

## “BAN THE BOX” LAW TO TAKE EFFECT IN SUFFOLK COUNTY

Insights  
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Suffolk County, New York will soon follow other state and local governments that have enacted “ban the box” legislation focusing on an applicant’s qualifications for a position prior to considering the applicant’s possible conviction history. The Suffolk County legislature recently passed legislation restricting employers from asking applicants about their criminal histories in job applications, effective August 25, 2020.

The intent behind this new legislation is to allow applicants with criminal convictions to have more employment opportunities without the stigma of their prior criminal history. The new law also gives applicants the opportunity to address their criminal history with a prospective employer earlier if they desire and protects the employer’s right to investigate an applicant’s background after an initial job interview. What do employers need to know about this new law?

### WHAT’S REQUIRED UNDER THE “BAN THE BOX” LEGISLATION?

Suffolk County’s “ban the box” legislation applies to employers within Suffolk County who have 15 or more employees. Under the new law, employers will be prohibited from asking questions regarding an applicant’s criminal conviction on any preliminary employment application. An “applicant” is defined broadly to include anyone “considered or who requests to be considered for employment by an employer.” This includes temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency.

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The new law will further prohibit employers from making inquiries regarding an applicant's criminal conviction during the "application process." The application process is defined to cover the time period beginning when an applicant first inquires about a position and ends when an employer has accepted the application.

The new law will also prohibit employers from inquiring about or requiring an applicant to disclose any criminal conviction before the applicant's first job interview. If an employer does not conduct an initial job interview, the employer must inform the applicant whether a criminal background check will be conducted before employment is to begin.

Where an employer is hiring for licensed trades or professions, including interns and apprentices for such licensed positions, the employer may ask the same questions asked by the trade or professional licensing body in accordance with state law.

## **ARE THERE EXCEPTIONS?**

There are a few exceptions to the prohibition on asking applicants about criminal convictions as set forth under the new law. These exceptions include:

- When such questions are authorized by applicable law, and
- When certain convictions or violations are a bar to employment in a position under state or federal law.

The provisions of the new law also do not apply to public or private schools, public or private service providers of services specific to the care or supervision of children, young adults, senior citizens, or the physically or mentally disabled, or to the Suffolk County Police Department, Department of Fire, Rescue, and Emergency Services, or any other employer hiring for "police officer" and "peace officer" positions, as defined by the Criminal Procedure Law.

## **HOW DOES THE NEW LAW INTERACT WITH STATE LAW REGARDING CRIMINAL BACKGROUND CHECKS?**

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The new legislation makes clear that employers in Suffolk County must comply with New York Correction Law Article 23-A when considering criminal history information in relation to an employment decision. Under Article 23-A, an employer may reject the job applicant on the basis of their criminal conviction only if the employer has determined, after conducting an individualized assessment, that the conviction bears a direct relationship to the duties and responsibilities of the position sought, or that hiring the applicant would pose an unreasonable risk to property or to the safety of individuals or the general public.

In making this determination, an employer must assess the impact of the applicant's criminal history on the relevant job by looking at the following: (1) the duties of the position, (2) the bearing of the applicant's conviction history on their ability to do the job, (3) the time elapsed since the conviction, (4) the applicant's age at the time of the offense, (5) the seriousness of the offense, (6) any evidence of rehabilitation provided by the applicant, (7) the employer's legitimate interest to protect property or the public, and (8) the state's policy to encourage the employment of persons with criminal convictions.

## **WHAT ARE THE PENALTIES FOR FAILURE TO COMPLY?**

Individuals aggrieved by a violation of the new law may commence a civil action for injunctive relief, damages, and attorneys' fees, and may also file a complaint with the Human Rights Commission.

## **WHAT SHOULD YOU DO?**

If you operate a business in Suffolk County, you must review your employment applications and remove any questions regarding criminal convictions prior to the August 25, 2020 effective date of this law. You should also train your hiring managers and Human Resources personnel to not ask questions regarding an applicant's criminal conviction until after an initial job interview has been conducted.

We will continue to monitor further developments and provide updates on this issue and other labor and employment issues affecting New York employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have

questions, please contact your Fisher Phillips attorney, or any attorney in our [New York City](#) office.

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