

EXPERT ANALYSIS

Heightened Restrictions on Use of Criminal Background History: What Employers Need To Know

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In a sweeping movement to limit the use of a job applicant’s criminal history during the application process, many states and localities have adopted some form of “ban the box” legislation.

Ban-the-box refers to legislation that prohibits, among other things, employment application questions that ask whether an applicant has been arrested or convicted of a crime. The goal of the ban-the-box movement is to ensure that employers consider a job applicant’s qualifications without the stigma of a prior criminal history.

Over 90 percent of human resource professionals conduct some sort of background check during the hiring process.¹ Nearly a third of American adults have been arrested by age 23.² Studies have shown that applicants who indicate their criminal history on an initial application are less likely to receive a callback.

One study found that 34 percent of white applicants without criminal records and 17 percent of those with criminal records were later contacted for a callback interview.³ Among black applicants, 14 percent of those without a criminal record and only 5 percent of those with criminal records were later contacted for a callback interview.⁴

By removing all criminal background questions from job applications and delaying background checks until later in the hiring process, proponents of ban-the-box legislation seek to provide applicants with criminal histories a better chance at obtaining employment.

‘BAN THE BOX’ MOVEMENT

Various forms of the ban-the-box movement have gone viral since November 2015, when President Barack Obama directed the Office of Personnel Management to remove the box asking about an applicant’s criminal history from federal job application forms.

At least 25 states — representing nearly every region of the country — have adopted some form of ban-the-box policy: California (2010, 2013), Colorado (2012), Connecticut (2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2013, 2014), Kentucky (2017), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2009, 2013), Missouri (2016), Nebraska (2014), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Rhode Island (2013), Tennessee (2016), Vermont (2015, 2016), Virginia (2015) and Wisconsin (2016).

While most ban-the-box regulations apply only to public employers, at least nine states — Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island and Vermont — have prohibited the arrest/conviction history question on job applications for private employers.



Ban-the-box regulations prohibit inquiries into a job applicant's criminal history on an employment application.

In addition to these state ban-the-box laws, over 150 cities and counties have adopted various versions of ban-the-box policies. Some of these regulations apply only to state employees, while others apply to private employees as well.

The restrictions on an employer can be dramatically different from one jurisdiction to the next, even within the same state. This trend of decentralized state and local guidance and enforcement is likely to continue under the Trump administration.

INITIAL CONSIDERATIONS

As noted, ban-the-box regulations prohibit inquiries into a job applicant's criminal history on an employment application.

In addition, many of these policies specify a particular point when employers are allowed to make inquiries into the criminal history of a job applicant.

Generally, employers must refrain from making inquiries into an applicant's criminal history until after a point specified in the applicable ban-the-box law (e.g., after the initial interview or after a conditional offer has been extended).

Complying with ban-the-box regulations can be both time-consuming and challenging for many employers, especially those that operate in multiple jurisdictions. No two versions of ban-the-box laws are identical.

In addition, these laws sometimes conflict or overlap with anti-discrimination laws, the Fair Credit Reporting Act, 15 U.S.C.A. § 1681, and other laws relating to background screenings.

Because companies that operate in multiple jurisdictions are subject to the ban-the-box legislation of each state and county in which they operate, they face the difficult task of creating applications and hiring procedures that comply with the ban-the-box policies of each location.

Thus, uniformity in applications and interview processes may not be feasible for employers that operate in multiple jurisdictions.

Compliance is further complicated by the fact that office location may not be enough to determine jurisdiction. If employees will be traveling to other cities or states to meet with clients, that could present jurisdiction challenges.

Likewise, an employee who regularly moves between office branches could pose unforeseen problems during the application phase. To help minimize exposure, many multistate companies have voluntarily dropped criminal background questions from their applications.

In addition to dictating when inquiries into an applicant's criminal history can be made, ban-the-box policies further dictate how a job applicant's criminal history can be used.

While employers should be careful to consider the specific policies in their jurisdictions, there are a few provisions that are typical of ban-the-box policies.

These include notice requirements, job-related screening tests, limits on the scope or type of criminal record employers can consider, and individualized assessment requirements.

TYPICAL PROVISIONS IN BAN-THE-BOX LAWS

Notice requirements

Several jurisdictions, including Philadelphia, New York City, San Francisco and Oregon, have adopted policies that require employers to notify applicants before and/or after an adverse employment decision is made based in whole or in part on criminal history information.

Some ban-the-box regulations require employers to provide the applicant with a copy of the criminal history report that affected the employer's decision, while providing the applicant a specified period of time to contest the accuracy of the report or to provide an explanation.

Job relatedness

Some ban-the-box laws include language establishing that an employer's policy or practice of rejecting applicants based on the applicant's criminal record must be job related and consistent with business necessity.

The language used in these laws often includes some variation of the Equal Employment Opportunity Commission's "Green factors." The factors came from the case *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977), in which the 8th U.S. Circuit Court of Appeals found that a complete bar on employment based on any criminal activity, other than a traffic violation, is unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e.

In determining whether a rejection is job related for the position in question and consistent with business necessity, states/counties generally require employers to consider:

- The nature and gravity of the offense or conduct.
- The time that has passed since the offense or conduct and/or completion of the sentence.
- The nature of the job sought.

Types of records that may be considered

Under some ban-the-box policies, certain information within an applicant's criminal history may never be considered by an employer. This general prohibition usually applies to:

- An arrest that did not result in a conviction.
- Participation in a diversion or deferral of judgment program.
- A conviction that has been dismissed, expunged or otherwise invalidated.
- A conviction in the juvenile justice system.
- An offense other than a felony or misdemeanor, such as an infraction.
- A conviction that is older than a specified number of years indicated by the particular ban-the-box law.

Individualized assessment

Generally, employers may not maintain hiring policies that automatically disqualify an applicant based merely on the existence of a criminal record.

Some laws require employers to conduct individualized assessments of an applicant before denying him employment based in whole or in part on his criminal history.

In conducting these individualized assessments, employers must consider factors such as the:

- Nature of the offense(s).
- Number of convictions.
- Length of time that has passed following the last conviction.
- Relationship between the crime(s) and nature of the position.
- Age of the applicant at the time of the most recent conviction.

Most ban-the-box policies provide for exceptions in a number of circumstances, including where:

- The employer is required by law to obtain information regarding past convictions.
- The applicant is required to possess or use a firearm in the course of employment.

Uniformity in applications and interview processes may not be feasible for employers that operate in multiple jurisdictions.

Generally, employers may not maintain hiring policies that automatically disqualify an applicant based merely on the existence of a criminal record.

- An applicant convicted of a crime is prohibited by law from holding the position.
- The position sought involves caring for the young, elderly or sick.
- The position sought is one that involves public safety.

PRACTICAL APPROACH TO COMPLIANCE

Don't search the applicant's criminal history

One common misunderstanding among employers is that although they may be prohibited from asking job applicants about their criminal history, they may nonetheless research applicants' criminal history themselves via Google, social media or other means.

Ban-the-box laws generally prohibit all inquiries into an applicant's criminal history until the point specified by the regulation — usually after the initial interview or after a conditional offer has been extended.⁵

Thus, employers must train their human resources personnel to refrain from making any inquiry into the applicant's criminal history — including asking the applicant directly or on a job application and researching the applicant's criminal history on the internet — until the specified point in the hiring process.

Revise applications

Employers may need to revise hard copy and/or online application forms to remove or appropriately limit questions seeking conviction information for impacted positions. They should also consider creating separate job applications for positions covered under any ban-the-box laws and positions exempted from such laws.

If an employer uses a third party to screen applicants, it should ensure that the third party's screening process complies with any applicable ban-the-box laws.

Employers that operate on a nationwide basis may want to consider the most stringent ban-the-box requirement from the relevant jurisdictions in which they operate to determine if that model is appropriate for their company.

Create written procedures

Employers should consider consulting an employment lawyer to create written guidelines for hiring managers and other human resources personnel. These guidelines should be implemented whenever inquiries are made into an applicant's criminal history.

Written procedures are especially useful in guiding human resources personnel if an offer is withheld or rescinded due to the applicant's criminal history.

Employers that operate within jurisdictions requiring them to provide specific pre-adverse and adverse decision notification should also consult a lawyer to assist in drafting form notification letters and to train their human resources staff.

Although ban-the-box notice requirements may be similar to those under the Fair Credit Reporting Act, ban-the-box notice requirements should be considered separate from and in addition to the pre-adverse and adverse action requirements under the FCRA. This is because compliance with the FCRA's requirements does not always ensure compliance with ban-the-box regulations.

Avoid blanket exclusionary policies

In addition to violating ban-the-box laws, blanket hiring policies that exclude all applicants with a criminal history may violate Title VII.

There may be Title VII disparate impact liability where the evidence shows that an employer's criminal screening policy or practice disproportionately excludes members of a Title VII-protected

class (race, color, religion, sex or national origin) and the employer does not demonstrate that the policy or practice is job related for the position in question and consistent with business necessity.

CONCLUSION

Employers should be diligent in reviewing their applications and policies to ensure compliance with all applicable ban-the-box policies. They should also consult employment lawyers to help train interviewing managers and human resources personnel to ensure the employer has compliant procedures across the entire organization.

NOTES

- ¹ See Society for Human Resources Management, *Background Checking: Conducting Criminal Background Checks* 3 (2010).
- ² Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, *Cumulative Prevalence of Arrest From Ages 8 to 23 in a National Sample*, 129 *PEDIATRICS*, 21 (2012).
- ³ JEFFREY C. DIXON, ROYCE SINGLETON & BRUCE C. STRAITS, *THE PROCESS OF SOCIAL RESEARCH* 342 (2015); see also Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, *NAT'L INST. OF JUST. J.* 42, 43 (2012) (citing Devah Pager, *The Mark of a Criminal Record*, 108(5) *AM. J. OF SOC.* 937, 947-49 (2003)).
- ⁴ C. DIXON ET AL., *supra* note 3, at 342.
- ⁵ Some ban-the-box policies contain provisions that allow employers to make inquiries into the criminal history of an applicant if the applicant opens the door by volunteering information about his criminal history.



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