



white paper

FAIR HIRING IN BANKING

Important amendments to background checks
in the banking industry.



OVERVIEW

On December 23, 2022, President Biden signed into law the “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023” (the “NDAA 2023”).

Within the NDAA, Section 5705, entitled “Fair Hiring in Banking,” relaxes statutory restrictions on hiring individuals with criminal records by insured depository institutions.

The enactment amends Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829 (“Section 19”), which restricts hiring at depository institutions insured by the Federal Deposit Insurance Corporation (FDIC), such as FDIC-member banks. Guidance from the FDIC discussing these amendments can be accessed [here](#).

PREVIOUS RESTRICTIONS UNDER SECTION 19

Section 19 imposes an affirmative duty upon an FDIC-insured depository institution to make a “reasonable inquiry” regarding an applicant’s criminal record history. Covered employers must take steps appropriate under the circumstances, and consistent with applicable law to

avoid hiring or permitting participation in its affairs by a person who has a conviction or program entry for a covered offense. Covered offenses under Section 19 include crimes involving dishonesty, breach of trust, or money laundering.

Previously, federally insured institutions needed to secure a waiver directly from the FDIC to employ individuals disqualified under Section 19. Without this waiver, disqualified individuals would be prohibited from directly or indirectly owning, controlling, or otherwise participating in the affairs of an FDIC-insured depository institution.¹ While this prohibition applies to individuals convicted of crimes as previously described, it also extends to individuals that have agreed to enter into a pretrial diversion or similar program in connection with a prosecution for any such offense.²

UPDATES UNDER THE FAIR HIRING IN BANKING PROVISIONS IN THE NDAA 2023

Consent for Older Offenses and De Minimis Crimes

The Fair Hiring in Banking provisions further *narrow* the scope of crimes subject to Section 19, and the circumstances which require the FDIC’s written consent. The Amendments state that an individual no longer needs to obtain consent from the FDIC for employment with a covered institution under these circumstances:

¹ 12 U.S.C § 1785.

² *Id.*

- if it has been seven years or more since the individual committed the offense; or
- if the individual was incarcerated with respect to the offense *and* it has been five years or more since the individual was released from incarceration; or
- if the individual committed the offense when they were 21 years of age or younger *if* more than 30 months have passed since the sentencing for the offense occurred.

When consent is required, the amendments now codify the process for waiver applications from the FDIC. Agencies are now required to adhere to specific standards in considering such applications. For instance, the FDIC must conduct an “individualized assessment” when reviewing consent applications that takes into account:

- evidence of rehabilitation;
- the applicant’s age at the time of the conviction or program entry;
- the time that has elapsed since conviction or program entry; and
- the relationship of individual’s offense to the responsibilities of the applicable position.

Agencies must also consider factors such as:

- the individual’s employment history;
- letters of recommendation;
- completion of substance abuse;
- job preparation or educational programs; and
- other relevant mitigating evidence.

The Fair Hiring in Banking provisions also allow the FDIC to exempt other *de minimis* (lesser/low risk) offenses by rulemaking, which must satisfy the following requirements:

- Any such *de minimis* offense “was punishable by a term of three years or less confined in a correctional facility”;
- Any *de minimis* exceptions with respect to offenses for writing insufficient fund checks must require that the aggregate total face value of all insufficient funds checks (regardless of the number of convictions and/or program entries at issue) is \$2,000 or less; and



- The FDIC may designate exemptions for other lesser offenses (including the use of a fake ID, shoplifting, trespass, fare evasion, and driving with an expired license or tag) if at least one year has passed since the conviction or program entry for such offense.

As stated, for these *de minimis* offenses to become exempt, the FDIC will need to do so via rule making, which they have not yet implemented.

Expunged, Sealed, and Dismissed Convictions

The provisions also amend Sections 19 to codify and expand prior guidance that prohibitions on employment do not apply when a covered offense has been expunged or sealed, as long as there has been “an order of expungement, sealing, or dismissal” issued in regard to the conviction for such an offense. This exception applies for the new Fair Hiring in Banking provisions, even if there are *other* exceptions that allow employers to consider the record for certain character and fitness evaluation purposes.

Additionally, the Fair Hiring in Banking provisions define the term “criminal offense involving dishonesty” consistently with the existing definition in the FDIC’s Final Rule (including a carve out of offenses involving the possession of controlled substances). The provisions explicitly *exclude* from the definition a “misdemeanor criminal offense committed more than one year before the date on which an individual files a consent application, excluding any period of incarceration.” It is likely that further guidance on how the FDIC interprets this change will be needed.

CONCLUSION

FDIC-insured depository institutions are encouraged to review their current hiring criteria to ensure they are staying up to date with the new provisions for Fair Hiring in Banking. Clients should contact their **BIG** Account Manager with any additional questions on these criminal check updates within the banking industry. ■

