

LEGAL WHITEPAPER

# Ban the Box & Fair Chance Laws

Over the past several years, “ban the box” or “fair chance” laws have continued to spread at the local, county and state level. “Ban the box” is the practice of moving the criminal history inquiry to later in the hiring process. However, several jurisdictions have taken a step beyond regulating the timing of the criminal history question to enact comprehensive “fair chance laws”. Employers that have removed the criminal history question from their employment application or hiring process must still be cognizant of these fair chance laws as they impact the adverse action process and may impose additional requirements.

# Ban the Box & Fair Chance Laws



<u>Jurisdiction</u>	<u>Fair Chance Law?</u>
<b>California</b>	
<u>California-Statewide Regulations</u> .....	Yes
<u>California State Law</u> .....	Yes
<u>Los Angeles, CA</u> .....	Yes
<u>San Francisco, CA</u> .....	Yes
<u>Connecticut</u> .....	No
<u>District of Columbia</u> .....	Yes
<u>Guam</u> .....	Yes
<u>Hawaii</u> .....	No
<u>Illinois</u> .....	No
<u>Chicago, IL</u> .....	Yes
<u>Cook County, IL</u> .....	No
<u>Indiana</u> .....	No
<b>Maryland</b>	
<u>Baltimore, MD</u> .....	No
<u>Montgomery County, MD</u> .....	Yes
<u>Prince George’s County, MD</u> .....	Yes
<u>Massachusetts</u> .....	Yes
<u>Michigan</u> .....	No
<u>Minnesota</u> .....	No

Missouri

- Columbia, MO..... No
- Kansas City, MO ..... Yes

New Jersey ..... No

New York

- Buffalo, NY..... No
- New York City, NY..... Yes
- Rochester, NY ..... No
- Suffolk County, NY..... No
- Westchester County..... No

Oregon..... No

- Portland, OR ..... Yes

Pennsylvania

- Philadelphia, PA..... Yes

Rhode Island..... No

Texas

- Austin, TX..... Yes

Vermont..... No

Washington ..... No

- Seattle, WA..... Yes

- Spokane, WA ..... No

Virgin Islands..... No

**Jurisdiction Specific Information**

*Note: The following represents a high-level snapshot of each ordinance or law. Asurint continually reviews this guide for accuracy and completeness, but it may be possible an applicable law is missing or outdated. Consultation with qualified legal counsel is recommended to determine if and how these laws impact your hiring process.*



## California – Statewide Regulations

### Consideration of Criminal History in Employment Decisions Regulations (published by the California Fair Employment & Housing Council)

*Applies to employers with five (5) or more individuals "regularly employed" (meaning individuals are employed for each working day in 20 consecutive calendar weeks whether located in California or not). Note: employees located outside of California are not covered by the Regulations if the wrongful conduct did not occur in California and it was not made by decision makes or participants located in California.*

#### Criminal history question

Regulations do not impact timing of the criminal history question. However, employers must establish criminal conviction information is job-related and consistent with business necessity before they consider taking any adverse action (such as not hiring an applicant, terminating a current employee, etc.). This includes looking at the nature and gravity of the offense, time passed since the offense occurred and the nature of the job held or sought.

If a bright-line disqualification rule is used (i.e., a specific policy stating that a certain conviction history automatically disqualifies all candidates), employers must demonstrate that they distinguished between applicants/employees that do and do not pose an unacceptable level of risk. Any bright-line disqualification rule that considers criminal conviction information that is seven (7) or more years old is subject to a rebuttable presumption that it is not job-related and consistent with business necessity.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers may not consider the following in their decision-making process:

- (1) An arrest or detention that did not result in conviction (Labor Code section 432.7);
- (2) Referral to or participation in a pretrial or post-trial diversion program (Id.);
- (3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) (Id.);
- (4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Id.); and
- (5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

### Adverse Action

If there is no bright-line disqualification rule used, employers must conduct an individualized assessment of the circumstances and qualifications of the applicant before making a hiring decision. This process requires providing notice to the adversely impacted employee or applicant (before adverse action is taken) that they may be screened out because of a criminal conviction.

Further, employers must provide a reasonable opportunity for an individual to demonstrate that the exclusion should not be applied due to the particular circumstances, and must consider whether additional information provided by the individual or otherwise obtained warrants an exception to the exclusion.

Additionally, all covered employers – whether using a bright line disqualification policy or individualized assessments – are required to “give the impacted individual notice of the disqualifying conviction” and a reasonable opportunity to present evidence that the information is factually inaccurate. If the criminal history is factually inaccurate, employers may not consider the conviction information in a hiring or employment decision.

### Less Discriminatory Alternatives

Individuals may still prevail if they can demonstrate that there is a less discriminatory policy or practice that serves the employer’s goals as effectively as the challenged policy or practice such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualified or risk as accurately without significantly increasing the cost or burden on the employer.

### Enforcement

Department of Fair Employment and Housing



## California – Statewide Law

### Assembly Bill 1008; effective Jan. 1, 2018

*Applies to employers with five (5) or more employees.*

#### Criminal history question

Employers may not include on any application, before making a conditional offer, a criminal history question. Additionally, employers may not inquire into or consider the conviction history of an applicant until after a conditional offer.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers cannot:

- Consider, distribute or disseminate information about any of the following while conducting a conviction history background check:
  - Arrest not followed by a conviction (exceptions: paragraph (1) of subdivision (a) and (f) of Section 432.7 of the Labor Code – this includes allowing employers to consider arrests for which the employee or applicant is out on bail or his/her own recognizance pending trial)
  - Referral to or participation in a pretrial or post-trial diversion program
  - Convictions that have been sealed, dismissed, expunged or statutorily eradicated
- Interfere with, restrain or deny the exercise of any right provided under this section.

#### Adverse Action:

Employers that intend to deny an applicant a position of employment in whole or in part on the conviction history must conduct an individualized assessment as to whether the conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. The following must be considered:

- The nature and gravity of the offense or conduct; the time that has passed since the offense or conduct and completion of the sentence, the nature of the job held or sought.
- An employer may, but is not required to, commit the results of this individualized assessment to writing.

Employers must notify the individual in writing if a preliminary decision is made that the conviction history disqualifies the applicant from employment. This notification may, but is not required to, justify or explain the employer's reasoning for making the preliminary decision. The notification must include:

- Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer
- A copy of the conviction history report (if any)
- An explanation of the right to respond to the notice of the preliminary decision before that decision becomes final and the deadline by which to respond. The explanation shall

inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

- The applicant must have at least five (5) business days to respond before making a final decision. If within that five (5) business days the applicant disputes the accuracy of the information and the applicant is taking steps to obtain evidence supporting that assertion, the applicant then has an additional five (5) business days to respond to the notice.
- The employer must consider additional information provided by the applicant before making a final decision.

If a final decision is made, the employer must notify the applicant in writing of all of the following:

- The final denial or disqualification. The employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification.
- Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration.
- The right to file a complaint with the department.

### Enforcement

Department of Fair Employment and Housing.



## Los Angeles, California

### **“Los Angeles Fair Chance Initiative for Hiring”; Rules and Regulations Implementing The Fair Chance Initiative For Hiring (Ban the Box) Ordinance**

*Applies to employers located in or doing business in the City that has at least 10 employees, which includes the owner or owners, and management and supervisory employees. It also includes job placement, referral and employment agencies.*

*“Employee” is defined broadly to include any individual who performs at least two hours of work on average each week within the geographic boundaries of the City and who qualifies as an employee entitled to payment of minimum wage under the California minimum wage law. Average week is determined by the last four complete weeks before the position is advertised. Employee also includes full-time, part-time seasonal or temporary employment positions, independent contractors and employees that telecommute (while living within the City).*

*To determine if a workplace or job site lies within the City limits, you may use Neighborhood Info (<http://neighborhoodinfo.lacity.org/>). Follow the exact instructions of this website. If an address is located within the boundaries of the City and is correctly entered, then the search will locate the address on the map with detailed address information.*

#### **Criminal history question**

Employers cannot inquire into an individual’s criminal history until after extending a conditional offer, or include the criminal history question on an employment application. “Inquire” is defined to include any direct or indirect conduct intended to gather criminal history information from or about an applicant, including, but not limited to, application forms, interviews and criminal history reports.

For temporary help firms, a conditional offer would be considered when an individual is to be placed in a pool of applicants from which the applicant may be sent to temporary positions.

#### **Any additional requirements (i.e., adverse action, posting, etc.)?**

- Employers must state in all job advertisements and solicitations that qualified applications with criminal history will be considered for employment.
- Employers cannot include a statement such as “Criminal background checks must be passed to be considered for a position” on an employment application.
- Employers must post a notice informing individuals of the law’s provisions in a conspicuous place at every workplace, job site or other location within the City under the

employer's control. A copy of the notice must also be sent to each labor union or representative of workers with which they have a collective bargaining agreement or other agreement.

- Employers are prohibited from discharging, reducing the compensation of or otherwise taking action against any employees who complain to the City or who seek to enforce his or her rights under the law.
- Employers must retain all records and documents related to employment applications, written assessments and reassessments for a period of three years following receipt of an individual's employment application.

### Adverse Action:

Employers are prohibited from taking adverse action based on an individual's criminal history unless a written assessment is conducted that "effectively links the specific aspects" of the individual's criminal history "with risks inherent in the duties" of the position sought. At a minimum, employers must consider the factors outlined by the Equal Employment Opportunity Commission: the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct and the nature of the job held or sought.

Following the written assessment, employers may still not take adverse action against an individual until after conducting the "Fair Chance Process". Under the Fair Chance Process, employers must provide the individual with written notification of the potential adverse action, a copy of the written assessment and any other information or documentation that supports the decision. Employers must then wait at least five (5) business days before making a final decision. During this time, the employer cannot fill the position sought by the applicant. If an applicant provides additional information or documentation, employers must take that into consideration and perform a written reassessment of the proposed adverse action. Finally, if adverse action will still be taken, the applicant must be notified and provide a copy of the written reassessment.

### Enforcement

The Department of Public Works, Bureau of Contract Administration, has administrative responsibilities and may issue civil penalties or administrative fines. Individuals also have a private cause of action, but cannot bring a civil action unless the alleged violation has been reported to the Department and the administrative enforcement process has been completed. The civil action must then be brought within one year of the completion of the enforcement process or the issuance of the hearing officer's decision (whichever is later).

The Department has published FAQs, guidelines, the notice and assessment and reassessment form: <https://bca.lacity.org/fair-chance>.



## San Francisco, California

### Fair Chance Ordinance; Amendments effective October 1, 2018

*Applies to employers with 20 or more employees regardless of whether those employees are located in San Francisco or not. The calculation of employees also includes owner or owners, and management and supervisory employees. "Employment" shall mean any occupation, vocation, job, or work, including but not limited to temporary or seasonal work, part-time work, contracted work, contingent work, work on commission, and work through the services of a temporary or other employment agency, or any form of vocational or educational training with or without pay. The physical location of the employment or prospective employment of an individual must be at least eight (8) hours per week within the City.*

*Effective October 1, 2018: The Ordinance will apply to 5 or more employees regardless of whether those employees are located in San Francisco or not. The rest of the current standards (such as how often they need to work within the City) will remain the same.*

#### Criminal history question

Employers may not inquire into or require disclosure of conviction history or unresolved arrests on an employment application. An employer may ask on an employment application for an applicant, potential applicant or employee's written consent for a Background Check so long as the application includes a clear and conspicuous statement that the employer will not itself conduct or obtain from a third party the background check until either after the first live interview with the person or after a conditional offer of employment.

Employers may not inquire into or require disclosure of conviction history or unresolved arrests until after the first live interview (via telephone, videoconferencing, use of technology or in person) or after a conditional offer of employment. Prior to inquiring into conviction history, employers must provide a copy of the Fair Chance Ordinance Notice.

Effective October 1, 2018: Employers may not inquire about, require disclosure of (or conduct a third party background check) or base a hiring decision on a person's conviction history until after a conditional offer of employment.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

- Employers covered by the Fair Chance Ordinance must submit an Employer Annual Reporting Form by April 30th each year for the prior calendar year.
- Employers may not consider the following in a hiring decision:
  - An arrest not leading to a conviction, except for unresolved arrests.
  - Participation in a diversion or deferral of judgment program.

- A conviction that has been dismissed, expunged, otherwise invalidated or inoperative.
- A conviction in the juvenile justice system.
- An offense other than a felony or misdemeanor, such as an infraction.
- A conviction that is more than seven (7) years old (unless the position being considered supervises minors or dependent adults).
- Employers must state in all job solicitations/ads that qualified applicants with arrest and conviction records will be considered for the position in accordance with this ordinance. Suggested language from the Office of Labor Standards Enforcement (OLSE): "Pursuant to the San Francisco Fair Chance Ordinance, we will consider for employment qualified applicants with arrest and conviction records."
- Employers must conspicuously post the Official Fair Chance Ordinance Notice in every workplace/jobsite under the employer's control, and must send a copy of this notice to each labor union or representative of workers with which they have a collective bargaining agreement or other agreement or understanding, that is applicable to employees in San Francisco. The notice must be posted in English, Spanish, Chinese and any language spoken by at least 5 percent of the employees at the workplace, job site or other location at which it is posted.
- Employers must maintain and retain accurate records of employment, application forms and other pertinent data for three (3) years, and allow the OLSE reasonable access to these records for monitoring and compliance purposes.
- Effective Oct. 1, 2018: Employers are prohibited from considering charges that have been decriminalized since the date of conviction. Examples would be marijuana and cannabis offenses. Employers need to evaluate any potentially disqualifying convictions to determine whether the charge has been decriminalized post-conviction.

### Adverse Action:

Employers are required to conduct an individualized assessment considering only directly-related convictions, the time that elapsed since the conviction or unresolved arrest and any evidence of inaccuracy, mitigating factors or rehabilitation.

If an employer intends to take adverse action based on anything in the individual's conviction history, the employer must:

- Provide the individual with a copy of the background check report.
- Notify the items forming the basis for the prospective adverse action.
- Wait seven (7) days before taking a final adverse action and hold the position open during this process.
  - If during that seven (7) day period the individual provides the employer notice (orally or in writing) of any evidence of inaccuracy or evidence of rehabilitation or other mitigating factors, the employer must delay final adverse action for a reasonable period and shall reconsider its decision during that time.

If the employer's decision becomes final, the employer must notify the individual of that decision.

## Enforcement

The Office of Labor Standards Enforcement is authorized to enforce the Fair Chance Ordinance, and may issue warnings/notices to correct and administrative penalties. If the employer does not demonstrate prompt compliance, the OLSE may refer the action to the City Attorney to consider initiating a civil action.

Effective Oct. 1, 2018: There are increased penalties for non-compliance. For example, the existing ordinance did not assess any penalties for the first violation. The amendment now allows for up to a \$500 penalty for the first violation. Penalties are paid to the impacted individual. If multiple people are impacted by the same procedural violation at the same time, the violation will be treated as one violation per each impacted person.



## Connecticut

### Public Act No. 16-83. "An Act Concerning Fair Chance Employment."

*Applies to any employers with one or more employees.*

#### Criminal history question

Prohibits employers from inquiring into whether an applicant has ever been arrested for, charged with or convicted of any crime on an initial employment application. Employers are also prohibited from requiring an employee or prospective employee to disclose the existence of any arrest, criminal charge or conviction which have been erased.

If an employment application form contains any question regarding criminal history, there must be a specific notice, in clear and conspicuous language, that the applicant is not required to disclose particular items of criminal history.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements.

#### Enforcement

The Labor Commissioner of the Connecticut Department of Labor.



## District of Columbia

### “Fair Criminal Record Screening Amendment Act of 2014”

*Applies to any business that employs more than 10 employees in the District of Columbia. Includes temporary or seasonal work, contracted work, contingent work and work through temporary or employment agencies, or any form of vocational or educational training with or without pay where the physical location of employment is in whole or substantial part within the District of Columbia.*

#### Criminal history question

Employers may not inquire into an arrest or criminal accusation that is not currently pending or did not result in a conviction. As for criminal convictions, employers may not inquire or require applicant to disclose criminal convictions until after extending a conditional offer of employment.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers may only withdraw a conditional offer or take an adverse action for a legitimate business reason. The legitimate business reason must be reasonable in light of several specific factors:

1. Specific duties and responsibilities related to the employment sought by the applicant
2. The bearing, if any, of the criminal offense for which the applicant was previously convicted, on his/her fitness or ability to perform the job’s duties or responsibilities
3. Time elapsed since the criminal offense occurred
4. Age of the applicant at the time of the criminal offense
5. Frequency and seriousness of the criminal offense
6. Any information produced by the applicant in regard to his/her rehabilitation and good conduct since the offense occurred.
7. If the applicant believes a conditional offer was terminated or an adverse action was taken on the basis of a criminal conviction, the applicant may request, within 30 days after the termination or adverse action, that the employer provide the applicant within 30 days of receipt of the request:
8. A copy of any and all records procured by the employer in consideration of the applicant, including criminal records, and
9. A notice that advises the applicant of his/her opportunity to file an administrative complaint with the Office of Human Rights.

#### Enforcement

The Office of Human Rights will investigate complaints and award civil penalties if a violation occurs. There is no individual private cause of action available.



## Guam

### Public Law 34-22, "Fair Chances Hiring Process Act"

*Applies to employers with more than fifteen employees in Guam. Includes any type of work for pay including temporary or seasonal work, contracted work, contingent work and work through the services of a temporary or other employment agency. The law was enacted in July 2017, but took effect February 8, 2018.*

#### Criminal history question

Employers may not request a police clearance or court clearance as part of an employment application. Upon a conditional offer, employers may then ask the employee to provide evidence as to any pending criminal cases or criminal history.

At any point in the hiring process, employers may not inquire into or require disclosure of an applicant's arrest record or criminal cases which resulted in dismissal, expungement, sealing or otherwise did not result in a conviction. However, employers can ask about pending criminal cases (and other criminal history) after extending a conditional offer.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

There are no specific adverse action requirements from a process perspective. However, employers may only withdraw a conditional offer for a "legitimate business reason". In making this decision, employers must consider factors such as: (1) the specific duties and responsibilities related to the employment sought/held; (2) the bearing (if any) of the criminal history on the applicant's fitness/ability to perform the position; (3) time elapsed since the criminal history occurred; (4) age of the person at the time of the criminal history; (5) the frequency or severity of the criminal history; and (6) any information provided by the individual in regard to rehabilitation or good conduct.

Additionally, if an applicant's offer is withdrawn or any other adverse action is taken due to the individual's criminal history, the applicant may request the following from the employer: (1) copy of any/all records obtained by the employer in considering the applicant; and (2) a written "statement of denial" which outlines the legitimate business reason and specifically demonstrates consideration of each factor outlined in the law. This must be provided within thirty days of the request. Failure to produce this information creates a rebuttable presumption that no legitimate business reason exists for denying the employment.

The law also specifies that the Guam Police Department and the Superior Court of Guam are prohibited from revealing any information concerning an arrest that did not result in a filed criminal case, or a court case that was dismissed (whether or not it was expunged) to a third party.

### Enforcement

Individuals harmed under this law may file a complaint with the Guam Department of Labor. The Department may issue training requirements, written warnings and financial penalties ranging from \$1,000-\$4,000 per occurrence depending on the size of the organization.



## Hawaii

### Hawaii Revised Statute §378-2; §378-2.5

*Hawaii Revised Statute §378-2 includes "arrest and court record" as a protected class making it an unlawful discriminatory practice for employers to refuse to hire or employ, or otherwise discriminate against an individual based on this or any other protected class. The law applies to any employer with 1 or more employees. Additionally, the law applies to both applicants and current employees.*

#### Criminal history question

Employers may inquire into conviction records after the individual has received a conditional offer of employment that may be withdrawn if the applicant's conviction record bears a rational relationship to the duties and responsibilities of the position. Employers may only consider criminal convictions within a 10 year period, excluding periods of incarceration.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No adverse action impacts. Employers are also prohibited from including any limitations in a job advertisement or publication, or on an employment application, based on any protected class.

#### Enforcement

The Hawaii Civil Rights Commission may investigate claims and order appropriate affirmative action (such as hiring, reinstatement or upgrading employees). There is also a private cause of action for individuals.



## Illinois

### **Job Opportunities for Qualified Applicants Act**

*Applies to employers with 15 or more employees in the current or preceding calendar year, and includes employment agencies.*

#### **Criminal history question**

Employers may not inquire into, consider or require disclosure of criminal history until the applicant has been determined qualified for the position and notified that he/she has been selected for an interview. If there is no interview, the inquiry or consideration of may take place following a conditional offer of employment.

#### **Any additional requirements (i.e., adverse action, posting, etc.)?**

No additional requirements.

#### **Enforcement**

The Illinois Department of Labor is responsible for investigating alleged violations and may impose civil penalties. There is no private cause of action for individuals.



## Chicago, Illinois

### Amended Chapter 2-160 "Human Rights"

*Applies to employers with one or more employees in the current or preceding calendar year with a business facility within the geographic boundaries of the City or that is subject to one or more of the license requirements in Title 4 of the Municipal Code. Does not apply to employers who are subject to the Illinois "Job Opportunities for Qualified Applicants Act" (see Illinois for more information below).*

#### Criminal history question

Employers may not inquire into, consider or require disclosure of an applicant's criminal record or history until after the applicant has been determined qualified for the relevant position and notified he/she has been selected for an interview. If there is no interview, the inquiry must take place after a conditional offer of employment is extended.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers, including those subject to the Illinois "Job Opportunities for Qualified Applicants Act", who make a hiring decision based in whole or in part on the applicant's criminal record, must inform the applicant of that fact at the time they inform the applicant of the hiring decision.

#### Enforcement

The Chicago Commission on Human Relations is responsible for receiving and investigating complaints of violations, and may impose monetary penalties. There is no private cause of action under the law.



## Cook County, Illinois

### Cook County Human Rights Ordinance, Section 42-35

*Applies to all private employers with one or more employees that have a principal place of business within Cook County or does business within Cook County. Employee includes any individual, whether paid or unpaid, engaged in employment or an applicant for employment. Does not apply to employers who are subject to the Illinois "Job Opportunities for Qualified Applicants Act" (see Illinois for more information below).*

#### Criminal history question

Employers may not inquire into, consider or require disclosure of an applicant's criminal record or history until after the applicant has been determined qualified for the position and selected for an interview. If there is no interview, the inquiry must take place after a conditional offer of employment is extended. Employers are permitted to notify the applicant in writing of the specific offenses that will disqualify him/her from employment in a particular position.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No specific adverse action impacts.

#### Enforcement

Cook County Commission on Human Rights will investigate complaints filed under the law. Individuals also have a private cause of action.



## Indiana

### IC 22-2-17 "Use of Criminal History Information in Employment Decisions"

#### Preemption Bill

This Act prohibits any city or "political subdivision" from enacting ban the box laws. Additionally, criminal history information may only be introduced as evidence against an employer in a civil action based on the conduct of the employee/former employee if the nature of the criminal history information bears a direct relationship to the facts of underlying the civil action.

#### Criminal history question

No impact. This legislation was designed to prevent cities/municipalities from enacting ban the box laws.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements.



## Baltimore, Maryland

### Subtitle 15: Fair Criminal-Record Screening Practices

*Applies to employers with 10 or more full-time equivalent employees in the City. Employment means any work for pay and any form of vocational or educational training, with or without pay. It also includes contractual, temporary, seasonal or contingent work and work through services of a temporary or other employment agency.*

#### Criminal history question

Employers may not require applicant to disclose or reveal criminal record information or other criminal accusation, conduct a criminal record check or otherwise make any criminal history inquiry until after a conditional offer of employment has been extended.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements are imposed upon employers. The law does state that it should not be construed to require any employer to hire someone with a criminal record, nor to limit an employer's ability to choose the most qualified and appropriate applicant for the employment opportunity at hand.

#### Enforcement

Individuals may file a complaint with the Baltimore Community Relations Commission. The Commission may award back pay for lost wages, reinstatement, compensatory damages and reasonable attorney's fees. The final decision of the Commission may be reviewed by the Circuit Court for Baltimore City upon petition. Any person who violates the law is guilty of a misdemeanor and, on conviction, is subject to a fine of not more than \$500 or imprisonment for not more than 90 days or both for each offense.



## Montgomery County, Maryland

### Montgomery County Code, Chapter 27, Article XII "Fair Criminal Record Screening Standards"

*Applies to any employers doing business in the County that employs 15 or more persons full-time in the County. Employment includes any work for compensation and any form of vocational or educational training, with or without compensation.*

#### Criminal history question

Employers may not require an applicant to disclose arrest or conviction records on an employment application. Employers may also not inquire into criminal history or conduct a criminal record check until after the conclusion of a first interview. An interview includes any direct contact by the employer with the applicant, whether in person, by telephone or via internet communication. It does not include written correspondence or email, or direct contact made for the purpose of scheduling a discussion.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

If an employer intends to rescind a conditional offer based on an arrest or conviction record, the employer first must: provide the individual with a copy of any criminal record report, notify the individual of the employer's intention to rescind the conditional offer and the items that are the basis for that decision, and delay rescinding the conditional offer for seven (7) days to permit the individual to provide notice of any inaccuracies on the report. Following that process, if the employer decides to rescind the conditional offer based on the arrest or conviction record, the individual must be notified of the decision in writing.

#### Enforcement

Individuals may file a complaint with the Executive Director of the Office of Human Rights.



## Prince George's County, Maryland

### Title 17, the Public Local Laws of Prince George's County, Subtitle 2, Division 12, Subdivision 10, "Fair Criminal Record Screening Standards"; Rules and Regulations

*Applies to employers with 25 or more employees full-time in the County.*

#### Criminal history question

Employers may not require an applicant to disclose criminal history information on an employment application. Employers also may not inquire into criminal history, require criminal history to be disclosed or conduct a criminal record check until after the conclusion of the first interview.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

- Employers that deny employment to applicants based on criminal history must retain up-to-date and complete records of the names, addresses, employment applications, descriptions of position applied for, selection processes, denial or notification letters, race, national origin, gender and age of each applicant so denied for a period of three (3) years.
- Employers may not retaliate against individuals for opposing any violations or filing a complaint.

#### Adverse Action

Employers must conduct an individualized assessment (considering specific offenses that may demonstrate unfitness to perform the duties of the position, the time elapsed since the offense(s) and any evidence of inaccuracies in the record) if making an employment decision based on an individual's arrest or conviction record.

If an employer intends to rescind a conditional offer based on an arrest or conviction record, the employer must:

- Provide the individual with a copy of any criminal record report,
- Notify the individual of the employer's intention to rescind the conditional offer and the items that are the basis for that intention, and
- Delay rescinding the conditional offer for seven (7) days to permit the individual to provide notice of any inaccuracies on the report.

Following that process, if the employer decides to rescind the conditional offer based on the arrest or conviction record, the individual must be notified of the decision in writing.

### Enforcement

The Human Relations Commission is responsible for enforcing the law. There is no private cause of action available to individuals.



## Massachusetts

### Massachusetts General Laws, Chapter 151B, Section 4; CORI Regulations 803 CMR 2.00; Criminal Justice Reform

*Chapter 151B, Section 4 applies to employers with 6 or more employees. The CORI Regulations speak to employer use of "Criminal Offender Record Information" which is defined under the most recent regulations to exclude records obtained from courts. Asurint does not offer a CORI check due to restrictions under the Regulations.*

#### Criminal history question

Under Chapter 151B, Section 4, 9 and 9 1/2: Employers may not inquire into criminal history information on an initial written application form. Employers may also not inquire into an arrest, detention or disposition where no conviction resulted, a first conviction for the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, or any misdemeanor conviction where the date of such conviction or completion of any period of incarceration (whichever is later) occurred five or more years prior to the date of application unless the person was convicted of any offense within five years immediately preceding the application.

#### Effective Oct. 13, 2018

Criminal justice reforms take effect prohibiting employers from considering any misdemeanor convictions that occurred three or more years prior to the date of the employment application unless the person was convicted within the preceding three years. Additionally, employers may not inquire into or request sealed or expunged records.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

803 CMR 2.18 outlines adverse action requirements based on CORI or "other types of criminal history information received from a source other than the DCJIS". It is unclear if that applies to adverse action decisions taken by employers based on county court searches for example. The requirements outlined in the Regulations include:

- a) Comply with applicable federal and state laws and regulations;
- b) Notify the subject in person, by telephone, fax, or electronic or hard copy correspondence of the potential adverse employment action;
- c) Provide a copy of the subject's CORI or criminal history information to the subject;
- d) Identify the source of the criminal history information;
- e) Provide a copy of the requestors CORI Policy, if applicable;
- f) Identify the information in the subject's CORI or criminal history information that is the basis for the potential adverse action;

- g) Provide the subject with the opportunity to dispute the accuracy of the information contained in the CORI or criminal history information;
- h) When CORI is considered as a part of a potential adverse action, provide the subject with a copy of DCJIS information regarding the process for correcting CORI; and
- i) Document all steps taken to comply with 803 CMR 2.18.

Employers should consult with qualified legal counsel to determine if these requirements apply.

### **Enforcement**

The Massachusetts Commission Against Discrimination is responsible for enforcement. If probable cause is found (meaning there is sufficient evidence to support a conclusion unlawful discrimination occurred) then the parties may attempt to resolve the dispute during conciliation. If that fails, the case proceeds to a public hearing.



## Michigan

### Michigan Senate Bill 0353

*Amendment: This bill amends the existing state law "Local Government Labor Regulatory Limitation Act" which limits local governmental bodies from regulating*

*the terms and conditions of employment in the private sector and is effective June 24, 2018.*

#### Criminal History question

No impact. This legislation was designed to prevent cities and counties from passing ban-the-box ordinances for private sector employers. Existing Michigan law does prohibit employers from asking an applicant about a misdemeanor arrest that did not result in a conviction.

#### Any additional requirements (i.e., adverse action, posting, etc.?)

No additional requirements.



## Minnesota

### Minnesota Statutes, Section 364.021

*Applies to employers with one or more employees.*

#### Criminal history question

Employers may not inquire into or consider criminal records/history until after the applicant has been selected for an interview, or has received a conditional offer of employment (if there is no interview).

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements. Employers are not prohibited from notifying applicants that the law or the employer's policy will disqualify an individual with particular criminal history from employment in particular positions.

#### Enforcement

The Minnesota Department of Human Rights is responsible for enforcement and can issue civil penalties. There is no private cause of action.



## Columbia, Missouri

### Article V, "Employment Opportunities for Qualified Applicants"

*Applies to all employers within the city.*

#### Criminal history question

Prohibits employers from inquiring into whether an applicant has ever been arrested for, charged with or convicted of any crime on an employment application and until the applicant has received a conditional offer of employment. Employers are not prohibited from notifying applicants in writing of the specific offenses that will disqualify them from employment in a particular position.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements. Employers are encouraged to not automatically ban applicants with a criminal history. Employers may make final employment-related decisions based on all of the information available to them, including consideration of the frequency, recentness and severity of a criminal record as well as rehabilitation efforts against the duties and responsibilities of the position.

#### Enforcement

The Commission on Human Rights is responsible for enforcement. Any person who violates any provision of the article will be deemed guilty of a misdemeanor and will, upon conviction, be punished by a fine of not more than \$1,000 or imprisonment not exceeding 30 days or both.



## Kansas City, Missouri

### Ordinance 180034

*Applies to employers with six or more employees.*

#### Criminal history question

Employers cannot inquire into criminal history until the individual is determined to be “otherwise qualified for the position” and been interviewed. Employers can ask about criminal history of all applicants that are in a “final selection pool” of candidates for the position.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers cannot base a hiring or promotion decision on an applicant’s criminal history unless the employer can demonstrate the employment-related decision was made after considering factors such as the frequency, recentness and severity of a criminal record, and that the criminal history is “reasonably related” to the duties and responsibilities of the position.

“Criminal history” includes convictions, plea of guilty/no contest, record of arrests not followed by a valid conviction, annulled or expunged convictions, etc.

#### Enforcement

The Ordinance amends the Kansas City Human Relations Act which is enforced by the Kansas City Human Relations Department. Penalties for violations of the Act include: civil penalties, back pay, actual damages and reinstatement.



## New Jersey

### **Opportunity to Compete Act; The Opportunity to Compete Act Rules; SB 3306**

*Applies to employers with 15 or more employees over 20 calendar weeks that does business, employs individuals or takes applications within the State. The definition of employee excludes independent contractors, but includes interns and apprentices. Employment includes temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency. The physical location of the prospective employment must be in whole or substantial part within the State for the Act to apply to that individual (meaning at least 50 percent of the individual's work hours take place in New Jersey); however, all employees – whether they work inside or outside of New Jersey – contribute to the employer's total employee count.*

#### **Criminal history question**

Employers may not inquire into or require disclosure of criminal history during the initial employment application process. The initial employment application process means the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview, whether in person or by any other means of an applicant for employment.

SB 3306 amended New Jersey's ban the box law to prohibit employers from inquiring into expunged criminal records on the initial employment application, or during the initial employment application process.

#### **Any additional requirements (i.e., adverse action, posting, etc.)?**

There are no adverse action requirements; however, employers also may not publish job advertisements that state candidates with arrest or conviction records will not be considered for employment.

Note, the New Jersey state law contained language pre-empting any local laws which included Newark, New Jersey's former ban the box law.

#### **Enforcement**

The Department of Labor and Workforce Development is responsible for enforcement and may issue civil penalties. There is no private cause of action.



## Buffalo, New York

### Chapter 154, Article V, “Fair Employment Screening”

*Applies to employers with 15 or more employees located within the City. Employment includes an occupation, vocation, job, work for pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency; or any form of vocational or educational training with or without pay.*

#### Criminal history question

Employers may not make any inquiry, or require any person to disclose or reveal any criminal conviction information during the application process, or before a first interview. The application process begins when the applicant inquires into employment and ends when an employer accepts employment application. If an employer does not conduct an interview, the employer must inform the applicant if a criminal background check will be conducted before employment begins.

#### Any additional requirements (i.e., adverse action, posting, etc.)? No additional requirements.

Enforcement: There is a private cause of action under this law. Additionally, individuals may file complaints with the Commission on Citizens' Rights and Community Relations. If the Commission determines there is probably cause of a discriminatory practice, the Director of the Commission may request the Corporation Counsel to commence an action against the accused party, in a court of competent jurisdiction, seeking the imposition of penalties.



## New York City, New York

### Fair Chance Act; Additional Rules Issued by the NYC Commission on Human Rights

*Applies to employers with four (4) or more employees. Individuals employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as employees. The Act applies to job applicants and employees equally.*

#### Criminal history question

Employers may not inquire into pending arrest information or criminal conviction records until after extending a conditional offer of employment. Employers also may not conduct a search of publicly available records or obtain a criminal background check until the conditional offer is extended. Additionally, employers cannot take into account any inadvertently disclosed or discovered criminal history information until an offer is extended.

For temporary help firms, a conditional offer is an offer to place an individual in the firm's labor pool. Temporary help firms may only consider the minimum skill requirements and basic qualifications necessary for placement in the labor pool, and cannot aid or abet an employer's discriminatory hiring practices.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Under the Rules, there are several per se violations employers can commit which means that even if no adverse employment decision was made, simply doing any one of the following can lead to liability:

- Including any solicitation, advertisement, policy or publication any limitation or specification regarding criminal history. This includes, but is not limited to, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."
- Using employment applications that require applicants to grant permission to conduct a background check or provide information regarding criminal history prior to a conditional offer.
- Making any statement or inquiry relating to the applicant's pending arrest or criminal conviction before a conditional offer.
- Using within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability.
- Failing to comply with the requirements of section 8-107(11-a) of the Human Rights Law, when they are applicable: (1) to provide the applicant a written copy of any inquiry an

employer conducted into the applicant's criminal history; (2) to share with the applicant a written copy of the employer's Article 23-A analysis; or (3) to hold the prospective position open for at least three business days from the date of an applicant's receipt of both the inquiry and analysis.

- Requiring applicants or employees to disclose an arrest that, at the time disclosure is required, has resulted in a non-conviction (means any arrest or criminal accusation not currently pending that was terminated in favor of the individual, adjudicated as a youthful offender, is a non-criminal offense that has been sealed or is a sealed criminal conviction).

### Adverse Action

If considering taking adverse action based on an individual's criminal history, the employer must first conduct a New York Article 23-A analysis which includes: consideration of specific factors (such as the duties/responsibilities of the position, bearing of conviction on ability to perform, interest in protecting workplace and safety, etc.) and an analysis if there is a direct relationship between the criminal conviction history and the position or if there would be an unreasonable risk to the public or safety. If there is no direct relationship or unreasonable risk, the employer must proceed with hiring the individual. If there is a direct relationship or unreasonable risk, the employer must then conduct the Fair Chance Process.

Under the Fair Chance Process, employers must:

- 1) Provide a written copy of the inquiry, a written copy of the Article 23-A analysis and the Fair Chance Act Notice to the individual;
  - a) Note: The Commission provides a sample Fair Chance Notice. Employers may adopt the form to their preferred form provided the material substance does not change.
- 2) Provide a "reasonable" time period to respond to concerns (during which time another person cannot be permanently placed in the position); and
- 3) Consider additional information provided by the individual and whether that changes the Article 23-A analysis

If a final decision is made, the employer must notify the individual in writing.

Employers cannot withdraw a conditional offer if the individual proves the report information was inaccurate or was a non-conviction. If the individual demonstrates that the actual criminal history is different than what was originally reported, the employers must re-do the Article 23-A analysis and the Fair Chance Process.

### Enforcement

The New York City Commission on Human Rights is responsible for enforcement. An early resolution process was created by the Rules for per se violations; however, this process is only available for employers with 50 or less employees.

There is also a rebuttable presumption under the Rules than an employer was motivated by an applicant's criminal history if it revokes a conditional offer of employment without following the Fair Chance Process.



## Rochester, New York

### Chapter 63, Article II of the City of Rochester Municipal Code

*Applies to employers with four (4) or more employees and includes temporary, job placement, referral or other employment agencies. For the law to apply, the position being filled must be performed primarily within the city.*

#### Criminal history question

Employers may not inquire into or require disclosure of prior criminal convictions during the initial application process. The “application process” begins when the applicant inquires about the employment sought and ends when an employer has conducted an initial employment interview or made a conditional offer of employment. An interview is defined as: “Any direct contact by the employer with the applicant, whether in person or by telephone, to discuss the employment being sought or the applicant's qualifications.”

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No adverse action requirements. However, if an employer does not conduct an interview, that employer must inform the applicant whether a criminal background check will be conducted before employment is to begin.

Additionally, the law requires employers to comply with Article 23-A of the New York State Correction Law and the Fair Credit Reporting Act, and does not limit an employer's authority to withdraw conditional offers of employment for any lawful reason, including the determination that the candidate has a conviction that bears a direct relationship to the duties and responsibilities of the position sought, or that hiring would pose an unreasonable risk to property or to the safety of individuals or the general public.

#### Enforcement

The Corporation Counsel may bring an action to restrain or prevent any violation of the law. Individuals are also afforded a private cause of action, but must bring a claim within one year after the alleged violation.



## Suffolk County, New York

### Suffolk County, NY Code § 528-7(A)(12)

*Applies to employers with four (4) or more employees.*

#### Criminal history question

Unless specifically required or permitted by statute, employers may not inquire into (whether on an employment application or otherwise), take adverse action based on or require an individual to divulge any information pertaining to any arrest or criminal accusation that is not pending. The prohibition also includes convictions that are sealed.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers must comply with Article 23-A of the New York State Correction Law. As outlined in the county-level legislation, this means employers may not deny employment to an individual by reason of them being convicted of one or more criminal offenses, or by reason of a finding or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses (if either leads to a violation of Article 23-A).

There is a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any individual, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if the employer can demonstrate their compliance with the NY Correction Law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.

#### Enforcement

Individuals may file a claim with the Suffolk County Human Rights Commission.



## Oregon

### **659A.360 Restricting criminal conviction inquiries**

*Applies to all private employers within the State, but does not impact volunteers.*

#### **Criminal history question**

Employers are prohibited from excluding an individual from an initial interview based solely on the existence of a past criminal conviction. Employers may not require individuals to disclose criminal conviction information on an employment application, prior to an initial interview or, if no interview is conducted, prior to extending a conditional offer of employment.

#### **Any additional requirements (i.e., adverse action, posting, etc.)?**

No additional requirements. The law makes clear that employers are not prohibited from considering an applicant's criminal conviction history when making a hiring decision.

#### **Enforcement**

The Oregon Bureau of Labor and Industries is responsible for enforcement.



## Portland, Oregon

### Chapter 23.10 Removing Barriers to Employment; Administrative Rules

*Applies to private employers within the city that have six (6) or more employees where the position is being performed a majority of the time within the City. Employment includes full-time, part-time, temporary or seasonal positions. The law does not apply to volunteer positions.*

#### Criminal history question

Employers may not inquire into a candidate's criminal history or perform a criminal background check until after a conditional offer of employment has been extended. If the applicant voluntarily discloses criminal history before a conditional offer, the employer must disregard that information and take reasonable steps to prevent further disclosure or dissemination of that information.

Employers may rescind a conditional offer based upon a candidate's criminal history only after determining "in good faith" that the offense/conduct was "job-related" and "consistent with business necessity".

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers may not consider the following when making hiring decisions:

1. An arrest that did not lead to a conviction, except for unresolved or pending charges;
2. Convictions that have been judicially voided or expunged; or
3. Charges that were resolved through completion of a diversion or deferral of judgment program for offenses not involving physical harm or attempted physical harm.

#### Adverse Action:

Employers must conduct an individualized assessment that analyzes: the nature and gravity of the criminal offense, the time that has elapsed since the offense took place and the nature of the employment held/sought. If the employer wishes to rescind the conditional offer following this analysis, it must first provide the candidate written notice identifying the relevant criminal convictions that are the basis for the decision.

Employers may use the form attached to the Administrative Rules as Exhibit B to notify the applicant of the rescission of a conditional offer.

#### Enforcement:

The City may contract with the Oregon's Bureau of Labor and Industries to enforce the law. There is no private cause of action.



## Philadelphia, Pennsylvania

### Chapter 9-3500. Fair Criminal Record Screening Standards

*Applies to all employers with at least one employee in the City. Employment includes any occupation, vocation, job, work for pay or employment, including temporary or seasonal work, contracted work, contingent work and worth through the services of a temporary or other employment agency.*

#### Criminal history question

Employers may not inquire into an individual's criminal history until after a conditional offer of employment has been extended. The inclusion of a criminal history inquiry on an employment application is "unlawful" whether or not the applicants are told they need not answer the question. Employers may also not ask any question before a conditional offer regarding the applicant's willingness to consent to a background check.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

- It is an "unlawful discriminatory practice" for a private employer to knowingly and intentionally make any inquiry about or take any adverse action against an individual on the basis of any arrest or criminal accusation that is not pending and did not result in a conviction.
- Employers may only consider an individual's conviction record for a period of seven (7) years from the date of the inquiry. Periods of incarceration are not included in the calculation of the seven (7) year period.
- Employers must post a summary of the law's requirements in a conspicuous place on the employer's website and premises.
- Employers may not automatically exclude individuals based on criminal conviction history.

#### Adverse Action:

Before denying an applicant employment based on a criminal record, the employer must conduct an individualized assessment, taking into account: the nature of the offense, time passed since the offense, individual's employment history before and after the offense in addition to any period of incarceration, the particular duties of the job position, character and/or employment references provided by the individual, the individual's employment history before and after the offense and any period of incarceration, and any evidence of the individual's rehabilitation.

Following the individualized assessment, if an employer chooses to take adverse action, it must notify the individual in writing including the basis for that decision and provide a copy of the criminal history report. The employer must then allow the individual 10 business days to provide evidence of an inaccuracy or a further explanation.

### Enforcement

The Philadelphia Commission on Human Relations is responsible for enforcing the law. Each violation of the law constitutes a “Class III” offense and is subject to fines. There is also a private cause of action for individuals; however, they must first report the violation to the Commission within 300 calendar days of the unlawful act and the Commission must conclude that it has not found sufficient evidence of a violation to proceed further with an investigation.



## Rhode Island

### General Laws, Chapter 28-5, Section 28-5-7

*Applies to employers with four (4) or more employees.*

#### Criminal history question

Employers may not include a criminal history question on an employment application. Employers may ask about criminal convictions at the first interview or thereafter, in accordance with all applicable state and federal laws.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

No additional requirements.

#### Enforcement

The Commission for Human Rights is responsible for enforcement.



## Austin, Texas

### § 4-15-4 – Fair Chance Hiring Practices

*Applies to employers that have at least 15 individuals whose primary work location is within Austin for each working day in 20 or more calendar weeks in the current or preceding calendar year. Includes full-time work, part-time work, temporary or seasonal work, contract work, casual or contingent work, work through the services of a temporary or other employment agency, and participation in a vocational, apprenticeship or educational training program.*

#### Criminal history question

Employers may not require applicant to disclose or reveal criminal record information or other criminal accusation, conduct a criminal record check or otherwise make any criminal history inquiry until after a conditional offer of employment has been extended.

From a staffing firm perspective, the law allows a staffing agency to solicit criminal history information about an individual and make an individualized assessment of an individual's criminal history when the staffing agency has identified a job to which the individual will be employed or placed in a staffing pool.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Employers may not publish any information about a job that states or implies that an individual's criminal history automatically disqualifies the individual from consideration for the job.

Employers may not take adverse action against an individual unless the employer has determined the individual is unsuitable for the job based on an individualized assessment, taking into account the nature and gravity of the offenses, the length of time since the offense and completion of the sentence, and the nature and duties of the job for which the individual has applied. Employers that take adverse action against an individual based on criminal history, must inform the individual in writing that the decision was based on the individual's criminal history.

#### Enforcement

The Equal Employment/Fair Housing Office is responsible for receiving and investigating complaints and enforcing the law. The Office may impose civil penalties for non-compliance. There is no private cause of action under this law.



## Vermont

### **Title 21: Labor, Chapter 5: Employment Practices, Subchapter 6: Fair Employment Practices, § 495j. Criminal history records; employment applications**

*Applies to employers with one or more employees performing services in the State.*

#### **Criminal history question**

Employers may not inquire into an individual's criminal history on an initial employment application; however, an employer may ask about criminal history in an interview or once the prospective employee has been deemed otherwise qualified for the position.

If the employer inquires into an individual's criminal history record, the prospective employee, if still eligible for the position under applicable federal or State law, must be afforded an opportunity to explain the information and the circumstances regarding any convictions, including post-conviction rehabilitation.

#### **Any additional requirements (i.e., adverse action, posting, etc.)?**

No additional requirements.

#### **Enforcement**

The Attorney General or a State's Attorney may enforce the provisions of the law. Employers may be assessed a civil penalty per violation.



## Washington

### House Bill 1298, "Washington Fair Chance Act"

*Applies to employers with one or more employees performing services in the State. Law takes effect June 6, 2018.*

#### Criminal history question

Employers may not inquire into criminal history, either verbally or in writing, until the applicant is determined to be "otherwise qualified." The law defines "otherwise qualified" as: "the applicant meets the basic criteria for the position as set out in the advertisement or job description without consideration of a criminal record." Employers may also not ask about criminal history on an employment application.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

- Employers may not advertise employment openings in a way that excludes people with criminal records from applying (for example: "no felons" or "no criminal background").
- Employers may not implement any policy or practice that automatically or categorically excludes individuals with a criminal record from consideration prior to an initial determination that the application is otherwise qualified for the position.

#### Enforcement

Washington's Attorney General will enforce the provisions of the law. The law does not allow for a private right of action.



## Seattle, Washington

### **Chapter 14.17, “The Use of Criminal History in Employment Decisions”; Practices for Administering Use of Criminal History in Employment Decisions Under SMC 14.17 (Chapter 80)**

*Applies to employers with one or more employees, and includes full-time, part-time and temporary workers. An employee is covered by the law when the physical location of services performed for the employer is in whole or part (at least 50 percent of the time) within the geographic boundaries of the City.*

*The Rules expand on the definition of “substantial part of services in Seattle” to outline:*

- 1. Employee location. An employee performs a substantial part of his or her services in Seattle if the employee works at least 50 percent of the time in Seattle or if the employer or employee reasonably expects the employee to work at least 50 percent of the time in Seattle.*
- 2. Employer location. The Ordinance applies to employees who perform 50 percent or more of their employment services in Seattle regardless of the location of their employer.*
- 3. Stopping in Seattle. The Ordinance applies to employees who stop in Seattle for work purposes to perform 50 percent or more of their employment services in Seattle.*
- 4. Seasonal employees. The Ordinance applies to seasonal employees who perform 50 percent or more of their employment services in Seattle over the course of employment with a single employer.*
- 5. Temporary employees. The Ordinance applies to temporary employees who perform 50 percent or more of their employment services in Seattle over the course of their temporary employment with a single employer. A temporary worker supplied by a staffing agency or similar entity, absent a contractual agreement stating otherwise, shall be an employee of the staffing agency for all purposes under the Ordinance.*

### **Criminal history question**

Employers may not perform a criminal background check or inquire into criminal history until after completing an initial screening of applications or resumes to eliminate unqualified applicants. An initial screening consists of a review of an applicant’s qualifications to ensure that the applicant possesses the minimum qualifications that are necessary for the job.

**Any additional requirements (i.e., adverse action, posting, etc.)?**

- Employers may not advertise, publicize or implement any policy or practice that automatically or categorically excludes all individuals with any arrest or conviction record from any employment position that will be performed in whole or in substantial part (at least 50 percent of the time) within the City.
- Employers must display a poster in a conspicuous and accessible location where any of their employees work in English and in the primary language of the employee(s) at the particular workplace.
- Employers may not retaliate against individuals for exercising their rights.

**Adverse Action:**

Employers may not take adverse action based solely on an individual's arrest record; however, employers may inquire into the conduct related to the arrest record and may then take adverse action based solely on the conduct if there is a legitimate business reason. Employers may not take adverse action based solely on an individual's criminal conviction record or pending charges unless there is a legitimate business reason to do so.

A "legitimate business reason" shall exist where, based on information known to the employer at the time the employment decision is made, the employer believes in good faith that the nature of the criminal conduct underlying the conviction or the pending criminal charge either:

- Will have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held, or
- Will harm or cause injury to people, property, business reputation or business assets, and the employer has considered the following factors:
  - the seriousness of the underlying criminal conviction or pending criminal charge;
  - the number and types of convictions or pending criminal charges;
  - the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration;
  - any verifiable information related to the individual's rehabilitation or good conduct, provided by the individual;
  - the specific duties and responsibilities of the position sought or held; and
  - the place and manner in which the position will be performed.

Before taking adverse action, employers must:

- Identify the record or information on which they are relying and provide the individual with an opportunity to explain or correct the information. This notice should be provided in a "reasonable manner most likely to reach the applicant or employee in the shortest amount of time."
- Employers must hold the position open for a minimum of two (2) business days.
  - After two (2) business days employers may – but are not required – to hold open the position until the pending charge is resolved or until questions about an individual's criminal convictions or conduct relating to an arrest are resolved.

**Enforcement**

The Office of Labor Standards is responsible for enforcement.



## Spokane, Washington

### Spokane Muni. Code §09.02.050.

*Applies to any employer that is acting directly or indirectly within the city limits of Spokane, and is hiring a person to perform a majority of his/her services within the City. The definition includes temporary staffing agencies, and job placement, referral and employment agencies.*

#### Criminal history question

Employers may not inquire into criminal history on an employment application. Additionally, employers may not inquire orally or in writing, or receive information through a criminal background check about an individual's arrest or conviction record until after there is an in-person or video interview, or until after the individual received a conditional offer of employment.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

- Employers may not advertise job openings in a way that excludes people with arrest or conviction records from applying, such as using language as "no felons", "no criminal background", etc.
- Employers may not disqualify an individual from applicable employment solely because of a prior arrest or conviction unless the conviction is related to significant duties of the job or disqualification is otherwise allowed under this law.
- Employers may not reject or disqualify an individual for failing to disclose a criminal record prior to initially determining if the individual is otherwise qualified for the position.

The law specifically states that it should not be interpreted as protecting criminal conduct or interpreted as imposing an obligation on the part of an employer to provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant with an arrest or conviction record, or who is facing pending criminal charges. The law also states that nothing should be construed as prohibiting an employer from inquiring into or obtaining criminal background information, and considering such information in a hiring decision provided they do so at the appropriate time.

#### Enforcement

Violation of the law is a Class 1 Civil Infraction which can result in a \$261 fine for each occurrence.



## Virgin Islands

### Bill No. 32-0230

*Applies to all private employers with limited exceptions accounted for in the law. The law is now in effect following the Governor's signature on November 10, 2018.*

#### Criminal history question

Employers may not ask any applicant to disclose, through a written form or orally, information concerning: (i) an arrest or detention that did not result in a conviction, (ii) information concerning referral to or participation in any pretrial or post trial diversion programs, or (iii) any conviction that has been judicially dismissed or ordered sealed. Employers may inquire into arrests for which the employee or applicant is out on bail.

Employers may also not seek out, or use in an employment decision, any of the information outlined above.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

There are no adverse action requirements imposed by this law.

#### Enforcement

Individuals may bring an action to recover actual damages or \$200 – whichever is greater – plus costs and reasonable attorney's fees as a civil penalty. Individuals who violate the law may also be subject to criminal penalties including imprisonment not to exceed six (6) months, a fine not to exceed \$500, or both.



## Westchester County, New York

### Local Law 10913

*Applies to all private employers with limited exceptions accounted for in the law. The law takes effect 90 days after County Executive*

*George Latimer signs the legislation.*

#### Criminal history question

Employers may not include criminal convictions or arrests on employment applications. Employers must also ensure their job advertisements do not contain any specifications or limitations regarding criminal history. Employers may ask about a candidate's criminal history after an employment application is submitted.

#### Any additional requirements (i.e., adverse action, posting, etc.)?

Before taking any adverse employment action (such as not hiring an individual) based on the candidate's criminal history, employers must comply with New York's Article 23-A correction law which includes looking at several specific factors in relation to the criminal conviction. Employers must provide this analysis in writing along with the reasons for their decision to candidates upon request.

#### Enforcement

The Westchester County Human Rights Commission is responsible for enforcement.

*The preceding is offered as general educational information and does not constitute legal advice. Consultation with qualified legal counsel is recommended for all employment law matters.*

# About Asurint

Asurint is revolutionizing your screening process. Utilizing technology-based screening solutions, Asurint yields turnaround times **24-36 hours faster** than competitors, **improves the accuracy** of search results and provides **automated compliance** practices. Asurint is continuously innovating and developing solutions to optimize your background screen process.

[www.asurint.com](http://www.asurint.com)