



“Ban the Box”: A Discussion of State and Local Laws Restricting Inquiries into an Applicant’s Criminal History

Over the last several weeks, New Jersey, Illinois, the District of Columbia, and San Francisco have joined the ranks of states and local governments across the country that have adopted so-called “ban the box” laws or ordinances. Generally, these rules prevent employers from asking about an applicant’s criminal history at the beginning of the job application process and allow such inquiries to occur only after the applicant has passed an initial employment screening. According to the National Employment Law Project, 67 cities and counties and 13 states have adopted such provisions.¹ More cities and states are expected to follow suit.

The ban the box movement stems from concerns about incarceration and recidivism rates. Proponents of these regulations argue that the increased use of background checks in employment screenings operates to exclude an alarming number of applicants from jobs for which they are otherwise qualified.² Advocates contend that these laws will help lift a perhaps misplaced stigma accompanying a criminal record and force employers to evaluate individual applicants on their job-related qualifications and skills. They argue that this, in turn, will increase the likelihood that a person with a criminal history will find gainful employment and, eventually, lead to a decrease in recidivism rates.

Despite these legitimate policy concerns, many employers are pushing back, arguing that they have an obligation to keep workplaces and customers safe. They claim that employers who hire convicted offenders are exposed to negligent hiring or workplace violence claims, particularly if they knew about, or failed to diligently discover, an employee’s criminal record. Additionally, many employers are concerned that ban the box statutes and ordinances create conflicts with other laws that prohibit them from hiring persons convicted of certain crimes in workplaces such as schools or hospitals.

This *Commentary* discusses the current state of the ban the box laws, the risks that these laws pose to employers, and strategies for compliance. It also contains a chart with highlights of key provisions from the jurisdictions that have enacted such laws as of the time this *Commentary* is published.

Current State and Local Laws

Thirteen states have passed ban the box statutes: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Mexico, New Jersey, and Rhode Island.³

Of these states, only six—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island—regulate private employers' use of criminal records.⁴ In addition to these statewide regulations, 67 cities and counties throughout the country have adopted ban the box ordinances, including New York, San Francisco, Austin, Seattle, the District of Columbia, Boston, Chicago, Atlanta, Tampa, and New Orleans.⁵ While not every city and county ordinance applies to private employers, a growing number do: San Francisco, Seattle, Boston, New Haven, Indianapolis, Detroit, and Baltimore.⁶

Notably, ban the box rules generally do not preclude an employer from considering criminal history information altogether. They simply require employers to remove the request for applicants to check a box on an employment application if they have a criminal history, thereby delaying a criminal records search until the later stages of the screening process. This delay is intended to prevent employers from relying on an applicant's criminal history as grounds for disqualification at the inception of employment, particularly if the person's past offenses bear no rational relationship to the job sought. Beyond this basic requirement, there is considerable variance among the statutes and ordinances, especially in terms of *what* information an employer may consider and *when* an employer may inquire into an applicant's criminal background.

Set forth below is a summary of state ban the box laws that apply to private employers at the time this *Commentary* is published:

Hawaii Rev. Stat. §§ 378-2, 378-2.5 (1998). Hawaii prohibits employers from inquiring into an applicant's conviction history until after a conditional offer of employment has been made. The offer may be withdrawn if the applicant's conviction bears a "rational relationship" to the duties and responsibilities of the position sought. Under the law, employers may consider an applicant's conviction record only within the most recent 10 years, excluding periods of incarceration. Additionally, the definition of "unlawful discriminatory practices" includes "arrest and court record" as an impermissible reason for an employer to refuse to hire, fire, or otherwise discriminate against any individual.

Illinois House Bill 5701 and Executive Order 1 (2014). The "Job Opportunities for Qualified Applicants Act" applies to employers with 15 or more employees and to employment agencies. Employers may not inquire into an applicant's criminal record until the applicant has been selected for an interview by the employer or until after a conditional offer of employment is made to the applicant. Positions that have state or federal law exclusions based on certain convictions are exempted.

Massachusetts Gen. Law Ch. 6 §§ 151B, 168-173 (2010). Employers can no longer use an initial written employment application to ask whether an applicant has been convicted unless there is a legal restriction that applies to the specific job or occupation (for example, schools are required to conduct background checks by Massachusetts law). An employer may inquire orally into an applicant's criminal record but may not ask about arrests, charges, or detentions that did not result in convictions; sealed or juvenile records; and first convictions for any of the following misdemeanors: drunkenness, simple assault, speeding, affray, or disturbance of the peace. (See G.L. c. 151B, § 4(9)). With certain exceptions, criminal records provided by the state may contain only (i) felony convictions for 10 years following disposition; (ii) misdemeanor convictions for five years following disposition; and (iii) pending criminal charges. The law permits employers to question an applicant about his or her criminal record during the interview process and may take adverse actions based on that record. However, prior to questioning an applicant or taking an adverse action based on criminal record information, an employer must provide the individual with a copy of the record. The legislation also requires any employer that annually conducts five or more criminal background investigations to establish and maintain a written criminal records policy.

Minnesota Stat. § 364 (2013). The law provides that private employers may not inquire into an applicant's criminal history until after the applicant has been selected for an interview or before a conditional offer of employment. Additionally, long-standing statutory protections exist in Minnesota, such as: (i) a prohibition against disqualifying applicants from public employment or licensure unless the conviction is "directly related" to the position of employment or occupational license sought; (ii) a requirement that job-related factors be

considered; and (iii) a ban on using records of arrest not followed by valid conviction, annulled or expunged convictions, and misdemeanor convictions for which no jail sentence can be imposed, when evaluating applicants for public employment or licensure.

New Jersey Stat. Ann. § 34:6B-11 (Effective March 1, 2015). Employers with 15 or more employees over a span of 20 calendar weeks are prohibited from inquiring about an applicant's criminal record until after the first interview has been conducted. Employers may make criminal background inquiries before making a final offer of employment. The law exempts from coverage law enforcement, corrections, judiciary, homeland security, and emergency management positions, as well as positions for which the employer is legally required to conduct a background check.

Rhode Island Gen. Laws §§ 25-5-6, 28-5-7 (2013). Employers are prohibited from inquiring about an applicant's prior criminal convictions until the first interview with the applicant. An employer may inquire about the applicant's criminal convictions during the first interview. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

What Risks Do these Statutes Pose to Employers?

The Equal Employment Opportunity Commission ("EEOC") is already aggressively challenging many employers' practices with respect to the use of criminal records in the hiring process. In April 2012, the agency issued new guidance relevant to an employer's use of criminal background checks.⁷ And for the past several years, the EEOC has initiated litigation and otherwise attempted to use its enforcement powers to reform employers' policies in this regard.⁸ The ban the box movement only exacerbates the risk of scrutiny by government agencies because there is now an increased layer of regulation in many jurisdictions at the state and local level.

Opponents of these rules have also expressed concern that the ban the box movement will make workplaces less safe and potentially expose employers to common law claims

such as negligent hiring. But these concerns, while valid, can likely be mitigated. Ban the box rules do not prohibit consideration of criminal histories altogether. Generally speaking, they merely delay consideration of applicants' criminal background and, in some cases, prohibit employers from considering certain records altogether. See, e.g., Massachusetts Gen. Law Ch. 6 §§ 151B, 168-173 (2010) (prohibiting consideration of arrests that do not result in convictions). Accordingly, employers should remain vigilant about screening applicants with criminal backgrounds, only doing so later than they may have in the past.

Additionally, ban the box rules do not trump other laws specifically prohibiting employers from hiring individuals with certain criminal records. For example, federal law excludes an individual who has been convicted in the previous 10 years of certain crimes from working as a security screener or otherwise having unescorted access to the secure areas of an airport. There are equivalent restrictions under federal, state, and local laws for law enforcement officers, child care workers, bank employees, port workers, elder care workers, and other occupations. The ban the box statutes should not preempt such laws and regulations.⁹

Ban the box rules may also pose challenges for employers who receive large numbers of applications via the internet. Some of these employers use facially neutral policies, such as a policy automatically excluding persons who have been convicted of crimes, to weed out undesirable applicants without having to expend time and resources determining whether such people are otherwise qualified for the job. These kinds of automated exclusions based on criminal records are specifically affected by ban the box policies and can no longer be used in jurisdictions that have passed a law or ordinance applicable to private employers and contractors. However, there are other screening techniques that employers can use to weed out large numbers of people without running afoul of ban the box rules. Employers can establish noncomparative, objective criteria that are relevant to performing the job. Such criteria could include, depending on the circumstances, requiring applicants to have a degree

or certain number of years' experience in a particular field, requiring certain licenses or certifications, requiring fluency in a particular language, or requiring availability during certain times of the day or week. If an employer still has a large pool of applicants, it may use random sampling techniques to limit the number of people contacted for an interview and, at this point, may weed out applicants whose criminal convictions affect their ability to do the job in question.

In sum, ban the box laws are intended to stop employers from discarding applicants in the initial screening process because of a conviction or arrest before they have had a chance to consider the applicant based on his or her job-related qualifications. To this end, employers must remove any inquiry into an applicant's criminal history at the beginning of the screening process. Once an employer makes a decision to hire the applicant, the employer can conduct a criminal background check. At that point, if an employer discovers that the applicant has been convicted of a crime, the employer should make an individualized assessment as to whether it should hire or reject the applicant for reasons that are job related and consistent with business necessity. To ensure that employers are making individualized, job-related assessments of applicants, the EEOC advises that employers establish targeted screening procedures that take into consideration the nature of the crime, the time elapsed since the offense was committed, and the nature of the job sought.¹⁰ Waiting until later in the application process to conduct criminal background checks may cause practical concerns for employers, such as potentially losing qualified candidates due to delays in the screening process. However, these employers should take comfort in the fact that the ban the box rules are not designed to force them to hire individuals with criminal records that legitimately disqualify them from the job.

Compliance Assistance for Employers

Given the growing trend among state and local jurisdictions to enact laws regulating the use of criminal background checks in the hiring process, employers, especially those who operate in multiple jurisdictions, should review their current criminal records check policies and practices with the following considerations in mind:

Revise Employment Applications and Policies that Inquire into Criminal History in the Initial Screening in Jurisdictions that Have Enacted Ban the Box Rules. In those jurisdictions that have enacted ban the box rules, employers should remove questions about criminal histories from employment applications. Employers should also eliminate policies that automatically or categorically exclude persons with an arrest or a conviction. Instead, they should develop, generally speaking, narrowly tailored policies and procedures that provide for individualized assessments of the applicant's circumstances.

Consider Criminal Histories Using an Individualized Assessment. Employers may still conduct criminal background checks for applicants prior to making hiring decisions. According to EEOC guidance, as well as many ban the box laws discussed above, when making employment decisions based on an arrest or conviction, however, employers should evaluate the candidate's criminal record in light of the nature and gravity of the offense, the time that has passed since the offense was committed, and nature of the job sought. Numerous other factors may also be taken into account, including, but not limited to, the person's age at the time of conviction, evidence that the person has held similar employment postconviction without incident, rehabilitation efforts undertaken by the applicant, employment or character references presented by the person, and the length and consistency of the person's employment history before and after conviction.

Provide an Opportunity for Applicants to Explain Their Criminal Records. In jurisdictions that require it, and as part of the individualized assessment, employers should also afford job applicants an opportunity to explain the facts and circumstances surrounding a criminal conviction. Employers should notify the applicant about the results of the criminal background check, provide a copy of the criminal record report to the candidate, specify a period of time in which the applicant has the opportunity to explain the situation, and make a decision only after hearing the explanation or after the time for response has expired. Providing individuals the opportunity to explain may expose, among other things, the possibility that the record was made in error, identifies the wrong person, or is otherwise incomplete.

Past Convictions Are Permissible Considerations in Most Cases, but Arrests Are Not. Generally, arrest records do not establish that criminal conduct has occurred. Many arrests do not result in criminal charges or convictions, and many are incomplete insofar as they do not report final dispositions. Moreover, under some ban the box laws and ordinances, for instance in Massachusetts and Minnesota, employers are expressly prohibited from asking about arrests that did not result in conviction. If an arrest is discovered, however, and the jurisdiction does not outright prohibit inquiring about it, the conduct underlying the arrest may justify an adverse employment action. As an example, if a person seeking a position as a teacher was arrested for indecent exposure to a minor, that conduct may be grounds for rejecting the applicant, even if the arrest did not result in a conviction.

Keep All Criminal Records Confidential and Keep Records of the Basis for an Adverse Employment Decision. It is generally a good practice for an employer to keep detailed records of employment decisions. The EEOC's Uniform Guidelines on Employee Selection Procedures require employers to maintain and have available for inspection records about selection devices. These Uniform Guidelines require employers to maintain records in order to disclose the impact that their pre-employment tests and selection procedures have on persons identifiable by race, sex, and certain ethnic groups. In the context of criminal records checks, employers should consider monitoring whether conducting such checks excludes a disparate number of people in a protected classification group. Employers who maintain records detailing how a criminal record affects a hiring decision and demonstrating that the employment decision was made based on an individualized assessment of the candidate, even if he or she was ultimately rejected because of a criminal record, will be in a defensible position should discrimination charges later be filed by the applicant.

Highlights of Local Ban the Box Laws¹¹

Location	Employers Regulated		Background Check only for some positions	Background Check only after conditional offer	EEOC Criteria Incorporated	Right to appeal (A), or provide copy of report (C)
	Private/ Contractor/ Vendor	Public				
California						
Alameda County		X				
Berkeley		X	X		X	
Carson		X				
Compton	X	X			X	
E. Palo Alto		X				
Oakland		X	X	X	X	A, C
Richmond	X	X	X			
San Francisco	X	X		X	X	A, C
Santa Clara County		X				
Connecticut						
Bridgeport		X			X	A
Hartford	X	X	X	X	X	A
New Haven	X	X		X	X	A,C
Norwich		X		X		
Delaware						
New Castle County		X				
Wilmington		X		X		
District of Columbia	X	X	X	X	X	A, C
Florida						
Jacksonville		X		X	X	A
Tampa		X		X		A
Georgia						
Atlanta		X		X		
Illinois						
Chicago		X		X	X	
Indiana						
Indianapolis	X	X			X	
Kentucky						
Louisville	X	X			X	
Louisiana						
New Orleans		X			X	C
Maryland						
Baltimore	X	X	X	X	X	
Massachusetts						
Boston	X	X	X			A
Cambridge	X	X			X	A, C
Worcester	X	X	X		X	A, C
Michigan						
Ann Arbor		X		X	X	
Detroit	X	X				
East Lansing		X				
Genesee County		X		X		
Kalamazoo		X				
Muskegon County		X				

Minnesota						
Minneapolis		X	X		X	
St. Paul		X	X		X	
Missouri						
Kansas City		X		X	X	
New Jersey						
Atlantic City	X	X		X	X	A
Newark	X	X	X	X	X	A, C
New York						
Buffalo	X	X		X		
New York	X	X				
Rochester	X	X		X		
North Carolina						
Carrboro		X			X	
Charlotte		X				
Cumberland County		X				
Durham City		X		X		
Durham County		X		X	X	A, C
Spring Lake		X			X	
Ohio						
Canton		X		X	X	
Cincinnati		X			X	A, C
Cleveland		X				
Massillon		X			X	
Oregon						
Multnomah County		X			X	
Pennsylvania						
Philadelphia	X	X		X		
Pittsburgh	X	X		X		A
Rhode Island						
Providence		X				
Tennessee						
Memphis		X			X	A, C
Texas						
Austin		X	X			
Travis County		X	X	X	X	
Virginia						
Alexandria		X				
Newport News		X			X	
Norfolk		X			X	
Petersburg		X				
Portsmouth		X				
Richmond		X				
Washington						
Seattle	X	X	X			A, C
Wisconsin						
Dane County		X				
Milwaukee		X				

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Aaron L. Agenbroad

San Francisco
+1.415.875.5808
alagenbroad@jonesday.com

Fred W. Alvarez

Silicon Valley
+1.650.739.3977
falvarez@jonesday.com

Terri L. Chase

New York
+1.212.326.8386
tlchase@jonesday.com

Eric S. Dreiband

Washington
+1.202.879.3720
esdreiband@jonesday.com

Michael J. Gray

Chicago
+1.312.269.4096
mjgray@jonesday.com

Brian M. Jorgensen

Dallas
+1.214.969.3741
bmjorgensen@jonesday.com

Matthew W. Lampe

New York
+1.212.326.8338
mwlampe@jonesday.com

Alison B. Marshall

Washington
+1.202.879.7611
abmarshall@jonesday.com

Elizabeth B. McRee

Chicago
+1.312.269.4374
emcree@jonesday.com

Endnotes

- 1 See Nat'l Emp't Law Project, "Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies To Remove Unfair Barriers to Employment of People with Criminal Records" (July 2014), available at <http://www.nelp.org/page/-/sclp/cityandcountyhiringinitiatives.pdf?nocdn=1> [hereinafter "Major U.S. Cities"]; see also Nat'l Emp't Law Project, "Statewide Ban the Box: Reducing Unfair Barriers to Employment of People With Criminal Records" (July 2014), available at <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1> [hereinafter "Statewide Ban the Box"].
- 2 Smith, Johnathan, J., "Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks," 49 Harv. C.R.-C.L. L. Rev. 197, 198 (Winter 2014).
- 3 Statewide Ban the Box, *supra* note 1.
- 4 *Id.*
- 5 Major U.S. Cities, *supra* note 1.
- 6 *Id.*
- 7 EEOC, Enforcement Guidance No. 915-02, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm [hereinafter "Enforcement Guidance"].
- 8 See, e.g., *EEOC v. Dolgencorp*, No. 13-4307 (N.D. Ill. June 11, 2013); *EEOC v. BMC Mfg. Col, LLC*, No. 13-1583 (D.S.C. June 11, 2013).
- 9 Enforcement Guidance, at § VI. See also, e.g., Richmond, Va. Resolution No. 2013-R 87-85 (Mar. 25, 2013) (exempting from ban the box coverage positions for which employers are required to conduct background checks); City of Baltimore, Administrative Manual, Positions of Trust AM-237-1 (Feb. 3, 2008), available at <http://www.nelp.org/page/-/SCLP/BaltimorePolicyonPositionsofTrust.pdf?nocdn=1> (requiring background checks for positions of trust, which include senior positions with the municipal government, positions involving working with children, and positions where employees have access to sensitive information or financial resources, but stating that for all other public employment positions, criminal history information is not required of applicants).
- 10 Enforcement Guidance, at § V.B.4.
- 11 Major U.S. Cities, *supra* note 2.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.