

### **New York City Joins a Growing Chorus of Cities and States that Believe in Second Chances: What Does the New “Ban the Box” Legislation Mean for NYC Employers?**

The New York City Fair Chance Act (the “Act”) went into effect on October 27. With the Act in place, New York City is one of a growing number of cities and states to implement so-called “ban the box” legislation, which prohibits employers from asking job applicants about their criminal history before extending a conditional offer of employment. The Act applies to employers with four or more employees or independent contractors that work for the employer. It covers virtually all types of employers, making limited exceptions for employers that are required to perform background checks pursuant to applicable law and for a limited number of excluded positions, including police officers.

Under the Act, it is unlawful for employers to ask prospective employees about their criminal records in a written application or during an interview during the job application process. Employers also cannot state that they will perform background checks in advertisements or job postings. It is also unlawful for employers to search publicly available records for the purpose of determining an applicant’s criminal history.

After a conditional offer of employment is extended, an employer may inquire about an applicant’s criminal record. Employers may not ask about arrests that did not lead to convictions, convictions that were sealed, expunged, or reversed on appeal, convictions for violations, infractions, or other petty offenses, convictions that resulted in a youthful offender or juvenile delinquency finding, or convictions that were withdrawn after the completion of a court program.

The Act expands upon the existing New York Correction Law Article 23-A (“Article 23-A”), which has been in effect throughout New York State for nearly 40 years. Article 23-A prohibits employers from unfairly discriminating against job applicants convicted of criminal offenses. Under Article 23-A, employers must consider eight factors when evaluating an employee with a prior conviction. The eight factors that must be considered are available [here](#).

The Act specifically states that employers must continue to perform this analysis. In addition, employers that decide to withdraw a conditional offer of employment after obtaining information about an applicant’s criminal history must provide the applicant with a written copy of their Article 23-A analysis. The New York City Commission on Human Rights [has provided a form](#) that may be used for this analysis. This analysis must state the employer’s reasons for deciding to withdraw the offer of conditional employment. Finally, the employer must keep the position open for three business days so that the applicant can respond to the written Article 23-A analysis.

In order to comply with the law, employers are advised to take the following actions:

- Ensure that all job applications and other forms (including job advertisements) do not state that a background check may be performed and do not inquire about an applicant’s criminal history.
- Ensure that employees conducting interviews do not ask applicants about their criminal history and do not attempt to independently verify an applicant’s criminal history.

- Confirm that you are complying with Article 23-A, and begin utilizing the form that the New York City Commission on Human Rights has provided for the Article 23-A analysis.

In enacting the Act, New York City joins more than 100 cities and counties and nineteen states that have adopted “ban the box” laws. New Jersey, for example, enacted a similar law, the “Opportunity to Compete Act” in 2014. Thus, employers with offices outside of New York City should confirm whether there is a “ban the box” law in their city when hiring new employees for those offices.

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