

“Ban the Box”: Fair Criminal Record Screening Act

- OHR Guidance No. 16-02-



Purpose

The DC Office of Human Rights (OHR) was established by the Human Rights Act of 1977 to eradicate discrimination, increase equal opportunity, and protect human rights for people who live, work, or visit the District of Columbia.

In 2014, the District of Columbia Council enacted the Fair Criminal Record Screening Amendment Act of 2014 (FCRSA, the Act), which went into effect on December 17, 2014. This law is popularly known as “Ban the Box” and generally, it prohibits employers in the District from inquiring about job applicants’ arrest record, charges, or convictions prior to a conditional offer of employment.

Filing a complaint with OHR is the “exclusive remedy.” As such, OHR issues this guidance to provide assistance with understanding the application of the law.

Legal Authority: DC Law 2-38; DC Code §§ 2-1403.01 et seq.

What does the law prohibit?

Prior to Conditional Offer of Employment: Prior to a conditional offer of employment, employers may NOT ask questions about, or engage in conduct intended to elicit information about, an applicant’s: (1) arrest record, (2) charges or criminal accusations (which are not pending at the time of the inquiry), or (3) convictions. This means that employers should remove any such questions from their employment application.

After a Conditional Offer of Employment: Once a conditional offer of employment has been extended, employers may ask ONLY about criminal convictions.

Withdrawal of Offer of Employment: Once a conditional offer of employment has been made, employers may only withdraw the offer of employment or take adverse action after considering various factors – such as how close in time the conviction was, how old the applicant was when the offense occurred, and the duties of the job, and such action or decision must be based on a legitimate business reason.

Who does the law apply to?

The prohibitions of this statute apply to employers with 11 or more employees.

This law does not apply where the federal government is the employer.

Additionally, the prohibitions do NOT apply in the following instances:

- Where federal or District law or regulations require considering an applicant’s criminal history;
- When a position is designated by government program or obligation to encourage employment of those with criminal histories; or
- Positions or services that provide services to or engage with minors or vulnerable adults.

FCRSA Case Processing at OHR

For processing purposes, OHR classifies allegations of FCRSA violations into two categories: **Type A** and **Type B**.

Type A: Allegations relating to prohibited inquiries (arrest, criminal accusation, and conviction history) on employment applications or other preliminary written application submissions (such as background check authorization forms).

Type B: Allegations relating to inquiries into an applicant’s criminal history (verbal inquiry, improper/premature background check, etc.). Type B violations include instances where an employer has revoked an applicant’s conditional offer of employment for reasons outside of those identified in the Act as “legitimate business reasons.”

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Filing procedure: Any individual who believes they have been aggrieved by a violation of the Act may file a complaint with OHR in person, by mail, or online, not later than one year after the alleged violation has occurred or the discovery thereof. Once a complaint has been filed, OHR will set an initial intake interview date to docket and finalize the complaint. Thereafter, the parties are required to attend the mandatory mediation session. If the case is not resolved at mediation, OHR will investigate the matter to make a probable cause determination.

Examples of Unlawful Inquiries

The following examples are provided as interpretation guidance only. OHR evaluates each case on its own merit.

Example A: An individual visits a popular local restaurant that it is seeking to hire a waitress and requests to apply for the position. The restaurant provides the individual with an application for the position that contains the following questions:

1. Have you ever been arrested?
2. Have you been charged with a crime that has not yet resulted in a plea of guilty, court trial, deferred adjudication or dropping of the charge?
3. Have you ever been convicted of a crime?
4. Were you on probation in the last five years?

Additionally, the bottom of the application states that an individual who fails to answer any question contained therein will be not be considered for the position.

Here, if the employer has eleven or more employees and is not exempt from the prohibitions of the statute, the restaurant has engaged in a Type A violation. The restaurant not only asked about the applicant's arrest and criminal accusation history, which is prohibited under the statute, it also asked the applicant to disclose her criminal conviction history prior to a conditional offer of employment.

Example B: During an interview for a janitorial position, the interviewer asks the applicant why he left his last job. The applicant replies that he left due to a "legal situation." Following the interview, the interviewer uses an online search engine to find out more information about the "legal situation" the application referred to in the interview. During the online search, the interviewer discovers news articles indicating that the applicant was convicted of stealing from his former employer. The interviewer immediately emails the applicant to inform him that the employer has decided "to go in a different direction" and will not hire the applicant.

Here, the interviewer likely engaged in a Type A violation by conducting an online search to obtain more information about the "legal situation" that led the applicant to leave his last job. Through the online search, the interviewer intended to obtain information about the applicant's criminal background prior to a conditional offer of employment.

The employer may have also engaged in a Type B violation by failing to consider the applicant for the position after discovering the applicant's criminal conviction history. The employer made the decision not to hire the applicant without determining whether there was a reasonable and legitimate business reason for not hiring the applicant in light of his criminal record.

Example C: A grocery store asks applicants to apply for open positions online on its website. An applicant goes to the grocery store's website and begins filling out an application for a Shift Supervisor position. The applicant fills out the application, but before she can submit the application, the application states:

By submitting this application, I authorize the grocery store to conduct an investigation into my background to determine my suitability for employment. This investigation may include reviewing my criminal conviction and driving records. I also agree to immediately notify the Company if I should be convicted of a felony, or a crime involving dishonesty, breach of trust, controlled substances, sexual misconduct, or violence, either while my application is pending, or during my employment, if hired.

The applicant is unable to submit her application without agreeing to the authorization.

Here, the grocery store likely engaged in a Type A violation. Through the authorization, the grocery store engaged in conduct intended to gather information about the applicant's criminal history during a time period impermissible under the statute.

Penalties

OHR investigates charges of discrimination and determines whether there is probable cause to believe a violation has occurred. If probable cause is found, the case proceeds to the Commission on Human Rights which will make a final determination as to whether a violation has occurred. The Commission may impose the following fines:

- \$1000 for employers with 11 to 30 employees;
- \$2500 for employers with 31 to 99 employees; and
- \$5000 for employers with 100 or more employees.

Half of the fine is awarded to the Complainant.

Best Practices

Applicants and Employees: This law is intended to provide protection for returning citizens attempting to reintegrate into society by seeking gainful employment and the prohibitions are intended to erase barriers in employment for returning citizens.

OHR interprets an "aggrieved person" as someone who has applied, or attempted to apply but was deterred because of an improper request for criminal background information prior to a conditional offer of employment. OHR reviews each individual case to determine whether a complainant is an "aggrieved person."

With regard to Type A complaints, individuals seeking to file complaints should be advised that effective October 1, 2016, if an employer changed its application form as a result of a charge filed with OHR at least 6 months prior to a new allegation of a violation and OHR has a copy of the compliant employment application then new complaints will be dismissed unless the complainant provides additional information to demonstrate that they were required to use the unlawful application.

Employers: 1) Employers should not ask any questions, or require the applicant to authorize a criminal background check on an employment application; 2) Employers should ensure that all personnel involved in the interviewing and hiring process are informed of the law and provided with training on how to comply with the statute.

Resources

- Visit OHR's website to learn more about resources for applicants and employers: <http://ohr.dc.gov/page/returning-citizens-and-employment>
- Call OHR at 202-727-4559. Emails and phone messages will be responded within 24 hours of receipt during normal hours of operation, 8:30 AM to 5:00 PM, Monday through Friday, and on all non-Federal holidays.