

Ban the Box Update Round Up: Portland, Philadelphia and New Jersey

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The past several weeks have seen a flurry of “ban the box” developments, including:

- The passage of a law in Portland, Oregon banning the box for private employers;
- The passage of amendments expanding the ban the box law in Philadelphia, Pennsylvania; and
- The publication of regulations regarding New Jersey’s ban the box law.

These developments are discussed below.

Portland, Oregon

Portland, Oregon recently passed a [law](#), which will take effect on July 1, 2016, that bans the box for private employers. This law is more expansive than Oregon’s state-level ban the box law (discussed [here](#)), which goes into effect on January 1, 2016. The following are the key provisions of Portland’s law:

- Employee Threshold: The law applies to private employers with at least six employees.
- Timing of Criminal Record Inquire: An employer will not be permitted to inquire about criminal history until after extending a conditional offer of employment. (Oregon’s state law permits inquiry about criminal record at the initial interview stage of the hiring process.)
- Individualized Assessment: After extending a conditional offer, an employer can consider criminal history but must conduct an individualized assessment that takes into account the nature and gravity of the offense, the time that has elapsed since the offense, and the nature of the employment sought.
- Off-Limits Criminal Record Information: The law also prohibits an employer from ever considering a non-pending arrest not leading to conviction, convictions that have been judicially voided or expunged, or charges that have been resolved through the completion of a

diversion or deferral of judgment program for offenses not involving physical harm or attempted physical harm to a person.

- Notification: If an employer rescinds a conditional offer on the basis of an applicant's criminal record, it must notify the applicant in writing of such decision and identify the criminal convictions on which the decision was based.
- Exceptions:
 - These restrictions do not apply:
 - If federal, state or local laws, rules or regulations require consideration of an applicant's criminal history;
 - To employers that are law enforcement agencies or are in the criminal justice system; and
 - To nonemployee volunteers.
 - In addition, an employer can consider criminal history at any point in the application process, and can use Portland's City Criminal History Matrix rather than conducting an individualized assessment (except that an individualized assessment is required for convictions not contained in the matrix), for the following positions:
 - Those involving direct access or the provision of services to children, the elderly, persons with disabilities, persons with a mental illness, or individuals with alcohol or drug dependence or substance abuse disorders;
 - Those that present heightened public safety concerns or a business necessity, as determined by administrative rule; and
 - Those designated by the employer as part of a federal, state or local government program designed to encourage the employment of those with criminal histories.
 - Rulemaking: The law tasks the City Attorney with drafting "rules, procedures and forms" to assist in the implementation of the law and provides that any rules adopted to implement the rule will be subject to a public review process.

Philadelphia, Pennsylvania

On Tuesday, December 15, 2015, Philadelphia mayor Michael Nutter signed [amendments](#) expanding the protections of Philadelphia's ban the box law, which was passed in 2011. The amendments will take effect on March 14, 2016. Key changes include:

- Employee Threshold: The law now will apply to all employers in the City of Philadelphia. (Previously, only employers with at least 10 employees were covered.)
- Timing of Criminal Record Inquiry: An employer now must wait to make any criminal record

inquiries until after extending a conditional offer of employment. (Previously, the restriction applied only until after the first interview.)

- Employment Applications: The law clarifies that a criminal record inquiry cannot be included in an employment application, even if applicants are told they need not answer the question.
- Individualized Analysis: The law now provides that employers only can reject an applicant based on his or her criminal record if such record “includes convictions 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.” Employers must make this determination by conducting an “individualized assessment” that takes into consideration the nature of the offense, the time that has passed since the offense, the applicant’s employment history before and after the offense and any period of incarceration, the particular duties of the job being sought, any character or employment references provided by the applicant and any evidence of the applicant’s rehabilitation since the conviction.
- Older Convictions: Employers only may consider convictions that occurred within the 7 years preceding the date of inquiry (not including any periods of incarceration). (Previously, there was no express limit on considering older convictions.)
- Notice and Opportunity to Respond: The law now provides that if an employer rejects an applicant based in whole or in part on criminal record, the employer must notify the applicant in writing of such decision and its basis and provide the applicant with a copy of the criminal history report. The applicant must be permitted 10 business days to provide evidence of inaccuracy or an explanation. (Previously, there were no express requirements related to notification of a decision or providing an opportunity to respond.)
- Penalties and Private Right of Action: In addition to the fines already available, the law now empowers the Philadelphia Commission on Human Relations (the “Commission”) to order remedies including, but not limited to, requiring an employer to cease and desist its unlawful practices; injunctive or other equitable relief; payment of compensatory damages; payment of punitive damages up to \$2,000 per violation; and payment of reasonable attorneys’ fees. If an individual files a complaint with the Commission within 300 days of the alleged violation and the Commission, within 1 year of such complaint, either concludes that it has not found sufficient evidence of a violation to proceed further with an investigation or has not entered into a conciliation agreement to which the complainant is a party, the Commission will notify the complainant that it is dismissing the case and the complainant shall be entitled, within 2 years of such notice, to bring an action in court. The court can grant any relief it deems appropriate, including compensatory damages, punitive damages, reasonable attorneys’ fees, court costs and such other relief as it may deem appropriate.
- Posting Requirement: An employer must post a summary of the law’s requirements, in a form to be supplied by the Commission, in a conspicuous place on the employer’s website and premises, where applicants and employees will be most likely to notice and read it. (Previously, there was no such requirement.)
- Exemption for Domestic Workers: In addition to the existing exemption for law enforcement agencies and when criminal record inquiries or adverse actions are authorized by other law,

there also is an exemption for employees performing domestic services in the employer's private residence.

New Jersey

As we previously [reported](#), New Jersey's Opportunity to Compete Act ("OTCA"), which banned the box for private employers, went into effect on March 1, 2015. Earlier this month, the New Jersey Department of Labor and Workforce Development (the "Department") adopted regulations regarding the OTCA, which are effective immediately, and also published its response to public comments. (See [N.J.A.C. 12:68](#) and [47 N.J.R. 3034\(a\)](#).) The key takeaways from the regulations and comments are:

- **Employee Threshold**: The OTCA applies to all employers with at least 15 employees, regardless of whether those employees work in New Jersey.
- **Covered Positions**: The OTCA applies to hiring for positions where it is expected that at least 50% of a successful candidate's work hours will be spent performing work functions within New Jersey.
- **Timing of Criminal Record Inquiry**: An employer cannot inquire about an applicant's criminal record until after the first interview. Interview is defined in the regulations as "any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications" and does not include email correspondence. In response to public comments, the Department stated that "if there are multiple interviews scheduled on a given day, once the first of those interviews has concluded, the 'initial employment application process' has concluded and the OTCA's prohibition against making inquiries regarding an applicant's criminal record would no longer apply."
- **Internet Searches**: An employer may not conduct an internet or other public record search concerning an applicant's criminal record before the initial employment application process is complete (e., before the first interview has concluded).
- **Interns and Apprentices**: The law covers apprentices and interns, whether paid or unpaid.
- **Employment Application**: Unlike under the amended Philadelphia law discussed above, employers in New Jersey can use multi-state application forms that include a criminal record inquiry, provided that immediately preceding such question, the application states that "an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer this question."

Employers should update hiring processes and forms to comply with the various new laws coming into effect in 2016.

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