



PROGRAM MATERIALS
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The Hiring Minefield: What Can You Ask These Days?

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The Hiring Minefield: What Can You Ask These Days?

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AGENDA

Medical Questions

Salary History Questions

Criminal Background Inquiries

Medical Questions

Applicable Laws

- Americans with Disabilities Act
- State Laws
 - New Jersey Law Against Discrimination (LAD)
 - Pennsylvania Human Relations Act (PHRA)
 - New York Human Rights Law (NYHRL)
- Medical Marijuana Statutes
- Municipal Ordinances
 - Philadelphia
 - New York City

What is the ADA?

- **Americans with Disabilities Act of 1990**, 42 U.S.C. § 12101, *et seq.* (ADA)
 - Prohibits discrimination against a qualified applicant or employee with a disability
 - Applies to employers with **15 or more employees**, including states and local governments
 - Must exhaust administrative remedies with the Equal Employment Opportunity Commission before proceeding to federal court
 - Failure to exhaust is an affirmative defense and can be waived if not raised. *See Fort Bend County v. Davis*, No. 18-525 (U.S. 2019)

ADA Basics

- ADA defines an individual with a disability as a person who:
 1. Has a physical or mental impairment that substantially limits a major life activity;
 2. Has a record/history of a substantially limiting impairment; or
 3. Is regarded or perceived by an employer as having a substantially limiting impairment

42 U.S.C. § 12102 (1).

- §12102(4) provides that:
 - “disability. . . Shall be construed in favor of broad coverage of individuals”
 - “substantially limits” must be interpreted “consistently with the findings and purposes of the ADA Amendments Act of 2008” (which greatly expanded the reach of the ADA)

State Enacted Disability Laws

- **New Jersey's Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD")**
 - Prohibits discrimination on the basis of disability, as well as age, ancestry, military service, color, creed, marital status, domestic partnership status, national origin, sex, sexual orientation and gender identity
 - Applies to **all employers**, regardless of size
 - No requirement of exhaustion of administrative remedies – can go directly to state court
 - Two-year statute of limitations

New Jersey's Smoking Law

- New Jersey Smoking Law (34:6B-1) prohibits employers from refusing to hire someone because the individual does or does not smoke or otherwise use tobacco products, unless the action is founded upon a rational basis reasonably related to the employment
- Penalties for violation: \$2,000 for first offense, up to \$5,000 for subsequent offenses
- **Private right of action:** must file within one year
 - Relief available: injunctive relief, compensatory and consequential damages, reasonable costs and attorneys' fees

State Enacted Disability Laws

- **Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.*, (PHRA)**
 - Prohibits discrimination on the basis of handicap or disability, use of guide or support animals because of blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, as well as race, color, familial status, religious creed, ancestry, age, sex and national origin.
 - Applies to employers with **four or more employees**
 - Must exhaust administrative remedies with the Pennsylvania Human Relations Commission.
 - Must file within 180 days of the alleged unlawful act

State Enacted Disability Laws

- **New York Human Rights Law**, N.Y. Exec. Law § 290 *et seq.* (“NYHRL”)
 - Prohibits discrimination on the basis of disability, as well as age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex and marital status
 - Applies to employers with **four or more employees**.
 - Must exhaust administrative remedies with the New York Division of Human Rights or EEOC (dual filing)
 - Three-year statute of limitations, which is tolled between the filing of an EEOC charge and the issuance by the EEOC of a right-to-sue letter. *DeNigris v. N.Y.C. Health & Hosps. Corp.*, 861 F. Supp. 2d 185, 192 (S.D.N.Y. 2012)

ADA Rules on Disability-Related Inquiries

Must be analyzed in three stages:

1. Pre-offer

All disability-related inquiries and medical examinations prohibited *even if they are related to the job, and even if the employer only intends to review the information post offer*

2. Post-offer

After a conditional offer has been made, disability-related inquiries and medical examinations permitted *as long as given to all entering employees in the same job category*

3. Employment

EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000

ADA Applies to the *Entire* Hiring Process

- This means advertising, recruitment and interviewing must comply with the ADA
- The ADA requires that reasonable accommodations be made to the application process unless it would cause an “undue hardship”
 - Required to provide another accommodation if undue hardship (i.e. interview on first floor)
- Examples reasonable accommodations:
 - Providing materials in accessible formats (i.e. braille, audio tape, large print)
 - Providing readers or sign language interpreters
 - Providing accessible locations
 - Adjusting or modifying application policies and procedures
- Employers should explain what the hiring process involves and ask if applicants will need a reasonable accommodation for the hiring process

Prohibited Inquiries Under the ADA

- The ADA prohibits employers from asking questions that are **likely to reveal** the existence of a disability or the nature and severity of the disability **before** making a job offer
- This prohibition covers written questionnaires (i.e. applications), inquiries during interviews and reference checks
- The **question is the violation**. Plaintiff does not need to be disabled to have standing to sue for violation. See *Green v. Joy Cone Co.*, 278 F.Supp. 2d 526, 538 (W.D.Pa. 2003), *affd* 107 Fed. Appx. 278 (3d Cir. 2004)

What Can You Ask?

- Non-medical qualifications and skills (i.e. education, work history, required certifications)
- Ability to perform *specific* job functions
 - Employer can state the physical requirements of the job (i.e. lift certain amount of weight, ability to climb ladders) and ask if applicant can satisfy those requirements
 - **Do not** ask if the applicant *generally* if they will require a reasonable accommodation

Examples on Impermissible Questions Per the EEOC

- Do you have a disability which would interfere with your ability to perform the job?
- Have you ever been injured on the job? Have you ever filed for workers' compensation?
- What prescription drugs are you currently taking?
- Asking broad questions about impairments likely to elicit information about a disability (e.g. What impairments do you have?)

EEOC Manual Guidance

Impermissible

- “Do you have any disabilities that may affect your performance in the position for which you are applying?”
- “How many days were you absent from work because of illness last year?”

Permissible

- “Are you able to perform the specific functions of **this job** with or without accommodation?” 29 CFR §1630.14(a)
- “How many days were you absent from work last year?”

What About Medical Marijuana/Cannabis?

- PA, NJ and NY all have medical marijuana laws
- Those laws prohibit employers from discriminating (i.e. refusing to hire) someone based “solely” on their status as a medical cannabis patient registered with the Cannabis Regulatory Commission
- New York City passed an ordinance in April that prohibits employers (with some exceptions) from testing for marijuana or THC as a condition of employment
 - Goes into effect May 10, 2020

Reference Checks

- In making pre-offer background or reference checks, an employer may not request any information about a job applicant from a previous employer or other source that it may not request from the job applicant himself or herself
- EEOC says you can ask about previous work attendance, so long as the question does not refer to illness or disability

What is a Medical Examination?

- A medical examination is a procedure or test that seeks information about an individual's physical or mental impairment or health
- The following factors are provided by the EEOC to determine whether a test should be considered a medical examination:
 - Whether the test is administered by a health care professional;
 - Whether the test is interpreted by a health care professional;
 - Whether the test is designed to reveal an impairment or physical or mental health;
 - Whether the test is invasive;
 - Whether the test measures an employee's performance of a task or measures their physiological responses to performing the task;
 - Whether the test normally is given in a medical setting; and
 - Whether medical equipment is used.

Examples of Medical Examinations

- Blood, urine and breath analyses to check for alcohol use
- Blood pressure screening and cholesterol testing
- Range-of-motion tests that measure muscle strength and motor function
- Psychological tests that are designed to identify a mental disorder or impairment
- Vision tests conducted and analyzed by an ophthalmologist or optometrist

Tests Not Considered to be a Medical Examination

- Psychological tests that measure personality traits such as honesty, preferences and habits
- Physical agility tests which measure ability to perform actual or simulated job tasks
- Physical fitness tests which measure performance of physical tasks, such as running and lifting
 - Physical agility and physical fitness tests cannot include examination that would be considered medical (e.g. measuring heart rate or blood pressure)

Example of a Permissible Tests

- Police department tests police officer applicants' ability to run through an obstacle course designed to simulate a suspect chase in an urban setting
- Department store gives a personality test designed and used to reflect only whether an applicant is likely to lie

Obvious or Disclosed Disability

- If an applicant has an obvious disability (e.g. in a wheelchair) or discloses a disability during the pre-offer process, an employer **may** ask how they can perform **essential** job functions and whether an accommodation would be needed
 - Can ask to describe or demonstrate how they would perform the essential functions job (not minor duties or things unrelated to the job).
 - Cannot ask about the underlying condition

Examples

- Applicant for a position repairing washing machines presents with one leg. Employer can ask them to demonstrate how they will be able to get down into a basement with tools to repair washer.
- Applicant for a receptionist position discloses that he has diabetes and will need periodic breaks. Employer may ask how often and for how long.
- Applicant uses a wheelchair and applies for a job that involves retrieval of files that would seem to be beyond his or her reach. The employer can show applicant the files and ask the person to explain or demonstrate how he or she would perform this task.

What is a Real Job Offer?

- A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer
 - *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, October 10, 1995
- Offers may be conditional on the results of a medical examination 29 C.F.R. §1630.14(b)

Post-Offer Medical Inquiries

- Once a conditional offer of employment has been extended, applicants may be asked medical questions and may be asked to undergo a medical examination. 42 U.S.C. § 12112(d)(3).
- **ALL** entering employees in the **same job category** must be subjected to the examination or questions. 29 C.F.R. § 1630.14(b).
- Results of examination shall not be used for any purpose inconsistent with the ADA. 42 U.S.C. § 12112(d)(3)(A)-(C); 29 CFR §1630.14(b)(2).
- Confidentiality requirements must be met.

What Can You Ask Post-offer And How Can You Use It?

- The questions/examinations **do not** have to be job-related and consistent with business necessity.
- **However**, if certain criteria are used to screen out an employee with a disability as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodations. 42 C.F.R. §1630.14(b)(3).

Can You Ask For Documentation?

- Yes. If an individual requests a reasonable accommodation so they will be able to perform a job and the need for the accommodation is not obvious, the employer may require reasonable documentation of the individual's entitlement to reasonable accommodation. So, the employer may require documentation showing that the individual has a covered disability, and stating their functional limitations.

Drug Tests

- **New Jersey**

- Updated CUMCA strictly regulates NJ employer's drug testing procedures pertaining to employees and applicants.
- Must give those who test positive for marijuana an opportunity to present a "legitimate medical explanation" or have a retest of the original sample at the applicant's expense *before facing action by the employer.*
- Applicant's explanation can include an authorization for medical cannabis issued by a health care practitioner, proof of registration with Cannabis Regulatory commission or both.

Drug Tests (Continued)

- **New York City**
 - passed an ordinance in April that prohibits employers (with some exceptions) from testing for marijuana or THC as a condition of employment.
 - Goes into effect May 10, 2020

Presenter to read NY Code

This code is required for all attorneys wishing to receive CLE credit in the state of NY and taking the program 'on-demand' at Celesq AttorneysEd Center either online or via CD

Please notate it carefully

The presenter will only be able to read the code twice and will not be able to repeat it or email it to you.

Thank you!

EEOC Position

- “If the employer rejects the applicant after a disability-related question or medical examination, investigators will closely scrutinize whether the rejection was based on the results of that question or examination”
- Reasons for rejection must **be job-related and consistent with business necessity**

Essential Functions Only

- Cannot reject an applicant because the disability prevents them from performing minor duties that are not essential to the job.
- EEOC Example: Wei is deaf and applies for a file clerk position. The essential functions for this job are to file and retrieve written materials. While the job description states that the clerk must also answer the phone, in practice the clerk rarely does this because other employees have responsibility for this duty. The employer cannot reject Wei solely because she is unable to answer the phone since that is not an essential part of performing this job.

Direct Threat

- An employer can refuse to hire only if the disability poses a significant risk of substantial harm to the employee or others
- Cannot be based on “slightly increased risk, speculation of future risk, or generalizations about the disability”
- Must seek appropriate information to assess the level of risk and the nature of the harm
- Must demonstrate “direct threat” that cannot be reduced through reasonable accommodation
 - *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, October 10, 1995

Circuit Splits Regarding Direct Threat

- The Second, Seventh, Eighth and Ninth Circuits have held that the burden is on the employer to show a direct threat
 - *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003); *Branham v. Snow*, 392 F.3d 896, 906 (7th Cir. 2004); *EEOC v. Wal-Mart Stores, Inc.*, 477 F.3d 561, 571-72 (8th Cir. 2007); *Dark v. Curry County*, 451 F.3d 1078, 1091 (9th Cir. 2006)
- The Eleventh Circuit has placed this burden on the employee
 - *Lewis v. U.S. Steel Corp. Fairfield Works*, 2016 WL 7373733, *3 (N.D. Ala. Dec. 20, 2016); *LaChance v. Duffy's Draft House, Inc.* 146 F.3d 832, 836 (11th Cir. 1998).

Circuit Split Regarding Direct Threat (Continued)

- The First Circuit and Tenth Circuit have established a burden-shifting framework
 - *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1st Cir. 1997); *Jarvis v. Potter*, 500 F.3d 1113, 1122 (10th Cir. 2007)
- The Third Circuit and Fifth Circuit have not fully decided the issues

EEOC Example

- An employer learns during a post-offer medical examination that Simone has major depression. She has been offered a high-level managerial position, but the employer is concerned that the job will be too stressful, causing Simone's illness to worsen. But, Simone's depression is well-controlled with medication and she has been working for two years in a similar position with no effect on her depression or her performance. Based on this information, Simone's disability would not pose a high level of risk of harm and therefore the employer could not refuse to hire her based on fears that she will experience an increased number of depressive episodes or that she would be unable to perform the job.

Confidentiality Requirements

- Medical Information on applicants must be kept confidential
- Must be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record
- Three Exceptions:
 1. Supervisors or managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
 2. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
 3. Government officials investigating compliance with this part shall be provided relevant information on request.

29 C.F.R. §1630.14(c)(1).

Cases Pertaining to Applicants

- ***EEOC v. BNSF Ry. Co.***, 902 F.3d 916 (9th Cir. 2018)
 - Holding an employer requiring an applicant, after a post-offer to obtain an MRI of his back despite examinations that the applicant had no current limitations of his back was a violation of the ADA.
- ***EEOC v. Grane Healthcare Co.***, 2 F. Supp. 3d 667 (W.D. Pa. Mar. 6, 2014), (*reconsideration denied*, July 7, 2014)
 - Ruling that the employer violated the ADA more than 300 times by subjecting job applicants to unlawful pre-offer medical examinations and questions. Holding even successful job applicants were subjected to illegal pre-offer medical examinations and inquiries could nevertheless have cognizable ADA claims.

Cases Pertaining to Applicants (Continued)

- ***EEOC v. Service Temps, Inc., d/b/a Smith Personnel Solutions***, 679 F.3d 323 (5th Cir. 2012)
 - Award of \$107,175 against employer where they refused to consider an applicant who was deaf for the position of stock clerk because of her disability.

Recent EEOC Settlements

- ***EEOC v. CRST International Inc. and CRST Expedited Inc.***, No. 1:17-cv-00129 (N.D. Iowa)
 - Settlement of \$47,500 paid by a trucking company that refused to hire a Vet who suffered from PTSD and needed a service dog because it had a “no pet” policy.
- ***EEOC v. Asurion, LLC***, No. 3:17-cv-336-CWR-FKB (S.D. Miss.)
 - Settlement of \$50,000 paid by customer service support provider that abruptly ended a phone interview with an applicant that disclosed she was paralyzed from the waist down.
- ***EEOC v. USA Parking Services***, No.1:18-cv-23984 (S.D. Fl)
 - Settlement of \$150,000 paid by company for refusing to hire a deaf applicant by assuming the person could not perform essential functions, rather than conduct an individualized assessment of his abilities.

Recent EEOC Settlements (Continued)

- ***EEOC v. Party City Corp.***, No. 1:18-cv-00838-PB (Dist. N.H. 2019)
 - Settlement of \$155,000 paid by employer for failing to hire a qualified employee with a disability after it became aware that she required a job coach as a reasonable accommodation.

Salary History Inquiries

Why Ban the Question?

- Perpetuates gender and racial disparities in compensation
- Women earn 82 cents for every dollar a man earns
- For women of color the gap is worse
 - 58 cents for Black women; 43 cents for Latina women

Federal Law

- There is no current ban in federal law pertaining to asking salary history questions
- There are federal laws in place to guarantee equal pay
 - Equal Pay Act of 1963, 29 U.S.C. § 206(d)
 - To state a claim under the Equal Pay Act, a plaintiff "must first establish a prima facie case [of unequal pay] by demonstrating that employees of the opposite sex were paid differently for performing 'equal work' —work of substantially equal skill, effort and responsibility, under similar working conditions." *Stanziale v. Jargowsky*, 200 F.3d 101, 107 (3d Cir. 2000).

New Jersey Salary History Ban

- Currently salary inquiries are only currently banned for state entities
- New Jersey Assembly Bill 1094 passed
 - **Effective January 1, 2020**
 - Prohibits all employers from:
 - Screening a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages, salaries or benefits; or
 - Requiring that the applicant's salary history satisfy any minimum or maximum.
 - Civil penalties from \$1,000-\$10,000 per violation

New Jersey Salary History Ban (Continued)

- New Jersey Assembly Bill 1094
 - Permits employers to:
 - Consider salary history in determining salary, benefits and other compensation for the applicant, and verify the applicant's salary history, if an applicant voluntarily, without employer prompting or coercion, provides the employer with salary history.
 - Request that an applicant provide the employer with a written authorization to confirm salary history, including, but not limited to, the applicant's compensation and benefits, after an offer of employment that includes an explanation of the overall compensation package has been made to the applicant.

New Jersey Equal Pay Law

- Referred to as the “Diane B. Allen Equal Pay Law”
- An amendment to the New Jersey Law Against Discrimination (NJLAD) that prohibits an employer from paying an employee, who is a “member of a protected class,” a lower rate of compensation than an employee who is not a member of the same protected class “for substantially similar work.” N.J.S.A. 34:10:5-12(t).
- Broader than the Federal Equal Pay Act
 - Not limited to gender
 - Extended statute of limitations
 - A violation under the NJEPA occurs every time an employer pays an employee a discriminatorily differential wage or an employee is affected by a discriminatory compensation decision or practice. N.J.S.A. 34:10:5-12(a).
 - Liability accrues and an aggrieved person may obtain relief for back pay for the entire period of time, up to six years. *Id.*

New Jersey Equal Pay Law(Continued)

- In order to bring a law suit, an employee merely needs to establish that: (1) he or she is a member of a protected class; (2) is paid less than an employee who is not a member of the same protected class; and (3) is doing work that is substantially similar to the other employee. N.J.S.A. 34:10:5-12(t).
- The NJEPA is not retroactively applied and individuals **cannot** seek the protection provided under the NJEPA associated with wage disparity prior to its effective date of July 1, 2018. *See Perrotto v. Morgan Advanced Materials, PLC*, 2019 U.S. Dist. LEXIS 6745 at *8 (D.N.J. Jan. 15, 2019).

Pennsylvania Salary History Ban

- Pennsylvania has a salary history ban for state agencies only
- Local municipalities have enacted bans on salary inquiries:
 - Philadelphia - Philadelphia Code § 9-1131, Wage Equity Ordinance
 - Applies to any person doing business in the city through employees or who employs one or more employees
 - Pittsburgh – Pittsburgh Code § 181.13, Ensuring Wage Equality
 - Applies to city agencies and offices

Philadelphia Equal Wage Ordinance

- First city ordinance in the country banning inquiries regarding salary-history
- Prohibits an employer from (i) including a question on paper or electronic employment applications asking applicants to provide their salary history; and (ii) relying on wage history in determining wages. Philadelphia Code § 9-1131(2)
- The Constitutionality of the Philadelphia Ordinance was challenged after its enactment and a partial preliminary injunction was granted. *Chamber of Commerce for the Greater Philadelphia v. City of Philadelphia*, 319 F. Supp. 773 (E.D. Pa. 2018). In this matter, the Eastern District of Pennsylvania found that the prohibition on the inquiry of salary violated the First Amendment's free speech clause, but the prohibition of relying on wages for setting salary was permissible. *Id.*
 - **An appeal is currently pending before the Third Circuit.**

New York Salary History Ban

- Currently has a ban for state agencies and departments.
- New York Local Law No. 6549
 - **Effective January 6, 2020**
 - Prohibits all employers from:
 - Inquiring about the salary history of a job applicant or current employees as a factor in deciding whether to hire the applicant, promote the current employee or what salary to offer;
 - Seeking, requesting, or requiring applicants or current employees to disclose their salary history as a condition of consideration for employment, an offer of employment or an offer of promotion;
 - Refusing to interview, hire, promote, otherwise employ or retaliate against an applicant or current employee based upon salary history or their refusal to provide their salary.

New York City Salary History Ban

- New York City Legislation (Int. 1253-A)
 - Applies to all employers, employment agencies or employees or agents thereof
 - Prohibits employers from inquiring about a prospective employee's salary history during all stages of the employment process.
 - Prohibits employers from relying on salary history of a job applicant when determining his or her salary amount at any stage in the employment process, including when negotiating a contract.

New York Equal Pay Act

- New York Labor Law § 194
 - Applies to all employers, regardless of size
 - Prohibits sex discrimination in compensation for jobs in the same establishment that require equal skill, effort, and responsibility, and that are performed under similar working conditions.
 - Pay differentials are permitted where the differentials are based upon:
 - a seniority system;
 - a system that measures earnings based upon quantity or quality; or
 - a bona fide factor other than membership in a class protected by the NYSHRL such as education, training or experience that is job-related and consistent with business necessity.
 - **Amendment effective October 8, 2019**
 - Employers are prohibited from employee pay differentials based upon employee membership in any class protected under the New York State Human Rights Law (NYSHRL) including, but not limited to, age, religion, sexual orientation, disability and marital status where employees perform equal or substantially similar work.

Criminal Background Inquires

Ban-the-Box Laws

- Prevents an employer from requesting a prospective employee's criminal history information on an employment application
- Requires employers to consider a job candidate's qualifications first – without the stigma of a conviction or arrest record
- Most laws permit inquiry into criminal records **AFTER** a conditional offer or interview is provided, but exceptions apply

Federal Law

- No ban on requesting criminal history information on an employment application or from an applicant during any part of the hiring process

New Jersey Ban-the-Box Law

- New Jersey Opportunity to Compete Act, **New Jersey Stat. Ann. § 34:6B-11** (eff. March 1, 2015)
 - Applies to employers with 15 or more employees over 20 calendar weeks
 - Prohibits employers from asking job applicants about their criminal history records until after an applicant has been interviewed and selected as the first choice to fill the position.
 - Prohibits employers from advertising that they will not consider a candidate who has been arrested for or convicted of a crime or offense.
 - No private cause of action (although there are possible administrative civil remedies)
 - Preempts similar local laws

New Jersey Ban-the-Box Law

- New Jersey Senate Bill S-3306 (2016)
 - Amendment to the New Jersey Opportunity To Compete Act (eff. June 29, 2017)
 - Clarifies that an employer may not inquire about an applicant's expunged criminal record during the initial employment application process or seeking information pertaining to expungements on an application

Use Of Criminal History Records In Pennsylvania

- **Pennsylvania Criminal History Record Information Act, 18 Pa.C.S. § 9125, et seq.**
 - Applies to **the use** of criminal history information, however it is obtained (not a ban the box law).
 - Felony and misdemeanor convictions may be considered by the employer **only to the extent to which they relate** to the applicant's suitability for employment in the position for which he or she has applied.
 - The employer shall notify the applicant in writing if the decision not to hire the applicant is based in whole or in part on criminal history record information.

Philadelphia Ban-the-Box Law

- **Philadelphia Ordinance: Chapter § 9-3500**
 - Applies to private employers within the City of Philadelphia including employment agencies.
 - Prohibitions:
 - Cannot ask about arrests at all
 - Cannot ask about convictions or an applicant's willingness to submit to a background check during the "application process" (i.e. prior to a conditional job offer)
 - Cannot automatically exclude applicant with a criminal history
 - Limits convictions that may be considered after a conditional offer
 - Can only consider convictions if they occurred less than **seven years** from when the employee applied (not counting time of incarceration)

Philadelphia Ban-the-Box Law (Continued)

- Employers may reject an applicant only if they pose an unacceptable risk to the business or to other people.
- Must conduct an **individualized assessment of risk considering**: (1) the nature of the offense; (2) the time that has passed since the offense; (3) employment history before and after any incarceration period; (4) the particular duties of the job; (5) any character or employment references provided; and (6) evidence of the applicant's rehabilitation since conviction.
- If rejected based in whole or in part on the criminal record information, must send the decision to the applicant in writing with a copy of the criminal history report and give them 10 days to provide evidence of inaccuracy or an explanation.

New York Ban-the-Box Law

- No state law prohibiting inquires about criminal history for public employers
- However, there are local municipalities that have ordinances banning seeking criminal history
 - New York City – Fair Chance Act, NYC Administrative Code §8-107(11-a)
 - Applies to employers with 15 or more employees/contractors doing business with the City.
 - No criminal inquiries prior to conditional offer.
 - Also disallows independent investigations into an applicants criminal history.

Recent Cases Pertaining to Background Checks

- ***Kelly v. Brooklyn Events Center, LLC***, No. 1:17-cv-04600 (E.D.N.Y. 2017) – class action involving over 100 individuals against a sports arena for not hiring applicants after background checks and not providing information why they were denied, as required under the Fair Chance Notice provision in NYC. Each individual received between \$250-\$2,350 depending on whether their background check would have disqualified them from the position and if they were still seeking employment with the company. An award of \$165,000 in attorneys' fees is also in dispute.
- ***Times v. Target Corp.***, No. 1:18-cv-02993 (S.D.N.Y. 2018) – Complaint alleged that Target's use of criminal background checks violated Title VII by disproportionately excluding Black and Hispanic applicants from obtaining employment. Target agreed to pay \$3.74 million and review its policies for screening job applicants.

Questions?



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