Ban the Box Laws Regulating Private Employers Continue to Expand

By Kevin Prendergast

Ban-the-Box (BTB) laws continue to proliferate at the state and local level, causing more than a few compliance headaches for multistate employers. "Ban-the-Box" is a phrase originally used to describe laws prohibiting employers from placing a check box on employment applications asking if an individual has ever been convicted of a crime. However, newer laws place more significant restrictions that affect the entire hiring process beyond the initial employment application.

Proponents of these laws, which include the National Employment Law Project (NELP) and the NAACP, claim the prohibitions help ex-convicts rebuild their lives. They argue that since criminal convictions have a disparate impact on minorities, employers should not consider convictions, at least at the initial hiring stages. The federal EEOC also issued a guidance memorandum for employers which opined that removing the criminal question from the initial job application is considered an employer best practice.

Opponents of these laws include various chambers of commerce and employer groups who contend the ordinances place an undue burden on businesses and do not have their intended effect.

There are now over 150 BTB laws in the United States. While most of these laws apply only to public sector employers, a growing number of jurisdictions now have laws regulating private employers as well. To date, nine states and 15 localities, including the District of Columbia, have adopted private-sector laws.

BTB laws differ greatly from jurisdiction to jurisdiction. While most prohibit an employer from asking an applicant to disclose their criminal history on an initial job application, they all allow criminal inquiries at varying times later in the hiring process.

It is also important to note that almost all BTB laws not only prohibit employers from requesting this information at the pre-offer stage, they also bar an employer from seeking or obtaining this information from any other source until after an initial interview or a conditional offer has been extended.

Because of this growing trend, and the EEOC memorandum, the vast majority of our clients have removed the criminal history question from job applications. Most now request this information after a conditional offer of employment has been extended and as part of the background screening process.

But many recently enacted laws go well-beyond eliminating the criminal history question from job applications.

San Francisco now requires employers to conspicuously post a notice in office locations advising employees of their rights under the law in any language spoken by at least 5 percent of their employees. They must also place language in any job advertisements or solicitations (including Web postings) stating that they will consider all qualified applicants with arrest and conviction records.

The law in Philadelphia also requires a specific notice to applicants prior to seeking criminal history information, a specific posting requirement and a mandatory waiting period of 10 days after advising an individual of potentially disqualifying information.

New York City recently enacted one of the most restrictive BTB laws in the country. Under this law, employers must provide a specific notice to job candidates prior to seeking criminal history information. Additionally, if an employer is considering taking action against a person because of a criminal record, they must complete an evaluation form and provide that form to the person prior to taking any final action.

Los Angeles recently passed a BTB law that became effective Jan. 22, 2017. Similar to the New York requirements, Los Angeles employers will now be required to complete an assessment form prior to taking any final adverse action against a candidate. The employer must then allow the candidate five business days to provide information showing the record is incorrect, mitigating circumstances, or to explain why they believe they are otherwise qualified for the position. If the candidate provides information, the employer must then complete a reassessment form and provide that form to the person if adverse employment action is the ultimate result.

Some employers mistakenly believe that removing the criminal history question from their job application is sufficient to comply with the various BTB laws. But newer laws are adding requirements. In addition to those already mentioned, most BTB laws have specific evaluation criteria for employers to follow when considering an applicant's criminal history similar to those issued by the EEOC in their guidance memorandum. However, procedural and functional nuances exist that can create a risk of a lawsuit or enforcement action for employers who are not fully cognizant of the subtle differences between the various BTB laws.

Employers would be well-advised to review their hiring practices and work with a background screening provider that focuses on compliance issues. My firm works with professional service firms in developing compliance programs that react to the quickly changing legal requirements. Our automated compliance process allows multistate employers to manage their candidate background documentation and help reduce the risk of a lawsuit or administrative enforcement action.

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