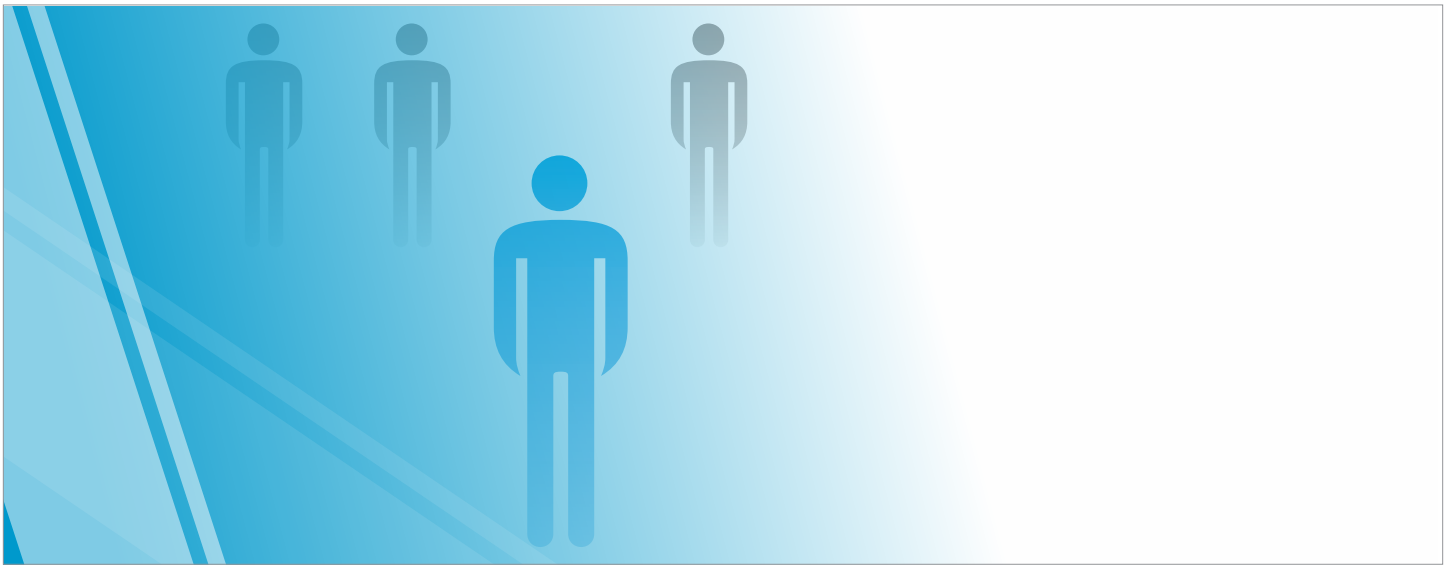
whitepaper

BAN THE BOX LEGISLATION

Background, Case Study & Best Practices



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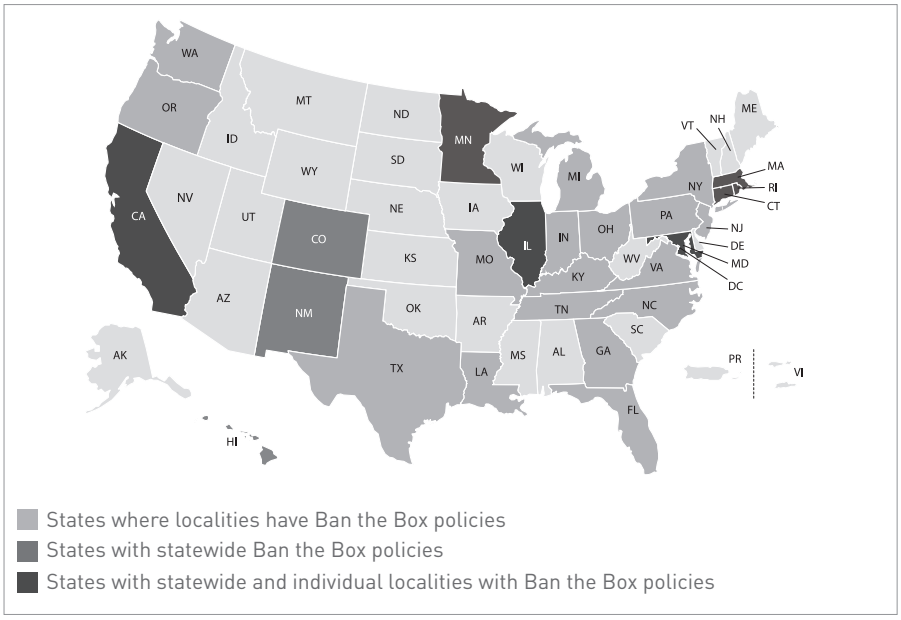
BACKGROUND

In the past few years, a movement to remove barriers to employment for applicants with criminal pasts has been gaining momentum nationwide.

The passage of "Ban the Box" legislation, or legislation that limits an employer's right to inquire into a job applicant's criminal history, is on the rise and new cities, counties and states are being added every few months to the growing list of those passing such legislation. "Ban the Box" is named for the box appearing on many employment applications that an applicant is asked to check to indicate that he or she has a criminal record. An estimated 65 million Americans (roughly one in four adults) have arrests or convictions that would show up in a background check.[1] Proponents of such laws argue that these Americans often face employment discrimination, even where the arrest did not result in a conviction or where the crime was minor. In addition, proponents claim that for those who have been convicted and served a criminal sentence, unemployment resulting from discrimination only fosters the cycle of recidivism and repeat incarceration. The idea behind the Ban the Box movement is that by deferring the disclosure of past transgressions until an employer is already knowledgeable about an applicant's qualifications and experiences, an employer is more likely to objectively assess the relevance of such information.

In April of last year, the U.S. Equal Employment Opportunity Commission (EEOC) also strongly endorsed the value of a policy that removes barriers to employment for qualified workers with criminal records when it issued its revised guidance on the use of arrest and conviction records in employment under Title VII of the Civil Rights Act of 1964. The EEOC guidance has certainly



Approximately 58 cities/counties and ten states have adopted Ban the Box policies in recent years.[3]

been a spark in much of the past year's legislation.[2]

Approximately 58 cities/counties and ten states have adopted Ban the Box policies in recent years.[3] While the laws vary in their application and implementation, they generally establish parameters for when, and to what extent, an employer may ask about or use criminal history for employment purposes. Generally, they require postponing the inquiry until an applicant has an opportunity to be considered (after an interview or once an applicant is a finalist or has received a conditional offer) and after the employer has determined in good faith that the specific position warrants a background check. Most include exceptions if the position is of a sensitive nature or if a background check is required by another law (such as jobs involving child care, financial services, education and law enforcement). Some Ban the Box laws provide applicants with the right to appeal a denial of employment. The latest cities to pass legislation are Indianapolis, IN, Louisville, KY and Charlotte, NC with laws that only apply to public employers. San Francisco passed similar legislation that applies to both public and private employers.

Significantly, however, while most early legislation applied primarily to employment by cities or state agencies, a growing number of recent laws have extended the restrictions on criminal history inquiry to private employers and even vendors and contractors. Detroit's City Council, for example, initially passed legislation in September 2010 banning the box on city applications. In July 2012, the city council extended such ban to require that business vendors and contractors who do business with the city also remove the conviction history question from their own job applications. Similarly, in January 2008, Cambridge, Mass. extended the requirements of its policies limiting discrimination against people with criminal records in city government positions (passed in May 2007) to private vendors that do business with the city. In March 2011, Philadelphia became the first city to extend the reach of the legislation to apply to private employers with ten or more employees within the City of Philadelphia.[4]

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[1] Michelle Natividad Rodriguez & Maurice Emsellem, "65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment," National Employment Law Project (2011), available at http://nelp.3cdn.net/e9231d3aee1d058c9e_55im6wopc.pdf

[2] There has been employer push-back on limiting the use of criminal background checks to screen applicants. The National Retail Federation, for example, appearing before the U.S. Commission on Civil Rights in December 2012, testified that such regulations threaten to undermine retailers' attempts to protect their customers and employees. While retailers who ask about criminal history run the risk of being charged with discrimination, there is no legal protection against lawsuits if an unscreened hire later commits a crime on the job.

[3] Hawaii imposed the first law in 1998. Since then, California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, Minnesota, New Mexico and Rhode Island have adopted Ban the Box policies. http://www.nelp.org/

[4] The cities of Buffalo, N.Y. and Seattle, Wash. and the states of Hawaii and Massachusetts also passed laws that also extend the ban to private employers.

Newark, N.J. passed the most restrictive ordinance in terms of an employer's ability to utilize criminal history information for employment purposes.

CASE STUDY: NEWARK, N.J.

In September 2012, the City of Newark, N.J. passed the most restrictive ordinance in terms of an employer's ability to utilize criminal history information for employment purposes. It is worthwhile examining it in a bit of detail as it incorporates many of the provisions from other Ban the Box legislation as well as the EEOC guidance.

Ordinance 12-1630[5] limits when and to what extent employers may ask about or use criminal history for employment purposes, and it applies to private employers with five or more employees doing business within the City of Newark. Employment (similar to legislation in other cities) is defined broadly to include "any occupation, vocation, job, work or employment with or without pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency, or any form of vocational or educational training with or without pay." In addition, the physical location of the employment "must be in whole or substantial part, within the City of Newark."[6]

The ordinance mandates that a Newark employer can only inquire about an applicant's criminal history after a conditional offer is made and after a determination has been made that the sensitive nature of the position warrants a check. If so, and after obtaining the applicant's consent, the information that can be searched and considered is limited.

[5] Ordinance 12-1630 is titled the "Ordinance to Assist the Successful Reintegration of Formerly Incarcerated People into the Community by Removing Barriers to Gainful Employment and Stable Housing After Their Release from Prison; and to Enhance the Health and Security of the Community by Assisting People with Criminal Convictions in Reintegrating into the Community and Providing for Their Families."

[6] The ordinance, in its current form, does not define "substantial part" nor does it suggest any objective threshold to assist employers in determining whether employees who perform some of their job duties within Newark make such employers subject to the ordinance.

Information That Can Be Searched With Applicant Consent:

1. Indictable offenses for eight (8) years following sentencing.
2. Disorderly persons or municipal ordinance violations for five (5) years following sentencing.
3. Pending criminal charges.
4. Any convictions for murder, voluntary manslaughter and sex offenses.

No inquiry can be made about arrests or accusations that did not result in a conviction; records which have been erased, expunged, the subject of an executive pardon or otherwise legally nullified; juvenile adjudications of delinquency; or any records which have been sealed.

Upon obtaining the results of a criminal history search, the ordinance requires employers to undertake an "individualized analysis," which must consider the following six factors (incorporating a lot of the EEOC guidance) and be documented in writing using the Applicant Criminal Records Consideration Form.

6 Factors for "Individualized Analysis":

1. The nature of the crime and its relationship to the duties of the position sought.
2. Any information pertaining to the degree of rehabilitation and good conduct.
3. Whether the job at issue provides the opportunity to commit a similar offense (this factor is not included in the EEOC guidance).
4. Whether the circumstances leading to the offense are likely to reoccur.
5. The length of time that has elapsed since the offense and the extent to which this was factored into the decision-making.
6. Any certificate of rehabilitation issued by any state or federal agency.

If an employer then decides to revoke the conditional offer of employment, the employer must provide the applicant with the following in a single package sent by registered mail.

A notice to revoke an employment offer should include:

- Notification of the adverse decision;
- A copy of the results of the criminal history inquiry, indicating the particular conviction that relates to the position and a copy of the Applicant Criminal Record Consideration form;
- Written notice of rejection, specifically stating the reasons for the adverse decision and including consideration of the above factors; and
- A statement advising applicant of his/her opportunity for review, including how he/she may present evidence related to employer's consideration of the above factors and what kind of evidence may be presented.

The applicant then has ten (10) business days after receipt of the notice to respond and invoke the right to review and specifically to present information/evidence related to the accuracy and/or relevance of the results of the criminal history inquiry. Finally, the employer must review all information and documentation received prior to taking any final decision regarding employment, document in writing the information and evidence considered and the employer's final action (specifically stating the reasons for the final action taken) and then notify the applicant of the final action and provide him/her with a copy of all the writings. The big takeaway for employers is that the Newark legislation mandates a very detailed, time-consuming, individualized process that must be well-documented.[7]

[7] While the Newark ordinance took effect on November 18, 2012, an amended/corrected version is forthcoming in the near term as the city council received some requests for changes from the business community. Members are working on an amendment, which will need to go before a re-vote of city council.

THE APPLICANT HAS 10 BUSINESS DAYS TO RESPOND AND INVOKE THE RIGHT TO REVIEW

When advertising for jobs, job posts should not suggest any limitations to employment eligibility based on criminal history.

BEST PRACTICES

For businesses employing workers in locales that have enacted Ban the Box legislation, the best first step is to carefully review the language of the law and modify practices accordingly.

In Newark, for example, employers should start by examining their employment applications closely to make sure they are not asking any information about criminal history on the application or before a conditional offer is made. When advertising for jobs, job posts should not suggest any limitations to employment eligibility based on criminal history. Pre-adverse and adverse action notices should be reviewed and modified to incorporate the individualized analysis required. Finally, all aspects of the hiring process, particularly the individualized analysis, should be well-documented.

For employers in cities and states unaffected, so far, by legislation, proactively adopting best practices when considering criminal record information in making employment decisions is recommended. As stated earlier, the list continues to grow of those locations adopting Ban the Box regulations.[8] Some general examples of best practices come straight out of the EEOC guidance. In addition to the employment practices discussed above, employers should also consider the following:

Additional Suggestions for Best Practices:

- Limit the use of criminal record information to those records that are job-related for the position in question and consistent with business necessity;

[8] Legislation applicable to both public and private employers is pending in Rhode Island; a measure to expand Washington, D.C.'s law to private employers was rejected in December 2012.

- Eliminate policies or practices that automatically exclude people from employment based on any criminal record;
- Develop narrowly-tailored written policies and procedures for screening applicants and employees for criminal conduct; and
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination.

Finally, employers must keep information about applicants' and employees' criminal records strictly confidential, making it available to only those who have a need to know, and only use it for the purpose for which it was intended.

As proposed and pending Ban the Box legislation is increasingly being acted upon at the federal, state and local level, employers need to monitor developments and modify their employment practices as required by such laws. By proactively ensuring that their employment practices are compliant, employers can avoid scrutiny and ultimately, liability.