

Employers Who 'Ban The Box' Could Avoid Patchwork Of Laws

By **Aaron Vehling**

Law360, New York (June 10, 2015, 7:01 PM ET) -- As more local governments pass “ban the box” laws erasing questions about convictions on job applications, employers operating in multiple jurisdictions would be wise to ditch the question, even if the law doesn't demand it, to avoid the headache of complying with a patchwork of varying regulations, attorneys say.

The New York City Council on Wednesday became the latest jurisdiction among six states and D.C., along with another 11 cities and counties, to pass a so-called ban the box bill. The law requires private employers to delay asking job applicants about convictions until after a conditional offer of employment and calls for more subjective considerations once the question has been addressed. More cities, counties and states will likely follow suit, according to Morgan Lewis & Bockius LLP partner Joyce Taber.

“This is a hot area for compliance,” Taber said. “I would characterize it as an evolving and fast-changing area that should be the focus for ongoing compliance reviews.”

As that trend continues, national employers will be looking to do business in some areas that have no laws and others that have a range of laws that vary in how, in what way and when the conviction issue can be addressed.

In light of that, it could be better to ditch the box, even if the law doesn't demand it, Faegre Baker Daniels LLP labor and employment partner Dan Prokott said.

“I don't think it's a good idea to be asking employees' criminal history at the applicant phase,” he said.

Employers that nix it wouldn't be alone: Target Corp., Wal-Mart Stores Inc. and, most recently, Koch Industries Inc. have all decided on their own to shift the question to later in the process.

Disparate Impact

The issue stems from a movement that began in the late 1990s. The idea is that by delaying inquiries about criminal convictions to an interview or another point in the process, a candidate is able to compete for a job on the merits and will be able to explain the nature of a potentially nondispositive criminal conviction, instead of being refused outright, according to Michelle Rodriguez, a senior staff attorney for the National Employment Law Project.

The movement has gained traction in the past five years as the number of Americans with criminal and

arrest records, disproportionately people of color, hit as many as 70 million, Rodriguez said.

Along those lines, the U.S. Equal Employment Opportunity Commission weighed in on the issue in 2012, publishing guidance that recommended removing the box because of the potential for a disparate impact under Title VII, Rodriguez said.

A coalition of 70 U.S. senators and 20 members of the House of Representatives have signed on to the Federal Fair Chance Initiative's push for President Barack Obama to promulgate a ban on the box for federal agencies and contractors.

Beyond Civil Rights Act implications, there is also a wider problem: The thousands of commercial background check databases employers use are not always accurate, Rodriguez said.

"There are so many mistakes," Rodriguez said. Even people who don't have criminal records or who have mistakes in their records are potentially weeded out by the box, she said.

Public and Private Approaches

The trend has taken two different paths. Of the more than 100 jurisdictions that have banned the box from their applications, most have focused only on the hiring process at government agencies and government contractors, according to the National Employment Law Project. On June 1, Ohio became the most recent to remove the conviction question from its applications.

On the other side, some governments not only have removed the conviction question from applications for public jobs, but have also passed laws and ordinances requiring private employers to do the same.

Hawaii, which is where the movement kicked off in the late 1990s, was the first state to go that route, and Illinois, Massachusetts, Minnesota, New Jersey, Rhode Island and D.C. followed suit over the years. Cities like San Francisco have also passed their own laws in recent years that altered how private employers can address the issue of a conviction.

Although all of the laws generally agree on removing conviction questions from an initial job application, there's no uniformity in what the laws require once the interviewing begins or when a conditional offer is extended.

"It's a patchwork at this point," Taber said.

In Minnesota, which passed its law for private employers in 2013, Prokott said, the statute says the employer can investigate a criminal background at the interview stage or when a conditional job offer has been extended.

D.C., meanwhile, has a multifactor test for determining whether there is a legitimate business interest for declining a candidate after the conditional offer of employment is given, Taber said. That involves looking at the duties and requirements of the job, in addition to other factors such as the age of the applicant at the time the criminal offense occurred, the frequency and seriousness of offenses, and evidence of rehabilitation, Taber said.

New York City's Fair Chance Act requires that after an employee is extended a conditional job offer, a company would be allowed to ask about a criminal record and conduct a background check.

If the company withdraws the offer, the law requires the employer to provide the applicant with a written explanation of the decision to not make the hire and to hold the position open for three days to give the applicant a chance to respond to any negative or incorrect information, or to provide the employer with some proof of rehabilitation.

Samuel Estreicher, director of the Center for Labor and Employment Law at New York University School of Law, said that the variety of laws underscores that "essentially, we need a rule for the whole country."

Customized Applications

In the absence of a universal rule, companies can still decide to include a conviction question box on their applications if they desire. Different companies have different philosophies about why they would want to do this, Paul Hastings partner Marc Bernstein said.

"Companies want to find out as much information about a candidate's background as possible," he said. "So there are many companies that want to ask questions to the extent they are permissible."

An employer with the wherewithal to do so could tailor its hiring processes to various locations' laws on criminal background checks, Taber said.

In relevant jurisdictions, employers could omit the criminal conviction question from an application and follow local laws for the interview process with respect to criminal records, or use explicit carveouts in specific jurisdictions, she said. In other areas, it could be business as usual.

That customization might require an outlay for software changes or the cost of reprinting paper applications, but Prokott said it's better than using a blanket job application. He said he's seen employers keep the box on nationwide applications without realizing that it might be banned in some areas.

Employers that keep the box on their applications need to be mindful of the changes taking place on the landscape, Bernstein said.

"Those employers will need to be carefully monitoring any or all changes in the law in all locations in which they operate," he said.

Or maybe those companies will want to take the cue of the massive employers like Wal-Mart and Koch Industries and get ahead of the trend on their own.

If an employer is doing background checks that are compliant with the Fair Credit Reporting Act anyway, there's no need for the box, Prokott said.

"The safest course of action is to develop a practice across states where you don't ask [about a criminal history] until the conditional offer of employment is made," he said.

--Editing by Kat Laskowski and Kelly Duncan. All Content © 2003-2015, Portfolio Media, Inc.