

Local pre-adverse and adverse action notification requirements

– is your organization prepared to comply

As fragmented “Ban the Box” policies continue to be adopted in hundreds of jurisdictions across the U.S., employers must now be vigilant of the recently developed “Ban the Box” pre-adverse and adverse action notification requirements that are separate and apart from Fair Credit Reporting Act (FCRA) requirements.

States and local jurisdictions have recently begun to adopt “Ban the Box” policies that go far beyond requiring private employers to remove criminal history questions from employment applications and to delay such inquiries until later in the application process.

Recently, cities such as Philadelphia, Los Angeles, New York, San Francisco and Portland, Oregon, and states such as California, have adopted policies that require employers to notify applicants before and/or after an adverse employment decision is made based in whole or part on criminal history information. These requirements are completely separate from and in addition to any FCRA pre-adverse and adverse action requirements that may apply, and in some instances, go further than the FCRA’s notification requirements. For example, California’s new law requires employers to notify

applicants in writing about the disqualifying conviction or convictions that are the basis for the preliminary decision to take an adverse action.

The chart below outlines the various notification requirements in several of these jurisdictions. Please note that your compliance with the FCRA’s pre-adverse and adverse action requirements does not ensure your compliance with these recent “Ban the Box” pre-adverse and adverse action notification requirements. Please review your policies and procedures to ensure that you are in full compliance with all notification requirements.

BIG has a solution to support our clients’ efforts to comply with these local notification requirements. While every organization has its own interpretation of the legal requirements in these jurisdictions, BIG’s tool provides clients with the ability to upload documents and letters to be delivered to the applicant as part of the pre-adverse/adverse action process.

For additional information on this service, please contact your account manager or sales executive.

California	
LAW/ REGULATION	Assembly Bill No. 1008 The California Fair Employment and Housing Council (FEHC)’s “Consideration of Criminal History in Employment Decisions” Regulation
COVERED EMPLOYERS	Employer includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, the state or any political or civil subdivision of the state, and cities.

California	
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	In most employment scenarios, employers are unable to ask about criminal records until making a conditional job offer.
PRE-ADVERSE ACTION REQUIREMENTS	<p>An employer cannot deny an applicant a position solely or in part because of conviction history until the employer performs an individualized assessment. This assessment must justify denying the applicant the position by linking relevant conviction history with specific job duties of the position sought. In particular, the assessment would have to consider:</p> <ul style="list-style-type: none"> • The nature and gravity of the offense and conduct; • The time that has passed since the offense or conduct and completion of the sentence; and • The nature of the job held or sought. <p>The law provides that the employer “may, but is not required to, commit the results of this individualized assessment to writing.”</p> <p>Once the employer makes a preliminary decision that the applicant’s conviction history is disqualifying, the employer must notify the applicant of this preliminary decision in writing. The employer must:</p> <ul style="list-style-type: none"> • Provide written notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer; • Include a copy of the conviction history report, if any; • Provide an explanation that the applicant has the right to respond to the notice within at least five (5) business days, and that the response may include submission of evidence challenging the accuracy of the conviction record, or evidence of rehabilitation or mitigating circumstances or both.
ADVERSE ACTION REQUIREMENTS	<p>The employer cannot make any final determination based on conviction history during the five (5) business day period. If the applicant timely notifies the employer in writing that he or she is disputing the conviction history and is taking steps to obtain evidence to support this, the employer must provide five (5) additional business days for the applicant to respond to the notice. The employer must also consider any additional evidence or documents the applicant provides in response to the notice before making a final decision.</p> <p>If the employer ultimately decides to take the adverse employment action based on the conviction history, the employer must notify the applicant of this in writing, and include notification of any existing procedure the employer has to challenge the decision, as well as notification of the applicant’s right to file a complaint with the Department of Fair Employment and Housing.</p>

Illinois	
LAW/ REGULATION	SB 1480 (Signed into law and effective on 3/23/2021)
COVERED EMPLOYERS	<p>Employer includes:</p> <ul style="list-style-type: none"> a. Any person employing one or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation; b. Any person employing one or more employees when a complainant alleges civil rights violation due to unlawful discrimination based upon his or her physical or mental disability unrelated to ability, pregnancy, or sexual harassment; c. The State and any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees; d. Any party to a public contract without regard to the number of employees; e. A joint apprenticeship or training committee without regard to the number of employees. <p>“Employer” does not include any religious corporation, association, educational institution, society, or non-profit nursing institution conducted by and for those who rely upon treatment by prayer through spiritual means in accordance with the tenets of a recognized church or religious denomination with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, society or non-profit nursing institution of its activities.</p>
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	Unless authorized by law, an employer is prohibited from inquiring about an applicant’s conviction record prior to making a job offer to the applicant.

Illinois	
PRE-ADVERSE ACTION REQUIREMENTS	<p>If after considering the mitigating factors set forth under 775 ILCS 5/2-103.1 B, an employer decides that the employee’s conviction record disqualifies the employee, the employer must first notify the individual in writing of the intent to take adverse action.</p> <p>The mitigating factors under 775 ILCS 5/2-103.1 B include:</p> <ul style="list-style-type: none"> • the length of time since the conviction; • the number of convictions that appear on the conviction record; • the nature and severity of the conviction and its relationship to the safety and security of others; • the facts or circumstances surrounding the conviction; • the age of the employee at the time of the conviction; and • evidence of rehabilitation efforts. <p>Notice of disqualification by the employer must include:</p> <ol style="list-style-type: none"> (1) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision and the employer’s reasoning for the disqualification; (2) a copy of the conviction report, if any; and (3) an explanation of the employee’s right to respond to the notice of the employer’s preliminary decision before the decision becomes final. <p>The explanation shall inform the employee that the response may include, but is not limited to, submission of evidence challenging the accuracy of the conviction record that is the basis for the disqualification, or evidence in mitigation, such as rehabilitation. Thereafter, the individual is entitled to a five-business-day waiting period to respond to the notification provided to the employee before the employer may make a final decision.</p>
ADVERSE ACTION REQUIREMENTS	<p>The employer must consider all information submitted by the employee before making a final decision.</p> <p>If the employer wants to take an adverse employment action after receiving the individual’s explanation (if any), the employer must provide a written notice to the individual that provides:</p> <ol style="list-style-type: none"> (1) Notice of the disqualifying conviction or convictions that are the basis for the final decision and the employer’s reasoning for the disqualification; (2) Existing procedures the employer has for the employee to challenge the decision or request reconsideration; and (3) The right to file a Charge of Discrimination with the Illinois Department of Human Rights.

Vermont	
LAW/ REGULATION	Act 81 of 2015-2016
COVERED EMPLOYERS	Any individual, organization, or governmental body including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor thereof, and any common carrier by mail, motor, water, air, or express company doing business in or operating within this State, and any agent of such employer, that has one or more individuals performing services for it within this State.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	<p>An employer may inquire about a prospective employee’s criminal history record during an interview or once the prospective employee has been deemed otherwise qualified for the position.</p> <p>An employer may inquire into criminal history on an initial employee application form only if:</p> <ul style="list-style-type: none"> • The position is one where federal or state law creates a mandatory or presumptive disqualification based on certain convictions OR the employer is required by law not to employ an individual who has been convicted of one or more types of criminal offenses; and • The questions on the form are limited to the types of criminal offenses creating the disqualification or obligation.
PRE-ADVERSE ACTION REQUIREMENTS	If an employer is considering taking an adverse employment action based on a criminal record, it must afford the applicant “an opportunity to explain the information and circumstances regarding any convictions, including post-conviction rehabilitation.”
ADVERSE ACTION REQUIREMENTS	None

CITY POLICIES

San Francisco, California	
LAW/ REGULATION	The Fair Chance Ordinance Amended (“FCO”), (and FAQs)
COVERED EMPLOYERS	<p>An employer includes:</p> <p>any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that</p> <ul style="list-style-type: none"> • is located or doing business in the City, and • employs five or more persons regardless of location, including the owner or owners and management and supervisory employees. <p>“Employer” includes job placement and referral agencies and other employment agencies.</p> <p>“Employer” does not include the City and County of San Francisco, any other local governmental unit, or any unit of the state government or the federal government.</p>
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	<p>Only after a conditional offer of employment is made, the employer may consider pending arrests or convictions within the last seven years.</p>
PRE-ADVERSE ACTION REQUIREMENTS	<p>Prior to making any criminal record inquiry or conducting a criminal background check, employers must provide a specific notice prescribed by the Office of Labor Standards (Section 4905(b)). That notice is available here.</p> <p>Before taking any adverse action against an employee or applicant because of criminal history, an employer must provide the applicant or employee with a copy of the background check report (if any) and notify the applicant/employee of the prospective adverse action, explain to the applicant which aspect of his/her unresolved arrest or conviction history is motivating the adverse action and give the applicant/employee at least seven days to respond.</p> <p>If, within seven days, the applicant gives the employer notice (orally or in writing) of evidence of the inaccuracy of the conviction history or provides evidence of rehabilitation or other mitigating factors, the employer must delay the adverse action for a reasonable period and reconsider the prospective adverse action in light of the information provided.</p>
ADVERSE ACTION REQUIREMENTS	<p>If the employer takes an adverse action based on conviction history, the employer must notify the applicant of the final adverse action. While the ordinance does not indicate that the notice must be in writing, employers should provide the notice in writing to show compliance with the ordinance.</p>

Los Angeles, California	
LAW/ REGULATION	Fair Chance Initiative for Hiring, Ordinance No. 184652 (and FAQS and Rules for Implementation)
COVERED EMPLOYERS	<p>An employer includes:</p> <p>any individual, firm, corporation, partnership, labor organization, group of persons, or association that:</p> <ul style="list-style-type: none"> • is located or doing business in the City and • employs ten or more employees, including the owner or owners and management and supervisory employees. <p>“Employer” includes job placement and referral’ agencies and other employment agencies.</p> <p>“Employer” does not include the City of Los Angeles, any other local governmental unit, or any unit of the state government or the federal government.</p>
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	Only after a conditional offer of employment is made.
PRE-ADVERSE ACTION REQUIREMENTS	<p>Before an employer can take an “adverse action,” including a withdrawal or cancellation of the employment offer, the employer must first perform “a written assessment that effectively links the specific aspects of the applicant’s criminal history with risks inherent in the duties of the employment position sought by the Applicant.” At a minimum, the employer must consider factors identified by the EEOC and any other factors as may be promulgated by the Department of Public Works.</p> <p>The employer must then provide the applicant with written notification of the proposed adverse action, a copy of the performed written assessment, and any other information supporting the proposed adverse action, and must also provide the applicant with a “Fair Chance Process,” allowing the applicant to provide information regarding the accuracy of the criminal history information, evidence of rehabilitation or other mitigating factors.</p> <p>The employer may not take adverse action or fill the employment position for at least five business days after the applicant has received this notification. If the applicant provides the employer with additional information or documentation, the employer must consider the new information and perform a written reassessment.</p> <p>Note: The Department has provided a sample form for the assessment and re-assessment that employers should use. That form is available here.</p>
ADVERSE ACTION REQUIREMENTS	If the applicant provides a response to the written assessment, after the employer performs the reassessment of the proposed adverse action, if it decides to take the adverse action against the applicant, then the employer must notify the applicant of the decision and provide that applicant with a copy of the written reassessment.

New York, New York	
LAW/ REGULATION	The Fair Chance Act (Int. 0318-2014) and Fair Chance Act amendments (Int. 1314-A) (see also Enforcement Guidance)
COVERED EMPLOYERS	Any employer with at least four persons in his or her employ in New York City. Employer also includes any person who employs natural persons as independent contractors to carry out work in furtherance of an employer's business enterprise, who are not themselves employers.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	Only after a conditional offer of employment is made.
PRE-ADVERSE ACTION REQUIREMENTS	<p>If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the “Fair Chance Process”:</p> <ol style="list-style-type: none"> (1) Disclose to the applicant a written copy of any inquiry it conducted into the applicant’s criminal history; (2) Request from the applicant information relating to the relevant fair chance factors; (3) Provide the applicant with a copy of the Article 23-A analysis using the Commission’s Fair Chance Notice. Fair Chance factors should be assessed in this analysis where necessary; and (4) Allow the applicant at least five business days, from receipt of the inquiry and analysis, to respond to the employer’s concerns. <p>The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer. These requirements apply to both applicants and employees.</p> <p>Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA’s report on the applicant, provided the consumer report is the only information relied upon.</p> <p>Note: The Commission has provided a sample form that should be used when conducting an Article 23-A analysis. That form is available here.</p>
ADVERSE ACTION REQUIREMENTS	<p>After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A or fair chance factor analysis. If, after communicating with an applicant, the employer decides not to hire him or her, it must relay that decision to the applicant.</p> <p>Note: The Commission has provided a sample form that should be used when conducting an Article 23-A analysis. That form is available here.</p>

Portland, Oregon	
LAW/ REGULATION	Ordinance No. 187459 (and Administrative Rules)
COVERED EMPLOYERS	<p>Any person or entity who directly or through an agent employs another for a position being performed a majority of the time within the City of Portland but does not include:</p> <ul style="list-style-type: none"> (1) The United States Government; (2) The State of Oregon and any office, department, agency, authority, institution, association, society or other body of the state, including the legislature and the judiciary; (3) Any political subdivision of the State of Oregon or any county, city, district, authority, public corporation or public entity other than the City of Portland; or (4) Employers with fewer than six employees.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	Only after a conditional offer of employment is made.
PRE-ADVERSE ACTION REQUIREMENTS	None
ADVERSE ACTION REQUIREMENTS	If after consideration, an employer chooses to rescind a conditional offer, it is required to notify the applicant in writing and identify the relevant criminal convictions on which the decision is based.

Philadelphia, Pennsylvania	
LAW/ REGULATION	Bill No. 150815 (FAQ may be accessed here)
COVERED EMPLOYERS	Law defines “employer” as any person, company, corporation, labor organization or association which employs [ten or more] any persons within the City of Philadelphia. It includes job placement and referral agencies and other employment agencies.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	After a conditional offer of employment is made, employers may consider convictions that occurred less than seven years from the date of the inquiry only. This requirement does not apply only if the inquiry is specifically authorized or mandated by applicable law.
PRE-ADVERSE ACTION REQUIREMENTS	None
ADVERSE ACTION REQUIREMENTS	If the decision not to hire is based on a criminal record, employers must provide applicants with written notice of the employment decision and the fact that it was based on the applicant’s criminal history. The employer must also provide the applicant with a copy of the criminal history report that affected the employer’s decision, and “allow the applicant 10 business days to provide evidence of the inaccuracy of the information or to provide an explanation.” An employer must conduct an individualized risk assessment for each applicant and cannot automatically exclude an applicant based on the applicant’s criminal history.

Austin, Texas	
LAW/ REGULATION	Fair Chance Ordinance (Guide for Employers)
COVERED EMPLOYERS	<p>An employer must comply if:</p> <ul style="list-style-type: none"> Work is performed primarily within the City of Austin, and The employer has 15 or more employees, and Those employees are employed for 20 weeks or more <p>Employer does not include:</p> <ol style="list-style-type: none"> (1) the United States; (2) a corporation wholly owned by the government of the United States; (3) a bona fide private membership club (other than a labor organization) that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code; (4) the state or a state agency; or (5) a political subdivision of the state.
TIMING OF BACKGROUND CHECK/ PERMISSIBLE CRIMINAL RECORD INQUIRY	Only after a conditional offer of employment is made.
PRE-ADVERSE ACTION REQUIREMENTS	None
ADVERSE ACTION REQUIREMENTS	An employer who takes adverse action against an individual based on the individual's criminal history must inform the individual in writing that the adverse action was based on the individual's criminal history.