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States and Cities Are Banning the Box

With increasing frequency, states and cities across the country are adopting so-called “ban-the-box” laws that prohibit employers from asking about an individual’s criminal history on job applications. Thirteen states and more than 60 cities and counties now have ban-the-box laws, and others are expected to follow. What began as an effort to modify public-sector hiring practices has widened, and a growing number of states and major cities – such as San Francisco, Philadelphia, and Seattle – now restrict criminal history inquiries on applications and during the early stages of the hiring process by most private employers as well. As ban-the-box laws gain momentum, the rapidly changing legal landscape and a growing patchwork of laws pose new compliance challenges for would-be employers.

Background

Employers use information from individual application forms to select candidates for further consideration or to eliminate them from the potential employment pool. Job applications often contain a question asking applicants whether they have ever been convicted of a crime, and instructions to check a box on the form if they have a criminal record. In many cases, the form does not indicate how the employer will use the information provided when looking at job applicants.

In some states, an employer's right to inquire about an applicant’s criminal history is limited to asking about specific criminal offenses or for specific jobs. Where permitted to ask about criminal history, an employer may still be prohibited from considering it in making hiring decisions. In other circumstances, an employer may disqualify an applicant based on his or her criminal record only if the criminal offense is related to the job the applicant is seeking. Even if applicable state or local laws do not limit the employer's right to obtain or use the information to make employment decisions, federal laws may.

Thirteen States on the Ban-the-Box Bandwagon

In 1998, Hawaii became the first state to remove conviction questions from job applications. Since then, a dozen other states have adopted ban-the-box laws — with eight of those passing legislation in 2013 and 2014 alone. The

13 states that have adopted statewide bans are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, New Jersey, and Rhode Island.

Ban-the-box laws require employers to delete the check-off box on their job application forms that asks applicants to disclose whether they have a criminal record. Although ban-the-box laws do not prevent employers from considering an individual's criminal history, they do impact the applicant screening process by delaying initial employer inquiries until sometime later in the hiring process. However, the extent of the information that an employer may consider and when criminal background inquiries may be made varies among the states and localities that have adopted ban-the-box laws.

Seven States Regulate Public Employers' Hiring Practices

California, Colorado, Connecticut, Delaware, Maryland, Nebraska, and New Mexico currently regulate how and when public sector employers — but not private employers — may use criminal records.

California. Governor Jerry Brown signed AB 218 into law on October 10, 2013, eliminating criminal conviction questions from employment applications used by state or local agencies (including cities, counties, and special districts) effective July 1, 2014. The law generally prohibits state and local authorities from asking job applicants about their criminal conviction history until after the agency has determined that the applicant meets the minimum qualifications for the job, but does provide limited exceptions for positions where a criminal background investigation is otherwise required by law. After determining that the applicant meets minimum job qualifications, inquiries about criminal convictions may be made.

> **Comment.** A new ban-the-box law in California (A. 1650), enacted on September 30, 2014, will require employers bidding on state contracts involving onsite construction-related services to certify that they will not ask an applicant to disclose conviction history on or at the time of an initial employment application unless required under federal or state law. The new requirement is effective on January 1, 2015.

Colorado. On May 29, 2012, Governor John Hickenlooper signed into law HB 1263, aimed at reducing barriers to employment by state agencies for individuals with criminal records. The law prohibits job advertisements and applications stating that a person with a criminal record may not apply, unless there is a statute that bars employment of a person with a record. The law also prohibits state agencies and licensing agencies from conducting a background check until the applicant is a finalist for the job or receives a conditional offer of employment. Whether a state or licensing agency may disqualify an applicant because of a conviction depends on four factors: the nature of the conviction; its relationship to the job; the applicant's conduct since; and how long ago the conviction occurred. Certain exceptions exist for public safety and corrections-related jobs.

Connecticut. Following a veto override, House Bill 5207 took effect on October 1, 2010. The law generally requires state employers to make conditional offers of employment to individuals prior to inquiring about their past criminal convictions. Exceptions exist for positions for which any provision of the general statutes specifically disqualifies a person from employment by the state or any of its agencies because of a prior conviction of a crime.

Delaware. On May 8, 2014, Governor Jack Markell signed into law HB 167, generally prohibiting a public employer from inquiring into or considering the criminal record, criminal history, credit history, or credit score of an applicant during the initial application process. A public employer may inquire into or consider an applicant's criminal background and credit history after the completion of the first interview if the applicant is otherwise qualified. State,

county, or municipal police forces, the Department of Correction, the Department of Justice, the Public Defender's Office, the courts, and other positions where federal or state statutes require or permit the consideration of an applicant's criminal history are excluded.

Maryland. Governor Martin O'Malley signed SB 4 into law on May 2, 2013, prohibiting state public employers from making inquiries into an applicant's criminal history until after an initial interview. The law generally applies to applicants for employment in all branches of state government, but excepts the Department of Corrections, the Sheriff's Office for any county, and any position for which a background check is required by law.

Nebraska. On April 16, 2014, Governor Dave Heineman signed LB 907 into law, prohibiting the state, cities, and counties from asking for an applicant's criminal history — including any inquiry on any employment application — until after the public employer has determined the applicant meets the minimum employment qualifications for the job. The law excepts law enforcement personnel and positions for which a background check is required by law, and also allows public school districts and educational service units to require an applicant to disclose a criminal record or history relating to sexual or physical abuse.

New Mexico. Governor Bill Richardson signed SB 254 into law on March 8, 2010, amending the existing Criminal Offender Employment Act to restrict inquiry into and consideration of a conviction until the final stages of the hiring process. The amended law prohibits a state board, department, agency, or political subdivision from inquiring about a conviction on an initial employment application and allows a conviction to be taken into consideration only after the applicant has been selected as a finalist for the position.

Six States Regulate Both Public and Private Employers

Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island are the only states that currently regulate private employers' use of criminal records. Some of these states defer inquiries about criminal convictions until the application has been submitted or an initial interview has occurred, while others bar them until after a conditional offer of employment has been made.

Hawaii. Hawaii became the first state to adopt a ban-the-box law (HRS section 378-2.5) in 1998. The law, which applies to both public and private employers, prohibits employers from asking about an applicant's conviction history until *after* a conditional offer of employment has been made. If a subsequently revealed conviction has a "rational relationship" to the responsibilities of the position applied for, the offer may be withdrawn. However, employers may only consider a conviction record within the most recent 10-year period (excluding any periods of incarceration).

Illinois. On July 19, 2014, Illinois Governor Pat Quinn signed into law the Job Opportunities for Qualified Applicants Act (HB 5701), which prohibits private employers with 15 or more employees and employment agencies from inquiring into a job applicant's criminal record until the employer has selected the applicant for an interview or a conditional offer of employment has been made. Specifically exempted are positions that state or federal law excepts on the basis of certain convictions.

> **Comment.** On October 3, 2013, Governor Quinn signed Administrative Order 1, which required the Department of Central Management Services Bureau of Personnel to revise the application for state employment and the processes for evaluating, interviewing, and selecting candidates for employment in all state agencies, boards, and commissions under the governor's jurisdiction. The order prohibits those state agencies from asking job applicants about their criminal history before beginning to evaluate the individual's knowledge, skills, and abilities.

Massachusetts. Massachusetts Governor Deval Patrick signed Chapter 256 of the Acts of 2010 into law on August 6, 2010 that generally prohibits both public and private sector employers from asking in an initial employment application whether an applicant has a criminal record. Exceptions exist if legal restrictions apply to specific jobs or occupations. Criminal records obtained through the state database are generally limited to felony convictions for a 10-year period following their disposition, misdemeanor convictions for a 5-year period after disposition, and pending criminal charges. Under Massachusetts law, applicants must receive a copy of their criminal history report before being asked about their history and whenever an adverse employment decision is made on the basis of such a report. (See our August 10, 2012 *For Your Information*.)

> **Comment.** Some cities that have banned the box have adopted similar measures requiring applicants to be provided with copies of their conviction history reports following an adverse hiring decision, and to be given an opportunity to rebut the accuracy of the report or the relevance of the record to the job at issue.

Minnesota. On May 13, 2013, Governor Mark Dayton signed into law an amendment (SF 523) to the state statute restricting criminal history inquiries in public sector hiring. The amendment expanded application of the state's ban-the-box law to private employers, prohibiting them from inquiring into an applicant's criminal history until after selection for an interview or before a conditional offer of employment

New Jersey. The Opportunity to Compete Act (A1999), approved on August 11, 2014, generally prohibits employers from inquiring into job applicants' criminal records or requiring them to complete applications that make criminal history inquiries during the initial application process. Also prohibited are advertisements stating that applicants who have been arrested or convicted will not be considered. The law is effective March 1, 2015.

Rhode Island. When Governor Lincoln Chafee signed HB5507 into law on July 15, 2013, Rhode Island limited a private employer's ability to ask about a job applicant's criminal background by delaying background check inquiries in the hiring process. Unless a conviction history would automatically disqualify the applicant by law from the position sought, employers cannot inquire into criminal convictions until the first interview with the applicant.

> **Comment.** Other states — such as New York, Pennsylvania, and Wisconsin — prohibit hiring discrimination based on an applicant's criminal record unless the conviction is substantially job-related, but have not adopted ban-the-box laws.

Major Cities Banning the Box

Thirteen states and the District of Columbia have already passed ban-the-box laws. While they do not have statewide bans in effect, 17 other states have at least one city or county that has a local ban-the-box law in place. Major cities across the country have enacted local ban-the-box ordinances and adopted hiring policies that restrict

the use of background checks by public employers and also, in some cases, by vendors that do business with them.

> **Comment.** Both New York City and New York state laws prohibit employers from taking adverse employment actions based on an applicant's or employee's criminal past unless it is directly related to the job sought or held or would pose an unreasonable risk to property or to the safety of individuals or the general public. By a 2011 executive order, then New York City Mayor Michael Bloomberg banned the box for city agencies, prohibiting criminal history inquiries on initial job application documents and in an initial interview. The New York City Council is now considering a bill (Int 0318-2014) that would, if enacted, expand the ban to private employers, and prohibit criminal history inquiries before a conditional offer of employment by both public and private employers.

In 2011, Philadelphia became the first major city to ban the box for both public and private sector employers. Since then, a growing number of major cities have adopted restrictions on criminal history inquiries by some or most private employers — including Boston, Baltimore, Detroit, New Haven, Philadelphia, Indianapolis, Seattle, and San Francisco. Washington DC is poised to do so shortly.

Competing Concerns?

Unless local ban-the-box ordinances are sufficiently limited, they may conflict with other laws that prohibit hiring individuals with criminal pasts. In examining their background check policies, employers have to balance appropriate limitations against potential claims for negligent hiring.

> **Comment.** On August 22, 2014, DC Mayor Vincent Gray signed the Fair Criminal Screening Act, which will become effective following the congressional review period required by the DC Home Rule Act and publication in the DC Register. With limited exceptions, the DC law will prohibit employers from asking an applicant about criminal convictions until after a conditional offer of employment has been made, prohibit employers from asking about arrests that do not result in a conviction, and allow employers to withdraw a conditional offer for a legitimate business reason.

The EEOC's Take

The EEOC has long held that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on certain racial and ethnic groups. Although Title VII does not prohibit an employer from requiring applicants or employees to provide information about arrests, convictions, or incarceration, it does prohibit employment discrimination on the basis of race, color, national origin, religion, or sex.

In 2012, the Equal Employment Opportunity Commission (EEOC) issued updated enforcement guidance on employer use of arrest and conviction records in employment decisions under Title VII. (See our May 11, 2012 *For Your Information*.) The guidance is premised on the EEOC's belief that a blanket exclusion of applicants with a criminal record is discriminatory, and presents an unfair barrier to employment for African-American and Hispanic men, who statistically have disproportionately higher arrest, conviction, and incarceration rates than the general population.

> **Comment.** The 2012 guidance replaces earlier EEOC guidance on arrest and conviction records. In a 1987 policy statement on conviction records, the EEOC made clear that convictions are considered reliable

evidence that criminal conduct occurred, and such conduct may disqualify an individual for a particular position. In a 1990 policy statement on arrest records, the EEOC explained that an arrest does not establish that criminal conduct has occurred.

Among other topics, the latest guidance discusses:

- How an employer's use of an individual's criminal history in making employment decisions could violate Title VII
- The differences between the treatment of arrest and conviction records
- Disparate treatment and disparate impact analysis under Title VII
- Other federal laws and/or regulations that restrict and/or prohibit the employment of individuals with certain criminal records

An employer's use of criminal history information may violate Title VII under two different theories of employment discrimination — disparate treatment and disparate impact. Title VII is violated if an employer treats job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin (disparate treatment discrimination). Title VII is also violated if an employer applies criminal record exclusions uniformly, but the exclusions disproportionately affect individuals of a particular race or national origin (disparate impact discrimination).

EEOC Best Practice

As a best practice, the EEOC advocates removal of the criminal conviction history inquiry from job applications.

Basing its updated enforcement guidance on a disparate impact theory, the EEOC maintains that disqualifying job applicants based on having a criminal record would violate Title VII unless the employer can show that the exclusion is "job related and consistent with business necessity." Thus, unless required by federal law, a blanket exclusion of everyone with a criminal record will not be job related and consistent with business necessity and will violate Title VII.

Limits on Exclusions

The EEOC's updated guidance clarifies the limits on employers' applicant screening and hiring policies, and spells out how an employer can show that a criminal conduct exclusion that has a disparate impact is job related and consistent with business necessity. The EEOC maintains that employers will consistently be able to link specific criminal conduct with the risks inherent in the duties of a particular position in the following two circumstances:

- The employer is able to validate the criminal conduct screen for the position using the EEOC's Uniform Guidelines on Employee Selection Procedures standards.
- The employer develops a targeted screen considering the nature and seriousness of the offense, how much time has passed since the offense, and the nature of the job. In some circumstances, the employer may also have to provide an opportunity for an individualized assessment for applicants who are screened out because of a criminal conviction.

The Fair Credit Reporting Act

While Title VII does not regulate how employers may acquire criminal history information, the federal Fair Credit Reporting Act (FCRA) does. Employment background checks, which are also are known as consumer reports, can include information from a variety of sources, including credit reports and criminal records. The FRCA establishes

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certain procedures that employers must follow when they obtain criminal history information from third-party consumer reporting agencies or use consumer reports to make employment decisions concerning job applicants or current employees — including hiring, retention, promotion, or reassignment. The FRCA provides rules for employers to follow both before and after they take an adverse employment action based on such a report. Detailed guidance is available on the Federal Trade Commission's website. Some state laws also restrict the use of consumer reports — usually credit reports — for employment purposes and/or provide protections for individuals related to criminal history inquiries by employers.

In Closing

Neither federal, state, nor local laws prohibit employers from screening job applicants or imposing job-related requirements in their candidate evaluation and selection processes. They do, however, impact how and when prospective employers may conduct pre-employment inquiries concerning criminal history or perform criminal background checks, and the extent to which employers may use that information in making hiring decisions.

Recent legislative activity in states, cities, and counties signals a developing nationwide trend to regulate employers' use of criminal histories in making employment decisions. Aimed at expanding employment opportunities for otherwise qualified individuals with criminal records, the new laws generally curb the ability of employers to consider criminal background checks at the initial stages of the hiring process. Employers will want to take stock of their current pre-employment practices — and their employment applications in particular — to ensure that they are in compliance with applicable federal, state, and local laws, and to consider what, if any, changes may be needed in the near future.

Authors
Nancy Vary, JD
Abe Dubin, JD

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