

Banning the Box: Ramifications to Employers

Many employment applications used by employers have a section where the applicant is asked about criminal activity. There is an increasing trend for cities and states to prohibit this practice, known in the industry as “Ban the Box,” the “box” being the area where applicants check yes or no to the criminal activity question and are often asked to elaborate.

Currently, 17 states have passed ban-the-box laws: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, Vermont and Virginia. Some of these states’ laws apply only to state agencies; some apply to state agencies and private employers.

Additionally, over 100 cities and counties have passed some form of Ban the Box.

<http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>

Recently, New York City’s council passed an ordinance on June 10, 2015. The ordinance will become effective 120 days after receiving Mayor Bill de Blasio’s signature, which is expected shortly, as the Mayor has expressed support for the legislation.

The NYC ordinance generally prohibits an employer with at least four employees from making an inquiry about an applicant’s pending arrest or criminal conviction record until after a conditional offer of employment has been extended. Other states and cities have different stipulations regarding number of employees and requirements.

Many employers prefer to assemble their initial candidates’ qualifications (including criminal record history) and then make a decision on whether to move forward in the process, arguing that if they decide on one person before all the information is known, they may have to go back through the screening process again on another candidate. They would argue that it makes no sense to spend time and dollars on, say, a CFO applicant who has a recent felony embezzlement conviction—they would like to know about that conviction up front, so they can save their time and money and focus their resources on a qualified candidate.

However, it should be noted that the EEOC, in their April, 2012 Guidance Document says:

Some states require employers to wait until late in the selection process to ask about convictions.¹⁰⁸ The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience.¹⁰⁹ **As a best practice, and consistent with applicable laws,¹¹⁰ the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.**

http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

But, the pre-conditional offer process and procedures is just one side of the coin when considering the ramifications of Ban the Box.

What if an employer *does* rescind a conditional job offer based on the criminal record?

If an employer does not hire someone based on criminal record information, it will be clearer (or certainly look clearer) that the criminal record information was the reason or at least a factor. As such, employers should ensure that their practices in the use of criminal records do not run afoul of the recent EEOC Guidance, including evaluating the criminal offense by nature, severity, certainty and timing; determining if the offense is “job-related and consistent with business necessity” and performing an individualized

assessment where appropriate. There are service providers available to support employers in this process.

Ban the Box is a rapidly moving initiative and it is complex because there is no one consistent standard from state to state or city to city. Additionally, Ban the Box is recommended as a “best practice” in the EEOC Guidance. And failure to conform to a best practice has resulted in EEOC actions against employers and more recently, the plaintiff bar has used EEOC best practices to initiate private actions (including class actions) against employers.

So Ban the Box is not just an employment application issue. It has ramifications that will bring into scrutiny employers’ compliance with the recent EEOC guidance on the use of criminal records.