

Ban the Box' Initiatives: Removing Conviction Histories From Employment Applications

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The use of criminal records in the hiring process has received a great deal of attention in recent years. The Equal Employment Opportunity Commission issued guidance in 2012 requiring employers to demonstrate that conviction records upon which they rely in making hiring decisions are directly job-related and applicants are individually assessed for each position. In addition, the federal Fair Credit Reporting Act and similar state laws impose a number of procedural requirements on employers that use third parties to conduct background checks on applicants.



There are nearly 80 million Americans with criminal records, including arrests that did not lead to a conviction, and computerized databases make that information easier than ever for employers to obtain, according to *The Wall Street Journal*. Now an increasing number of states and municipalities are taking additional steps to remove barriers in employers' hiring policies that impact these Americans. Widely known as "ban the box" initiatives, these regulations typically ban questions on job applications about an individual's conviction history and delay background check inquiries until later in the hiring process. The premise underlying ban the box initiatives is that

eliminating criminal history questions from the preliminary stage of the process provides applicants with a fair shot at consideration based on their qualifications. To date, six states — Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island, as well as the District of Columbia — have enacted ban the box laws for private employers. A number of localities, including Baltimore; Buffalo, New York; Chicago; Montgomery County, Maryland; Newark, New Jersey; Philadelphia; San Francisco; Seattle; and Rochester, New York, also have required removal of the conviction history question on private employers' job applications.

Many current ban the box laws go further than proscribing when criminal history information may be sought in the hiring process. A number of state and local laws limit how an applicant's criminal history can be taken into account at any stage of the hiring process, for example by requiring consideration of additional factors, such as the nature of the crime and its relationship to the job, the time elapsed since the conviction and the individual's rehabilitation. In addition, states and cities are increasingly imposing restrictions on the substantive scope of the criminal history question, such as prohibitions on seeking arrest records, convictions that have been expunged and marijuana-related offenses, as well as limitations on the look-back period for criminal offenses (*e.g.*, 10 years for felonies and five years for misdemeanors in Massachusetts).

For multistate employers, these restrictions make it increasingly difficult to follow a uniform approach across the jurisdictions where they have employees. Given the strong likelihood that more states and municipalities will enact new limitations on the criminal history question, employers are advised to evaluate their employment applications and hiring procedures to ensure compliance.