

Background Checks- Be Aware!

"Ban the Box" Legislation

Increasingly, state and local governments continue to pass "ban the box" legislation requiring employers to remove questions about an applicant's criminal record from employment applications. Though each law is different, ban the box legislation typically permits employers to question an applicant regarding his or her criminal history later in the hiring process - but not on the application itself. In this regard, ban the box legislation would impose a procedure similar to the Americans with Disabilities Act, i.e., an employer cannot ask about a non-job-related disability until after a conditional offer of employment has been made.

To date, six states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island) and eleven localities (Baltimore (MD), Buffalo (NY), Columbia (MO), Washington (DC), Montgomery County (MD), Newark (NJ); Philadelphia (PA), Prince George's County (MD), Rochester (NY), Seattle (WA) and San Francisco (CA)) have enacted so-called "ban the box" laws. Legislation is pending in several other localities and states, including New York City and Florida. In addition, a number of local governments, including Boston, Pittsburgh, and Detroit, require government contractors to ban the box. Others still do not "ban the box" but have implemented some restrictions as to what inquiries can be made, for example, prohibiting employers from asking about misdemeanors. As a "best practice", the EEOC has advised in its guidance on criminal background checks that employers should not ask about convictions in employment applications and, if and when such inquiries are made, they should be limited to convictions for which exclusion would be job related and consistent with business necessity.

Employers should take steps now to ensure their applications and any accompanying documents are compliant with existing laws. Those employees responsible for the hiring process should be trained on when - and how - to speak with applicants about their criminal history.

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