

One Minute Memo®



Ban the Box 2.0: Philadelphia Upgrades Its Fair Criminal Records Screening Standards Ordinance

By Pamela Q. Devata and Robert T. Szyba

On December 15, 2015, Philadelphia passed an upgrade of its “ban the box” law, the Fair Criminal Records Screening Standards Ordinance. In 2011, Philadelphia led the pack by becoming the first U.S. city to pass an ordinance prohibiting both public and private employers from asking about, considering, or sharing information about non-conviction arrests. With the 2015 amendment, Philadelphia is once again at the forefront.

The ordinance, which goes into effect on **March 14, 2016**, contains multiple significant changes to the prior law that expand coverage while creating new requirements and restrictions for employers. As a preliminary matter, all private employers with at least one employee in Philadelphia are now subject to the ordinance, with the exception of employers of in-home domestic services.

Other changes include:

- Employers are prohibited from making “any inquiry” regarding an applicant’s criminal convictions any time from the moment the applicant seeks employment until after a conditional offer of employment is made. Importantly, the ordinance specifically prohibits the use of a form that includes a question regarding criminal convictions, but includes a state-specific carve-out directing the applicant to not answer the question until after a conditional offer is made. In practice, this requirement will likely limit the viability of using one multi-state employment form containing state-specific instructions and will require a separate, Philadelphia-specific form to be used. Additionally, during the application process, the applicant cannot be asked about his or her willingness to submit to a criminal background check.
- During the application process, employers can notify applicants of the intention to perform a criminal background check following a conditional offer of employment, provided that the notice is “concise, accurate, made in good faith, and [states] that any consideration of the background check will be tailored to the requirements of the job.”
- Once a conditional offer is made, the employer can perform a criminal background check. However, the employer can consider only convictions within the preceding 7 years, exclusive of any period of incarceration.

- After obtaining the results of the background check, similar to the EEOC criminal history guidance, the employer must determine whether the conviction is 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 that exclusion of the applicant is compelled by business necessity.” To make this determination, the employer must conduct an “individualized assessment” of:
 1. The nature of the offense;
 2. The time that has passed since the offense;
 3. The applicant’s employment history, both before and after the offense and any period of incarceration;
 4. The particular duties of the job being sought;
 5. Any character or employment references provided by the applicant; and
 6. Any evidence of the applicant’s rehabilitation since the conviction.
- After a criminal background check is performed following the conditional offer of employment, the offer cannot be revoked unless:
 1. The employer performs the individualized assessment and concludes that hiring the applicant would pose “an unacceptable risk in the position applied for”; or
 2. The applicant fails to meet another legal or physical job requirement.
- If a conditional offer is revoked, the employer must provide written notice of its decision and the basis for the decision, along with a copy of the criminal history report. The employer must give the applicant 10 business days to provide any evidence of inaccuracy or to give an explanation. This provision extends what is required already under the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq.
- The amendment also revises the enforcement mechanisms, with the Philadelphia Commission on Human Rights being granted administration and enforcement jurisdiction. Private individuals can bring a claim using a specific procedure:
 1. A person must first report an alleged violation of the ordinance to the Commission within 300 days. The Commission then has 1 year to conclude its investigation or enter into a conciliation agreement, or it must dismiss the case.
 2. Once the Commission dismisses the case, the person has 2 years to sue in court to recover compensatory damages, punitive damages, injunctive relief, attorneys’ fees, costs, and any other relief the court deems appropriate.
- Additionally, employers will now be required to post a conspicuous notice which will be supplied by the Commission, both on the employer’s premises and website. We do not yet have this notice but will send another update when it is available.

In sum, Philadelphia's ordinance is poised to impose new, specific requirements upon virtually all private employers within city limits. These requirements go far beyond the previous law. Any employer with at least one employee in Philadelphia should review its employment forms and application procedures for compliance, and should consider training interviewers on the new requirements.

[Pamela Q. Devata](#) is a partner in Seyfarth's Chicago office, and [Robert T. Szyba](#) is an associate in the firm's New York office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Pamela Q. Devata at pdevata@seyfarth.com, or Robert T. Szyba at rszyba@seyfarth.com.

www.seyfarth.com



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