

# ANDERSON KILL EMPLOYMENT LAW INSIDER

# ALERT

## New York City Enacts 'Ban the Box' Law — Barring Early Criminal Checks on Job Applicants

By Bennett Pine

Joining a growing trend, on June 29, 2015, New York City Mayor Bill de Blasio signed the Fair Chance Act, a species of so-called “ban the box” laws, which bars New York City employers from asking job applicants about their criminal history at the early stages of the employment process. Removing such questions (e.g., “Have you ever been convicted of a crime?”) at the job application or initial job interview stage is part of a growing national movement to ban the box regarding criminal conviction inquiries.

### Purpose and Details

The New York City Council found that

- the use of criminal background checks by employers has become more prevalent in recent years as part of the hiring process;
- individuals with criminal histories represent a large proportion of job seekers;
- such background checks act as a significant barrier to permitting such persons to enter, re-enter, contribute and become productive members of the workforce; and
- striking a fair balance will improve the economic viability, health and security of the state.

**Who Is Covered:** The law covers both private and public sector employers who employ at least four employees and who do business, employ persons or take employment applications within New York City; and includes job placement, referral and employment agencies. There are exceptions for law enforcement, police and peace officers, corrections, judiciary and other positions where a criminal history background check is required by law, rule or regulation.

ANDERSON KILL  
1251 Avenue of the Americas  
New York, NY 10020  
(212) 278-1000 Fax: (212) 278-1733

ANDERSON KILL  
864 East Santa Clara Street  
Ventura, CA 93001  
(805) 288-1300 Fax: (805) 288-1301

ANDERSON KILL  
1600 Market Street, Suite 2500  
Philadelphia, PA 19103  
(267) 216-2700 Fax: (215) 568-4573

ANDERSON KILL  
1055 Washington Boulevard, Suite 510  
Stamford, CT 06901  
(203) 388-7950 Fax: (203) 388-0750

ANDERSON KILL  
1717 Pennsylvania Avenue, Suite 200  
Washington, DC 20006  
(202) 416-6500 Fax: (202) 416-6555

ANDERSON KILL  
One Gateway Center, Suite 1510  
Newark, NJ 07102  
(973) 642-5858 Fax: (973) 621-6361

ANDERSON KILL  
JP Morgan International Plaza III  
14241 Dallas Parkway, Suite 650  
Dallas, TX 75254  
(972) 728-8753 Fax: (805) 288-1301

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





**who's  
who**

**Bennett Pine** is a shareholder in Anderson Kill's New York and

Newark offices and is chair of the firm's employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.

**[bpine@andersonkill.com](mailto:bpine@andersonkill.com)**

**(212) 278-1288**

**(973) 642-5006**

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### **What Is Prohibited:**

Under the new law, employers are forbidden from:

1. Publishing a job advertisement or posting stating that the employer will not consider applicants who have been arrested or convicted of one or more offenses
2. Requiring a job applicant to complete an employment application that makes any inquiries regarding the applicant's criminal record, or pending arrests
3. Making any oral or written inquiry regarding an applicant's criminal record prior to the time a conditional offer of employment has been made

### **What Is Allowed:**

An employer permissibly may inquire into and consider the criminal history (conviction record or pending arrest) of the applicant either through a background check or directly from the applicant once a conditional offer of employment is made.

### **Procedural Safeguards:**

Once a conditional offer of employment has been made, the Fair Chance Act requires that an employer must follow these steps before withdrawing the job offer or taking other "adverse action":

1. Provide the applicant with a written copy of the background inquiry and report (in a format to be determined)
2. Perform the multifaceted analysis set forth in the New York State Correction Law to determine whether there is a sufficient nexus between the position sought and the conviction so as to justify denying the position to the applicant
3. Provide the applicant with a copy of the correction law analysis and explanation of the employer's decision, including supporting documents (in a format to be determined)
4. Provide the applicant with written notice of the adverse action and a period of time of at least three business days to respond, during which time the employer will hold open the position for the applicant

### **Penalties:**

The Fair Chance Act amends the New York City Human Rights Law by adding the prohibited pre-offer inquiries about an applicant's criminal convictions or pending arrests as unlawful discriminatory practices. Affected applicants or employees may bring claim against employers or employment agencies through administrative complaints with the New York City Commission on Human Rights, the New York State Division of Human Rights or directly in court.

### **Effective Date:**

The law takes effect on October 27, 2015.



### **Growing Trend**

At least six states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island), the District of Columbia, and a number of other cities (including Seattle, San Francisco, Buffalo and Rochester, New York) have similar ban-the-box laws that cover private employers. According to the National Employment Law Project, at least 12 states and 60 cities and counties have such laws applicable to public employment.

### **Recommendation**

New York City employers should be well aware of the new ban-the-box restrictions and should take appropriate steps to ensure that improper inquiries or restrictions regarding an applicant's criminal background are removed from job advertisements, job applications and interviews that take place before a job offer is extended. It is permissible, however, to make such inquiries thereafter provided the safeguards outlined above are followed. Employers have until October 27, 2015, to implement this distinction in their employment application and selection procedures.▲

