

Ban the Box Laws: What's the Box and Why is it Banned?

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by Anabel Cassady



An overwhelming majority of states have adopted what is widely known as “ban-the-box” laws or policies that generally prohibit employers from inquiring about an applicant’s criminal background until later in the hiring process. The laws are intended to allow an employer to evaluate an applicant’s job qualifications first, without a criminal record overshadowing their candidacy. **Here’s what employers need to know to make sure they are complying with ban-the-box laws.**

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What is banned?

For a long time, many employers included a “box” on their employment applications. If the applicant had been arrested for or convicted of a crime, then they had to check the box. Today, fifteen states and at least twenty-three localities have adopted ban-the-box laws or policies applicable to private-sector employment. Thirty-seven states have adopted statewide laws or policies applicable to public employers. Many of these jurisdictions do more than simply eliminate the box. For example, some laws incorporate the best practices set forth by the EEOC. And still others prohibit employers from even considering certain records when reviewing applications.

The EEOC issued guidance on the use of arrest and conviction records in employment decisions in 2012, as part of the Commission’s efforts to eliminate unlawful discrimination in employment decisions. As the EEOC warned, “[a]n employer’s use of an individual’s

criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended.”

There are two ways that employers get into trouble under Title VII by using criminal records: (1) if an employer treats job applicants or employees with the same criminal records differently because of their race, national origin, or another protected characteristic; and (2) if an employer’s neutral policy of excluding applicants with criminal records has the effect of disproportionately screening out a protected group and the employer fails to demonstrate that the policy is job-related and consistent with business necessity. The EEOC’s guidance calls on employers to conduct an individualized assessment of job applicants by evaluating three factors:

- the nature and gravity of the offense;
- the time elapsed since the offense or completion of the sentence; and
- the nature of the job.

As part of the individualized assessment, the employer would notify the individual that they have been screened out because of their criminal record, and provide the individual an opportunity to demonstrate that the exclusion should not be applied due to their particular circumstances.

What does the future look like for ban the box laws?

A recent employer to “ban the box” is the U.S. government, thanks to the enactment of the Fair Chance to Compete for Jobs Act of 2019. The Act went into effect on December 20, 2021, and it prohibits federal agencies and contractors from inquiring about an applicant’s criminal history before extending a conditional job offer, with some carve-outs. But as the Office of Congressional Workplace Rights announced: “The purpose of the FCA is not to remove access to criminal history information about an applicant for government employment; rather, the purpose is to move that information to the end of the process to give those with a criminal history a fair chance to compete for a Federal job.”

Because a number of states and localities prohibit employers from requiring applicants to disclose a criminal record before a job offer has been extended, the federal law is unlikely to require significant changes for many contractors who are already subject to some form of state or local ban-the-box law.

Nevertheless, with ban-the-box laws operating in a growing number of jurisdictions, employers should take the time to review and, if necessary, revise their hiring policies and provide regular training to individuals involved in the hiring stages. Multistate employers should consider how this legal patchwork may effect their policies—including whether to have multiple policies based on the states in which they operate or a universal policy based on the strictest laws. Moreover, even if an employer does not have a physical office in a certain state, the state’s laws likely apply to remote employees who live or work there. If you have any questions, do not hesitate to contact us to help

ensure your policies are in compliance with these laws.