



HR Resources | Best Practices Series

BAN THE BOX LEGISLATION



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Should You “Ban the Box” ?

An increasing number of states, counties, and cities have passed so called “Ban the Box” legislation which seeks to limit discrimination against applicants with a criminal record. Some state’s laws only apply to public employers, and others include private employers and have an impact on small business.

The “box” in question is found on employment applications and asks the applicant to ‘check the box’ to disclose prior criminal convictions. The new legislation mandates that a background check occur only **after** the interview process, and that applicants are not asked about criminal records until they are in the final stages of the selection process. In some cases, the background check is only allowed **post-offer**. The laws are varied and can include county/city workers (and the vendors that do business with them), and private employers. In September of 2011 the city of Cleveland ‘Banned the Box’ for felony record questions for city employees and civil service test applications.

Ex offenders frequently cite the barriers they face trying to get a foot in the door for an interview when they have a criminal offense on their record. Proponents of “Ban the Box” legislation propose that offenders already face huge hurdles, such as housing and other basic needs. Proponents of the laws state that the inability to gain employment can be a contributing factor to reoffending. Many point out that a released offender has paid their dues, and deserves the chance to start a new life over.

In some cases, “Ban the Box” laws completely eliminate background checks for certain positions in county and/or city jobs and the vendors that do business with them; in others, it just changes the timing of the background check. In all cases, it does affect who is invited in for an interview. Officials at the United States Equal Employment Opportunity Commission are already reviewing their current guidelines concerning employment screening. It’s only a matter of time until federal legislation or guidance is published.

According to the National Employment Law Project (NELP 2012);

- Three states (Connecticut, Massachusetts, and New Mexico) have adopted “ban the box” policies that prescribe the point at which an individual’s criminal record may be revealed in the hiring process.
- Two states (North Carolina and Ohio) passed laws that create certificates that recognize an individual’s rehabilitation and thereby reduce employment sanctions and disqualifications.
- Thirteen states (Arkansas, California, Colorado, Delaware, Indiana, Louisiana, Mississippi, North Carolina, Oregon, Rhode Island, South Dakota, Texas, and Utah), recognizing that old, minor offenses can plague job seekers years later, took positive steps to allow the expungement and sealing of a number of low-level offenses.
- Five states (Colorado, Kentucky, Nevada, New York, and Virginia) created new rights for workers to more easily access identification documents and other information needed to secure employment.
- Three states (Colorado, Massachusetts, and North Carolina) adopted laws, in conjunction with other reforms, to limit the liability of employers that hire people with criminal records.

Are more rules and mandates necessary?

The EEOC already has published guidelines relating to pre-employment screening which include considerations for:

- The length of time since the offense occurred.
- Validity of the offense in relation to the job duties.
- The nature and seriousness of the conviction.

Why the additional scrutiny on applicants with criminal records? The Fair Credit Reporting Act (FCRA) already has requirements for companies that utilize a third party screening service, that allows an applicant to, 1) dispute information found in a background check report and 2) make it mandatory for an employer to get an applicant's permission to run the background check. Some state FCRA laws limit the scope of the background check to 7 years.

What are the pros and cons of Ban the Box legislation?

Pros:

Some of the Ban the Box legislation allows for people with minor offenses to apply for expungement and sealing of the criminal record. This clears up their criminal record and lets them enter the job search on an even plane.

There are instances when a stupid mistake in college can haunt a person for life. A 20 year old conviction with no history of repeat infractions should not follow a person indefinitely.

Cons:

There *will* be additional cost to employers. Whereas previously an employer could eliminate a candidate for a cashier position with a history of theft; now they would have to incur the additional expense of a background check to find out the candidate is not suitable.

Aside from the EEOC guidelines for employment screening noted above, how far should the government go in mandating additional requirements for private employers? After all, it is the private employer who is liable for negligent hiring litigation. It is in their best interest to insure they hire the best applicant for the position.

Some sectors are universally exempt from Ban the Box legislation such as banking and health care. Small businesses that handle consumer credit card transactions and the owner's cash are not given this opportunity to exempt themselves. Is this a level playing field for small business owners? Small business is very aware of their liability for negligent hiring if they hire someone who could put their employees or customers at risk, and now the new potential liability for not hiring someone with a criminal record, if it's not seen as a "business requirement".

Perhaps an easier solution would have been to 'Expand the Box', and require employers using "The Box" to leave space for the applicant to list the year of the offense and an explanation. This would give an employer the information they need in order to determine if the crime has bearing on the position being applied for, and to weigh the length of time that has lapsed since the crime occurred. It also opens the door for communication between the employer and applicant regarding the offense and rehabilitation. Very few employers order a background check before the initial interview anyway. As a screening provider, we know that approximately 40% of our clients already have a process in place that allows for the convicted to apply, and win, those job positions. Many clients do not even want us to include minor offenses in their reports.

Instead of more legislation imposing restrictions on employers, the state lawmakers should review the process for having criminal records sealed or expunged. Community service, a clear, unblemished record for a number of years, rehabilitation efforts, all could be used as a basis for sealing a criminal record, hence, solving the problem without needless impositions on employers.

As a best practice, the easiest solution is to remove the box from the employment application, and include it with the required background authorization documentation which is already required by the FCRA. It's a simple move for employers, and still allows for them to process the background checks as needed. Additionally, employers should

have a clear and specific hiring policy in place which addresses how criminal records will be reviewed for each job position.

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