

New Delaware Law “Encourages” State Vendors to “Ban the Box”

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Delaware’s Governor recently signed a **“ban the box” law to prohibit public employers^[1] from inquiring into or considering the credit or criminal history of a job candidate during the initial application process** (up to and including the first interview), unless otherwise required by state or federal law. Public employers must state this restriction in all “formal solicitations.”^[2]

While the new Delaware law does not specifically cover or define **“vendors doing business with the State,”** it explicitly “encourages” them to adopt policies in accordance with the statute. As such, private employers that seek or hold contracts with the State of Delaware should consider refraining from inquiries into an applicant’s credit or criminal history until after the first interview and, even then, only consider such records in a manner that is job related and consistent with business necessity. Such employers that use third-party vendors to run background checks also should remember to adhere to the Fair Credit Reporting Act before taking any adverse action against applicants or employees based on the results.

Delaware’s new law is just the latest in a series of statutes that have **restricted the use of criminal history in hiring and personnel decisions.** Approximately 11 states and 60 localities have “banned the box” and, although many of these laws only apply to public employers, several local ordinances cover (rather than “encourage”) government contractors in particular, including in Compton (CA), Richmond (CA), Hartford (CT), New Haven (CT), [Indianapolis \(IN\)](#), [Louisville \(KY\)](#), Boston (MA), Cambridge (MA), Worcester, (MA), Detroit (MI), Atlantic City (NJ), New York City (NY), and Pittsburgh (PA). Nine other jurisdictions—Hawaii, Massachusetts, [Minnesota](#), [Rhode Island](#), as well as the Cities of Philadelphia (PA), [Newark \(NJ\)](#), [Buffalo \(NY\)](#), [Seattle \(WA\)](#), and [San Francisco \(CA\)](#)—also have “banned the box” for private employers (either expressly or implicitly covering government contractors).

Moreover, many jurisdictions that have not “banned the box” also have imposed limitations on the types of criminal records that employers (including government contractors) may ask about or otherwise consider. And, ten states—California, Maryland, Connecticut, Hawaii, Illinois, Washington, Oregon, Vermont, [Colorado](#), and [Nevada](#)—and at least two localities—Chicago (IL) and Madison (WI)—also have restricted the use of credit checks for purposes of employment.

[1] The new law covers the State of Delaware and its agencies/political subdivisions, but excludes any state, county or municipal police force, the

Department of Correction, the Department of Justice, the Public Defender's Office, the Courts, or any position where federal or state law requires or expressly permits consideration of an applicant's criminal history.

[2] Although the new Delaware law "bans the box," following the first interview, public employers may ask about or consider an applicant's criminal or credit history. Still, consistent with guidance from the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs, the new Delaware law provides that public employers only may disqualify an applicant based on criminal history when "job related" and "consistent with business necessity." To make this determination, public employers must consider: (i) the nature and gravity of the offense or conduct; (ii) the time that has passed since the offense or conduct and/or the completion of the sentence; and (iii) the nature of the job held or sought.

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