

# Criminal background checks in the Ban the Box era

Employers routinely perform criminal background checks for employment on applicants. They may worry that hiring applicants with criminal histories expose them to negligent hiring liability, potential theft or fraud. But more than 75% of the U.S. population lives in a “Ban the Box” jurisdiction. There, employers are limited in when, how and why they do a background screening for criminal history. They cannot use a checkbox on applications asking if the applicant has a criminal record. Employers in ban the box jurisdictions must wait until they make a job offer before doing a criminal background screening. They also fear the ‘ban the box’ movement means regulators may cite them for improper background checks.

To date, 35 states and over 150 municipalities prohibit public employers from asking job applicants about their criminal history. In twelve states, the prohibition applies to private employers as well. In 2015, President Obama banned the box from federal job applications. Since 2012, EEOC guidance asks employers to evaluate an applicant’s qualifications before conducting a criminal background check. In other words, it urges all employers to ban the box and forego asking the applicant to self-reveal a criminal past.

President Obama’s 2015 ban did not extend to federal contractors. However, the Fair Chance Act (HR 1076) is headed for a vote before the House of Representatives. The bill would codify ‘Ban the Box’ into federal law and would apply to all federal agencies and federal contractors. Should the House approve the measure, it would move to the Senate for a vote. The bill enjoys bipartisan support and is part of a ‘second chance’ approach to criminal justice reform and employment.

The EEOC claims forced criminal record revelation disparately impacts minority applicants because they are convicted at higher rates than non-minorities. That guidance also states that blanket bans on applicants with criminal convictions violates Title VII of the Civil Rights Act.

Employers have several hiring tools available such as background checks for employment, criminal background checks, and other searches. If and when to use all of these depends on many factors. Employers must look to the position being filled and the laws in their jurisdiction when designing their hiring procedures.

## Background check types

Multiple background check products exist to fill specific needs. The background type an employer chooses depends on the position being filled. In many cases, employers simply wish to verify statements on the job application. This background check for employment would verify previous employers, addresses, and educational credentials.

For jobs with fiduciary responsibilities, employers often need a credit check. Employers using credit information in hiring decisions have specific responsibilities under the Fair Credit Reporting Act (FCRA). The FCRA requires employers to obtain signed permission from the applicant to pull the credit report. If the employer relies on information in the credit report to turn down the applicant, it must provide a copy of the report. Additionally, the rejected applicant is entitled to “A Summary of Your Rights Under the Fair Credit Reporting Act”, from the

Federal Trade Commission (FTC).

Applicants have the right to challenge errors on the credit report such as disputed bills or gaps in employment. The credit report may also reveal information from public sources such as arrests or criminal convictions. Most 'ban the box' laws bar the use of arrest records in hiring. Make sure the service you use to conduct background checks understands the law in your jurisdiction. Arrests are not convictions. A person is not guilty of a crime until convicted.

## **Disappearing criminal records**

In addition to 'Ban the Box' laws, some states have taken measures to expunge old criminal records under specific conditions. An applicant's criminal history will then not show up during a criminal history background check. For example, West Virginia recently passed a law allowing criminal charges to be expunged sooner under certain circumstances. The expungement period is reduced if the applicant completes a substance abuse treatment program or a job-readiness training course.

Nevada, New Jersey, North Carolina, Pennsylvania, South Carolina, and Vermont have similar laws. These laws are designed to minimize the impact of older, less severe criminal acts on the applicant's employment prospects. While individuals have always been able to petition courts for expungement, the new laws make that easier. Sometimes, expungement is automatic.

## **How to do a background check**

Although state and local laws differ on exactly how 'ban the box' works, most follow a common process. Applicants are not asked about any criminal history on the job application or until they are deemed qualified for the position based on education or experience. In this way, the process is similar to handling disabled applicants under the Americans With Disabilities Act (ADA) and similar state anti-discrimination laws.

Once the employer has determined the applicant is qualified, the employer may inquire about the applicant's criminal history. When determining whether to use criminal history in the hiring decision, employers should consider the following:

- The relevance of the conviction to the job;
- The time elapsed since the conviction; and
- The applicant's job history and behavior since the conviction.

Background checks can also open other cans of worms. Any investigation that reveals a family medical history or other genetic information cannot be used in the hiring decision. Employee/applicant rights are protected under the Genetic Information Nondiscrimination Act (GINA).

Employers must treat all applicants the same. Employers should determine what background information is necessary for each open position. The same information is then obtained for all applicants for that position. Employers should never use the applicant's race, color, national origin, religion, disability or other protected characteristic in the hiring decision.

When deciding on the appropriate background search for each position, consider any federal, state or local requirements for the position. Gauge the exposure for each job. For example, a position with no fiduciary responsibilities and little interaction with the public poses a low risk. A position with fiduciary responsibilities and engagement with vulnerable populations would represent high employer exposure.

Once established, the employer could then explore costs for conducting the appropriate background check for each position. Many vendors offer discounted rates for high volume users.

## **Ban the Box exceptions**

Virtually all 'Ban the Box' laws have exceptions. Federal law requires criminal background screenings for many positions. Most law enforcement positions including prison guards are exempted. Additionally, teachers or other jobs working with vulnerable populations will still require criminal background checks. Vulnerable populations usually include children, the elderly and the disabled.

## **Does Ban the Box work?**

Several studies have concluded that 'Ban the Box' actually hurts minority applicants. In one, researchers sent out 15,000 fictitious resumes to employers in New York and New Jersey. One set of resumes were distributed before 'Ban the Box' and one after. Each set of resumes contained last names common among whites and those common among blacks. Prior to 'Ban the Box', whites received callbacks for interviews at a rate 7% higher than blacks. After 'Ban the Box' the gap widened to 45%.

This 'name discrimination' has also crept into the regulatory consciousness. Employers should avoid this trap.

A 2006 study found that black applicants were hired at higher rates when employers conducted criminal background checks on all applicants. Employers can choose this option as long and comply with 'ban the box.' The background check must occur after determining the applicant's qualifications.

## **Criminal background checks during full employment**

Another important consideration for employers during an economic boom is that the pool of available applicants has shrunk. That may mean taking a chance on an applicant with a criminal history for jobs that don't pose a risk. There are also financial incentives. For example, the IRS provides an employer tax credit for hiring recently released felons. Some states have similar programs.

## **Steps an employer should take to be in compliance with background checks**

Consult with counsel to determine which state and local laws apply. Employers with multiple locations may have to comply with different laws. Counsel may also offer guidance on how to comply with the EEOC guidance.

The EEOC guidance does not have the weight of the law. However, the EEOC has charged employers with blanket prohibitions with violating Title VII. While this practice is being challenged, courts have generally deferred to agency interpretation of laws. This is an evolving area and employers should stay in contact with counsel on this subject.