2015-2016</a>
<b>PRE-ADVERSE ACTION REQUIREMENTS</b>	If an employer is considering taking an adverse employment action based on a criminal record, it must afford the applicant “an opportunity to explain the information and circumstances regarding any convictions, including post-conviction rehabilitation.”
<b>ADVERSE ACTION REQUIREMENTS</b>	None