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## What Employers Need to Know About "Ban the Box"

By Rebecca Raizman

For advocates of the "Ban the Box" movement, 2013 might be appropriately called a banner year. "Ban the Box," in addition to referring to a "pledge" that employers voluntarily make to refrain from asking applicants about their arrest and/or conviction records on job applications, has also come to be used as shorthand for legislation that prohibits or limits employers from asking such questions on job applications. In 2013 alone, five states (California, Illinois, Maryland, Minnesota, and Rhode Island) adopted "Ban the Box" measures, joining Colorado, Connecticut, Hawaii, Massachusetts, and New Mexico in enacting legislation or taking other action that prohibits or limits some or all employers from inquiring about an applicant's criminal history. These laws vary by state, as some apply only to public governmental agencies, while others apply to both private and public entities.

Most typically, "Ban the Box" refers to the question on job applications, "Have you ever been convicted of a crime?" Historically, employers utilized such questions and screening mechanisms to limit potential liability for negligent hiring accusations if an employee commits a crime on the job, and more generally to assist in the employer's evaluation of applicants' safety and security risks to the company.

To be clear, much "Ban the Box" legislation does not eliminate an employer's ability to ask about all criminal convictions or conduct criminal background checks. Instead, such legislation tends to limit certain employers' ability to inquire about arrests not leading to conviction; convictions older than seven years; and convictions that have been expunged, sealed, or pardoned by the state. Often these laws apply only to the initial screening phase, as employers are allowed to delve more deeply into certain conviction history if the candidate reaches an advanced phase of consideration or receives a conditional offer of employment. Further, employers are usually allowed to screen for a criminal record that would be related to the position in question. For instance, certain law enforcement positions are typically exempt from the requirements, as are other specific positions that require a criminal background check by law, as reflected, for example, in the California law applying to public employers under Assembly Bill 218, which takes effect July 1, 2014.

This type of legislation can also be passed at the county or city level. Effective August 2014, San Francisco will prohibit employers (located in or doing business in the city and employing at least 20 employees) from asking about, inquiring about, or considering an applicant or employee's arrest not leading to a conviction; participation in or completion of a diversion program; convictions that have been judicially dismissed or expunged; juvenile convictions; convictions more than seven years old; or information pertaining to an offense other than a felony or misdemeanor, such as an infraction. California Labor Code Section 432.8 has long prohibited employers from inquiring into certain types of marijuana-related convictions older than two years.

These state-level developments mirror [the Equal Employment Opportunity Commission's \("EEOC"\) increasing attention](#) to employers' consideration of certain types of criminal convictions in the hiring process, as reflected both in the EEOC's issuance [in April 2012 of enforcement guidance](#) regarding the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, and in its 2013 lawsuits against two large employers, Dollar General and BMW, for alleged improper use of criminal background checks. Employers can expect to see continued enforcement efforts along these lines given that the [EEOC's Strategic Enforcement Plan for Fiscal Years 2013 through 2016](#) includes "eliminating barriers in recruitment and hiring" as the first item in its list of six national enforcement priorities.

What can employers do to comply with this oft-changing, tangled web of requirements concerning criminal record inquiries? First, employers may want to consult local counsel in the states in which they do business for consultation of specific state requirements, as these do vary widely. Some states without "Ban the Box" laws, such

as New York, Pennsylvania, and Wisconsin, have existing anti-discrimination laws based on arrest and/or conviction records and limit how and under what circumstances employers may take into account an applicant's criminal record. Further, even if a state has recently enacted "Ban the Box" legislation, there may be other, preexisting laws in that state that prohibit the consideration of arrest and/or conviction records in certain employment decisions. Second, employers should review state-specific job applications to ensure that written questions and forms, as well as the interview process and post-offer, pre-hire background check process, comply with any applicable requirements or anti-discrimination laws. Third, aside from the EEOC's increasing emphasis on enforcement, employers should take the time to discuss and consider internally their company's position on evaluating and considering applicants with criminal convictions and what type of convictions are most relevant (or less relevant) to the company's business and workforce composition in order to protect themselves from potential charges involving disparate impact of certain policies or practices on Title VII-protected groups. Managers, hiring officials, and other decision-makers should be trained on and aware of Title VII and its prohibition on employment discrimination, as well as any state laws regarding screening applicants and employees for criminal conduct. Finally, information about applicants' and employees' criminal records should always be kept confidential and used for intended purposes only.

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