

Increasing Criminal Background Check Requirements Pose Challenges for National Retailers

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Retailers operating in multiple states and communities face growing challenges in complying with (i) the increasing and varying number of state and local “ban the box” laws and (ii) laws limiting employers’ use of applicants’ criminal background information. According to a [May report](#) from the National Employment Law Project, 27 states and more than 150 municipalities and counties now regulate criminal background checks in some form. Expect the numbers to go up. Just this past year, three states—Connecticut, Vermont, and California—expanded existing laws or regulations pertaining to criminal background checks by private employers. Municipalities also continue to enter the fray.

New State Laws/Regulations

- As of January 1, 2017, [Connecticut](#) law prohibits asking about criminal history on job applications and prohibits employers from, among other things, denying employment solely on the basis of “erased records.” Further, pardoned and/or rehabilitated convictions cannot form the sole basis of a discharge.
- Effective July 1, 2017, employers in [Vermont](#) will be prohibited from requesting criminal record information on an initial application. If criminal information is subsequently uncovered by the employer, the applicant must be given an opportunity to respond.
- [California](#) adopted new regulations that govern the use of criminal history in employment decisions and largely follow the [Equal Employment Opportunity Commission’s 2012 Enforcement Guidance](#). The regulations, which become effective July 1, 2017, prohibit employers from considering non-felony convictions for possession of marijuana that are more than two years old and prohibit employers from considering criminal history at all if doing so will result in an adverse impact on individuals within a protected class. The regulations further require employers to notify applicants before taking an adverse action and to provide them a reasonable opportunity to present evidence that the information is factually inaccurate. As of January 1, 2017, California employers are also prohibited from considering juvenile convictions when making a hiring decision.

Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island already prohibit, with limited exceptions, private employers from inquiring about criminal background information in an employment application. In most circumstances, a conditional job offer or first interview of a candidate must be conducted before any such inquiries may be made.

New City Ordinances

Many cities and counties have established their own limitations on pre-employment criminal history inquiries by employers, thereby creating an even more complicated web of compliance requirements for employers. For example:

- **Austin, Texas:** Under a city ordinance passed last year, private employers with at least 15 employees whose primary work location is within the city are prohibited from inquiring about criminal convictions until a conditional offer of employment has been made.
- **Los Angeles, California:** Los Angeles passed an ordinance prohibiting employers from inquiring about job seekers' criminal convictions until a conditional offer of employment has been made. Even then, an employer that wants to rescind an offer after reviewing criminal history information can do so only after engaging in the "Fair Chance Process." The ordinance requires employers to include a notice in all job postings stating that they will consider all qualified applicants regardless of their criminal histories. The ordinance carries significant monetary penalties for non-compliance, which the city will begin imposing on private employers starting July 1, 2017.
- **Portland, Oregon:** In 2016, Portland added private employers to a preexisting city ordinance barring criminal history inquiries until after a conditional job offer has been made.

Currently, Baltimore, Buffalo, Chicago, Columbia (Missouri), the District of Columbia, Montgomery County (Maryland), New York City, Philadelphia, Prince George's County (Maryland), Rochester, San Francisco, and Seattle also have ban-the-box laws that apply to private employers.

Conclusion

As the number of new statutes and ordinances shows, there is an increasing trend towards both the adoption and expansion of laws limiting employers' ability to obtain and use applicants' criminal background information. Generally, ban-the-box ordinances and similar laws are triggered by where the employee works, not necessarily where the employer is headquartered or has stores. The home of a telecommuting employee, for example, will likely be the employee's job location for purposes of ban-the-box and related laws, not the employer's headquarters or brick-and-mortar locations. Employers must, therefore, remain up to date on legislation in not only all the cities where they have retail and warehousing operations but also the locations where remote and field employees are based.

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