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# Philadelphia Amendments to Ban-the-Box Become Effective

By Amy C. Lachowicz / Feb 24, 2016

Philadelphia recently amended its "Ban-the-Box" ordinance to significantly increase the protections afforded to job applicants with a prior criminal history. Ban-the-Box, also known as the Fair Criminal Records Screening Standards Ordinance, originally became effective in July 2011. The ordinance was intended to encourage the hiring of "qualified ex-offenders" and to reduce recidivism through the employment of these individuals. Specifically, Ban-the-Box prohibited employers in the City of Philadelphia from asking about criminal convictions during the application process and in the first interview, and from making personnel decisions based on arrests or criminal accusations that did not result in a conviction.

In December 2015, Mayor Nutter signed into law amendments to Ban-the-Box that give significantly more "teeth" to the ordinance and greatly expand its protections. There are several major differences between the original Ban-the-Box and the amended version.

Initially, the number of employers covered by Ban-the-Box has increased dramatically. The prior ordinance applied to Philadelphia employers with ten or more employees. However, the amended ordinance applies to employers with only one or more employees.

Additionally, the amendments make it much more difficult for employers to reject an applicant with a criminal history. First, employers must remove all questions in job applications about criminal convictions. It is no longer sufficient simply to tell an applicant that he or she does not have to answer a question about criminal convictions.

Further, under the prior version of Ban-the-Box, background checks could be conducted at any time after the first interview. Now, background checks may be conducted only after a "conditional offer of employment" has been made, and employers may "look back" at an applicant's criminal history for the prior seven years (as opposed to an unlimited time period).

The term "conditional offer of employment" is another new addition to the Ban-the-Box ordinance. A conditional offer of employment is an offer that can only be withdrawn if an employer subsequently determines that the applicant: (1) has a conviction which could, based on an individualized assessment, reasonably lead an employer to conclude that the applicant would pose an unacceptable risk in the position applied for; or (2) does not meet other legal or physical requirements of the job. The "individualized assessment" includes the analysis of various factors, including the nature of the offense, the time period that has passed since the offense, character and employment references provided by the applicant, and the applicant's employment history before and after the offense.

Further, the amended Ban-the-Box specifically prohibits an employer from rejecting an applicant based on his or her criminal record, unless: (1) that record includes conviction for an offense that bears such relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers; and, (2) exclusion of the applicant is compelled by business necessity. Further, if an employer rejects an applicant based on criminal history, the employer must notify the applicant in writing of the decision and its basis, and provide a copy of the criminal history report. The applicant then has ten days in which to produce evidence as to whether the report is inaccurate, or to provide an explanation.

Perhaps most significantly, there are now additional powers given to Ban-the-Box's enforcing body, the Philadelphia Commission on Human Relations, which include issuing orders to cease and desist, injunctive relief, and awarding compensatory and punitive damages, as well as attorneys' fees. The amendments also create a private cause of action for rejected applicants to sue potential employers in court. Finally, there is a new requirement that employers post a summary of the Ban-the-Box requirements in a form that will be supplied by the Philadelphia Commission on Human Relations.

The new, expanded protections of Ban-the-Box take effect in March 2016. Employers should immediately take the following action to avoid potential litigation:

- Remove all questions in job applications about criminal convictions;
- Conduct background checks only after a "conditional offer of employment" has been made, and restrict those background checks to the past seven years (excluding any period of incarceration);
- In deciding whether to reject an applicant based on criminal history, carefully weigh: (1) the nature of an applicant's criminal offense and related factors, against (2) the job duties of the position at issue, the potential risks to the business and others, and business necessity; and
- Post the notice provided by the Philadelphia Commission on Human Relations on the company website and in a conspicuous physical location that is accessible to all employees.

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