



Eye On Washington

Legislative Update



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Legislative Trends: Ban-the-Box and “Fair Chance” laws Pose New Compliance Tasks for Employers

Eye on Washington’s series focuses on the latest HR regulatory trends taking place at the federal, state and local level. Topics include tax and HR compliance, Health Care Reform, payroll, benefits, leaves, reporting obligations and more.

Background

The Ban-the-Box (“BtB”) movement refers to removing the checkbox and/or related questions on employment applications which ask a job applicant about previous arrests or criminal convictions. Across the country, more than 30 states and 150 local jurisdictions have enacted such laws in both the private and public sectors, with 28 of those jurisdictions enacting laws affecting private employers.

With an estimated 70 million people in the United States having a prior arrest or conviction record, the BtB movement seeks to remove barriers to employment for qualified workers. The BtB movement grew as a need to provide qualified job seekers who have prior convictions with a more equal footing in the job market. Those in support of the movement suggest that these individuals have a difficult time obtaining employment since their criminal history may serve as a potential early disqualification impediment, despite having served their time, even if their offense is unrelated to their qualifications for the job.

Intent of the Laws

The laws vary by jurisdiction, but the intent of the movement is for employers to remove the checkbox asking about previous criminal convictions from an employment application. In addition, employers are often prohibited from asking a job applicant about their criminal history during some or all stages of the

hiring process. Where such laws apply, questions about previous conviction history need to be moved from the application stage to later in the hiring process – typically after an initial interview or sometimes later, if at all.

“Fair Chance” laws have evolved out of the BtB movement, and go further than simply removing a checkbox. They often delay inquiries into an applicant’s history until after a conditional offer of employment; require an individualized assessment to determine if the conviction relates to duties of the position; or mandate additional steps during the adverse action process. The goal of these laws is to help ensure a fairer decision-making process by forcing employers to consider multiple factors connected with the applicant’s history. Many jurisdictions have incorporated the Equal Employment Opportunity Commission’s (“EEOC”) guidelines, which urge employers to take into account the time passed since an offense, whether the offense is related to the position, and evidence of rehabilitation.

Under the Fair Credit Reporting Act (“FCRA”), employers also have certain notice requirements when making an adverse employment decision based on the candidate’s criminal history. Fair Chance laws often go one step further by mandating that employers disclose the specific offense upon which their decision was based; or requiring a specific notice, such as pre-adverse action or adverse action notifications.



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Considerations for Employers

Employers face many challenges with the patchwork of diverse state BtB laws. As a result, employers should reconsider any blanket hiring policy for those with an arrest or conviction history. Employers should carefully review these laws and modify internal policies and procedures as needed to be compliant, noting that the location of the employer and any positions and employees determine which laws apply. Employers also need to be mindful of which employment decisions are covered under these laws; e.g., some only address hiring. Others address hiring, promotion, training, discipline, and/or termination. Further, laws in some states, like California, may limit certain records that an employer may request during the decision-making process. Even though the FCRA allows consideration of convictions and records of arrest not older than seven years, many jurisdictions further restrict what an employer may utilize. Juvenile offenses, sealed or expunged records, certain marijuana offenses, or even records relating to a diversion program may be barred from use.

Although not all jurisdictions mandate individualized assessments, like California or New York City, employers may want to incorporate this practice into their current hiring policies and procedures. The EEOC encourages analysis of the conviction history in light of the time passed since the offense, rehabilitation, or any other mitigating factors. Additionally, for some employment decisions such as a promotion or employee discipline, some jurisdictions require employers to demonstrate that such consideration is job-related and consistent with business necessity. Since more jurisdictions are requiring some type of assessment, it may be more effective and efficient to have a blanket individualized assessment procedure.

Employers should also focus on record retention policies. Many BtB and Fair Chance laws incorporate requirements to keep job applications, individualized assessments, and other employment records for a certain period of time.

List of Localities by State

The list below depicts localities where BtB laws are applicable to private employers. Statewide laws that apply to both private and public employers have also been noted.

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| California Statewide (public and private) Los Angeles San Francisco | Illinois Statewide (public and private) Chicago | Missouri Columbia Kansas City | Pennsylvania Philadelphia |
| Connecticut Statewide (public and private) | Maryland Baltimore Montgomery County Prince George County | New Jersey Statewide (public and private) | Rhode Island Statewide (public and private) |
| District of Columbia Statewide (public and private) | Massachusetts Statewide (public and private) | New York Buffalo New York City Rochester | Texas Austin |
| Hawaii Statewide (public and private) | Minnesota Statewide (public and private) | Oregon Statewide (public and private) Portland | Vermont Statewide (public and private) |
| | | | Washington Statewide (public and private) Seattle Spokane |



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Impact of the Movements

Supporters of the BtB and Fair Chance movements make the case that millions of people with an arrest or conviction history now have a more level playing field with these laws in place. The laws force employers to review each candidate based upon their qualifications before taking conviction history into account. These supporters argue that the laws expand the talent pool of applicants by encouraging more individuals with records to apply for roles they might not have otherwise applied for due to a criminal conviction. Even with the myriad of laws in effect, employers may still refuse to hire individuals with criminal convictions that are relevant to the position. Others are concerned with negligent hiring risks; for example, an applicant hired with a serious conviction record who later commits a crime on the job.

Next Steps

Employers may want to review related employment policies and consider modifying them in light of the rapid adoption and complexity of the BtB and Fair Chance movements.

- Consult with appropriate legal counsel to maintain awareness of these laws and ensure compliance.
- Consider implementing an individual assessment procedure.
- Create a retention policy for pre-employment and employment records.
- Since the laws are constantly evolving, develop methods for keeping abreast of these movements.

ADP Compliance Resources

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