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## Ban-the-Box Movement Goes Viral

*Dozens of cities and states restrict employers from asking job applicants about criminal convictions*

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By Roy Maurer 8/18/2014

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The District of Columbia, Illinois and New Jersey have joined 66 cities and counties and 11 states to pass “ban-the-box” laws, preventing employers from asking about prior criminal history on job applications.

Ban the box refers to the check box on employment applications asking whether the candidate has ever been convicted of a crime. Ban-the-box laws require hiring managers to put off asking about a candidate’s criminal history until after an interview has been conducted or a provisional job offer has been extended.

“Civil rights groups and others view ban-the-box initiatives as important toward re-entry efforts by ex-offenders, the argument being that these measures reduce unfair barriers to employment for those with criminal records,” said Montserrat Miller, a partner in the Washington, D.C., law firm of Arnall Golden Gregory.

But the movement also creates challenges for employers, remarked Angela Preston, vice president of compliance and general counsel at background screening firm EmployeeScreenIQ. “The removal of this little check box has potentially made life easier for job seekers with a criminal past, but it has created much confusion and frustration for employers,” she said. “Ban the box shows no signs of slowing down and it’s creating new headaches, not to mention real risks, for employers across the country.”

### **New Jersey, Illinois, D.C. Adopt Ban the Box**

New Jersey is the latest state to enact a ban-the-box measure.

[\(/legalissues/stateandlocalresources/pages/nj-criminal-record-bill.aspx\)](#) The law, signed Aug. 11, 2014, applies to an employer with 15 or more employees and prohibits that employer from inquiring about an applicant’s criminal record during the initial employment application process. The law takes effect March 1, 2015, and pre-empts an ordinance that the city of Newark had enacted earlier.

On July 19, 2014, Illinois Gov. Pat Quinn signed a law preventing criminal background checks [\(/legalissues/stateandlocalresources/pages/illinois-ban-the-box.aspx\)](#) before an applicant has gone through the interview process. The law takes effect Jan. 1, 2015, and covers private employers with 15 or more employees. Quinn had previously issued a ban-the-box policy for public jobs in 2013.

On July 14, 2014, the Council of the District of Columbia unanimously approved the Fair Criminal Record Screening Act prohibiting private employers from inquiring about an applicant's criminal conviction record until the employer has extended a conditional job offer. Mayor Vincent Gray is expected to sign the legislation into law, but a potential wrinkle in this case is that it must also pass congressional review. The district enacted a ban-the-box law in 2011 for public hiring. In a potential class-action lawsuit filed July 30, 2014, nine black men alleged that the Washington Metropolitan Area Transit Authority denied them employment for irrelevant criminal offenses in their past, in violation of their civil rights (</hrdisciplines/safetysecurity/articles/pages/dc-metro-sued-screening-policy.aspx>).

Currently, 13 states have passed ban-the-box laws: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico and Rhode Island.

Additional states with cities and counties that have banned the box include: Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington and Wisconsin.

### **Blanket Laws Gaining Traction**

The majority of ban-the-box laws apply only to public employers, but blanket ban-the-box laws impacting all sectors are trending. Many advocates embrace private-sector ban-the-box laws as the "next step in the evolution of these policies," according to the National Employment Law Project (NELP), a worker advocacy organization.

"Employers now have to comply with a dizzying number of variations on banning the box, not only from state to state, but city to city," said Preston. In addition to laws in Illinois and New Jersey taking effect next year, laws affecting private employers currently exist in Hawaii, Massachusetts, Minnesota and Rhode Island.

"The trend on passage of ban-the-box measures will continue at the state level and should therefore be considered holistically by companies as they consider their overall hiring and retention practices with respect to the use of criminal history records," advised Miller.

There are also various city and county ban-the-box laws around the country that apply to private employers. Beginning Aug. 13, 2014, employers in San Francisco are barred from asking applicants about their criminal history (</legalissues/stateandlocalresources/pages/ca-ban-the-box.aspx>) until after the first live interview or following a conditional offer of employment. Further, under the San Francisco law, employers are restricted from looking at certain types of arrests or convictions anytime in the hiring process. Other local governments have passed similar ordinances, including Baltimore, Newark, N.J., Philadelphia, and Seattle. Many more are considering doing so.

"Companies doing business in multiple jurisdictions now have to consider the law and policy of each location, possibly having different processes depending on where they're located," Preston said.

Many ban-the-box policies exempt employers that have 10 employees or less, but some, such as Minnesota's, do not. And while many private employers have balked at ban-the-box policies, at least two large retailers have jumped on board. National retailers Target and Wal-Mart no longer ask about an applicant's conviction record during the initial phase of the hiring process, according to NELP.

In order to comply with the 2013 Minnesota law, Minneapolis-based Target announced it was eliminating the box on its applications. Wal-Mart took that action in 2010.

### **Impact on Employers**

Critics of ban-the-box measures say the laws raise the stakes for potential litigation and penalties, complicate the hiring process, and erode safety and security.

"Employers are in the best position to assess their hiring needs," remarked Melissa Sorenson, executive director of the National Association of Professional Background Screeners. It should generally be up to each employer to determine when in the hiring process criminal history information is most relevant, she said.

Rich Mellor, head of loss prevention at the National Retail Federation, sees it as a safety and security issue. "No retailer can make decisions without all the relevant and necessary facts," he said. Retailers and businesses across the board have an obligation to their employees and customers to create and maintain a safe workplace, he added.

"From a risk mitigation and due diligence perspective, employers need to be informed about job applicants' past history as it is important to maintaining a safe work environment, especially if there is a criminal past," said Miller. "In the interest of transparency, it is beneficial for HR to know relevant information as early in the process as possible if the goal is to make informed decisions."

Depending on the facts, an employer in Virginia can be liable for failing to conduct a reasonable investigation of an applicant it hires who then harms another person during employment, noted Todd Leeson, a partner with Gentry Locke in Roanoke, Va., and legislative director for the Virginia Society for Human Resource Management State Council.

"Consider these allegations from a 2012 Virginia case," Leeson said. "The employer hired a person to work in a hotel, and allegedly did not perform a background check or ask about the person's criminal history. The person had previously been convicted of a felony sex crime. The person thereafter raped an 18-year-old hotel maid on her third day on the job. The maid sued the hotel for negligent hire. The case settled with the hotel agreeing to pay \$675,000 to the former maid." Ultimately, Leeson said, "I believe it is reasonable and prudent for employers to ask about prior convictions as one factor in the overall evaluation of the applicant."

### **HR Challenges**

Most ban-the-box laws do much more than just eliminate a check box, Preston said. “Some employers mistakenly believe that if they remove the check box from the application, they’re covered. Not so,” she said. Preston said that most ban-the-box laws contain additional notice requirements, job-related screening tests, and limits on the scope or type of criminal record that can be considered. “No two versions of ban the box are the same, and they often conflict or overlap with existing anti-discrimination laws, the Fair Credit Reporting Act (FCRA)

(/legalissues/federalresources/federalstatutesregulationsandguidanc/pages/faircreditreportingact(fcra)of1969.aspx), and other laws requiring or relating to background screening,” she said.

According to Preston, there are a few “hidden” factors to watch out for in ban-the-box legislation, which increases exposure for employers and increases the cost of hiring:

- Statutes and ordinances that often include language establishing a test for employers that must be undertaken before asking about criminal history. These tests may include some variation of the Equal Employment Opportunity Commission’s “Green” factors—referring to the three components identified by the Eighth Circuit in the 1975 *Green v. Missouri Pacific Railroad* decision that were relevant to assessing whether a criminal record exclusion is job-related for the position in question and consistent with business necessity. The three factors to consider are the nature and gravity of the offense; the time that has passed since the offense and/or completion of the sentence; and the nature of the job held or sought.
- Limitations on the types of records employers can consider in a specific jurisdiction. “These limitations may conflict with FCRA requirements, or existing laws that allow or restrict information used in the hiring process. They may also conflict with state laws prohibiting the hire of ex-offenders for certain regulated jobs, like banking or health care,” she said.
- Notifying the applicant when criminal information is being used, and requiring that the employer provide the applicant with a copy of the record. “This requirement is a duplication of the adverse-action requirement that already exists as a protection under the FCRA,” Preston said.

In addition, complying with the laws can prove time-consuming and counterproductive, especially for small businesses with limited HR staff managing the hiring process, said Sorenson. “Individuals with prior criminal convictions may spend time applying and interviewing for positions which they are not qualified for due to their criminal conviction.”

### **Your Box Is Banned, Now What?**

“From a best-practice perspective, employers who operate on a nationwide basis may want to consider the most stringent ban-the-box requirement from the relevant jurisdictions in which they operate to determine if that model is one that would be appropriate for their company,” said Miller. “Where possible, I recommend that companies move the question regarding criminal history to further in the hiring process. Remove it from the job application unless there is an absolute need to know about someone’s criminal history.”

Sorenson advised HR professionals to find attorneys with employment screening expertise to review their hiring practices that may be impacted by ban-the-box laws in their hiring locations. HR should be prepared to provide counsel with a list of all hiring locations, a document outlining the hiring process, and documents that are involved in the hiring process, including employment applications, offer letters and adverse-action notices, she said.


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