

LEGISLATIVE BRIEF

Brought to you by Baldwin Krystyn Sherman Partners

“Ban the Box” Laws

“Ban the box” laws limit an employer’s ability to ask a job applicant about his or her criminal background as part of the hiring process. In 1998, Hawaii became the first state to adopt a “ban the box” law. Since then, a number of states and municipalities have passed similar legislation.

BAN THE BOX OVERVIEW

These laws prohibit companies from asking job candidates about their criminal backgrounds on job applications or as part of the initial application and interview process. The specific requirements and restrictions vary depending on the applicable law, but there are some similarities between them.

In general, employers are not **completely** prohibited from asking about an individual’s criminal background. However, they are typically prohibited from doing so until later in the hiring process as part of a conditional job offer. In most cases, the employer can withdraw the offer of employment if the applicant has a conviction record that bears a rational relationship to the duties and responsibilities of the position. Some laws also limit the number of years an employer can look back into an applicant’s or employee’s criminal history.

FEDERAL LAW

On April 25, 2012, the U.S. Equal Employee Opportunity Commission (EEOC) issued its [*Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*](#). The guidance states that an “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.”

Under federal law, an employer’s use of criminal history information may violate Title VII in two ways. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin. This is disparate treatment discrimination.

Second, even when an employer applies criminal record exclusions uniformly, the exclusions may still cause a disproportionate and unjustifiable exclusion of individuals of a particular race or national origin. This is disparate impact discrimination. If the employer cannot show that an exclusion is “job related and consistent with business necessity” for the position being considered, the exclusion is considered unlawful under Title VII.

Title VII does not regulate when or how an employer might acquire a candidate’s or employee’s criminal history information. However, the Fair Credit Reporting Act establishes procedures that employers must follow when they obtain criminal history information through a third-party consumer reporting agency. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

STATE LAWS

As of fall 2015, 19 states have passed “ban the box” legislation for public employers. Seven states have adopted laws for both public and private employers.

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State	Employers: Private or Public	Job-related Screening	Statutes
California	Public		Cal. Lab. Code § 432.9
Colorado	Public	There must be a "direct relationship" between the conviction and the job.	CO House Bill 12-1263
Connecticut	Public	Employers must consider the nature of crime and the relationship to the job.	CT Gen. Stat. § 46a-80
Delaware	Public	Employers must consider the nature of offense and the job.	Delaware House Bill 167
Georgia	Public		Executive Order 02.24.15.01
Hawaii	Private & Public	Conviction must bear "rational relationship" to the position.	Haw. Rev. Stat. § 378-2
Illinois	Private & Public		820 ILCS 75/1
Maryland	Public		Senate Bill 4
Massachusetts	Private & Public		MGLA 151B §4 ; MGLA 6 § 171A
Minnesota	Private & Public	Conviction must "directly relate" to the position.	MN 364.021
Nebraska	Public		Neb. Rev. Stat. § 48-202
New Jersey	Private & Public		N.J.S.A 34:6B-11 to 19
New Mexico	Public	Conviction must "directly relate" to employment.	N.M. Sta. §§ 28-2-1 to 28-2-6
New York	Public		Executive Action
Ohio	Public		Administrative Policy
Oregon	Private & Public		House Bill 3025
Rhode Island	Private & Public		RI Gen. Law § 28-5-6 ; 28-5-7
Vermont	Public		Executive Order 03-15
Virginia	Public	Conviction must be job-related.	Executive Order 41

Source: National Employment Law Project

Note that, in addition to state laws, municipal requirements may also apply. Approximately 100 municipalities have enacted similar laws.