



“Ban the Box” Gives Ex-Offenders a Fresh Start in Securing Employment

By C. W. Von Bergen and Martin S. Bressler

Abstract

Nationwide, over 100 cities and counties, and 23 states, have adopted what is widely known as “ban the box” programs that require public and/or private employers to consider a job candidate’s qualifications first, without the stigma of a criminal record. These initiatives, also called “fair chance hiring” schemes, are said to provide job applicants a less discriminatory hiring approach by removing the conviction history question on job applications and delaying the background check inquiry until later in the hiring process when there has been a conditional offer of employment. The authors argue that removing “the box” improves employment opportunities and is critical to designing a robust policy platform to help millions of Americans with records integrate into society.

Martin, Goldstein, and Cialdini¹ convincingly illustrate with numerous examples in their recent best seller, *The Small Big: Small Changes that Spark BIG Influence*, that a small change in the setting, framing, timing, or context of how information is conveyed can dramatically alter how it is received and acted upon. For example, Englich, Mussweiler, and Strack² asked judges to impose a sentence for a hypothetical defendant convicted of robbery, then rolled a pair of dice that were loaded so every roll resulted in either a three or a nine. After the dice came to a stop, judges who rolled a nine said they would sentence the individual to eight months while those who rolled a three said they would sentence defendant to five months. It appeared that a minor change in numeric reference points that were transparently irrelevant affected judges’ decisions.

As another example, Grant and Hoffman³ showed that changing a single word in messages (“Hand hygiene prevents *you/patients* from catching diseases”) encouraged greater hand hygiene among health care professionals. Patient consequences signs produced an increase of more than 45 percent in the amount of hand-hygiene product used per dispenser and an increase of more than 10 percent in hand-hygiene behavior among health care practitioners over a two-week period. Such a finding demonstrates that a simple change in one word can have a considerable impact on preventing infections, and if the increased hand-hygiene adherence obtained were sustained for a year, the potential benefits could include the prevention of more than 100 infections and a savings of more than \$300,000—in just one hospital!

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Ban The Box

One relatively small change that is being promoted by increasing numbers of governmental entities and officials and advocates for ex-offenders involves the removal of the little box on most employment application forms that asks about a person's conviction record. Figure 1 illustrates this small box. The movement began in 2003 when the grassroots civil rights organization, All of Us or None, began advocating removing the box applicants must check on job applications if they have a criminal record. This nationwide crusade is frequently referred to as "Ban the Box" (sometimes called a Fair Chance Act). The goals of Ban the Box are to remove inquiries about criminal history from preliminary job applications and to encourage employers to consider applicants based on their qualifications first and their conviction history second. It would also, in theory, help ensure that employers follow fair hiring principles such as checking whether the conviction is related to the job. Ban the Box regulations do not limit an employer's right to perform a background check as a condition of employment; they simply affect when in the application process this can be done.

Figure 1 — An Example of the Box on Many Application Forms at the Center of This Controversy

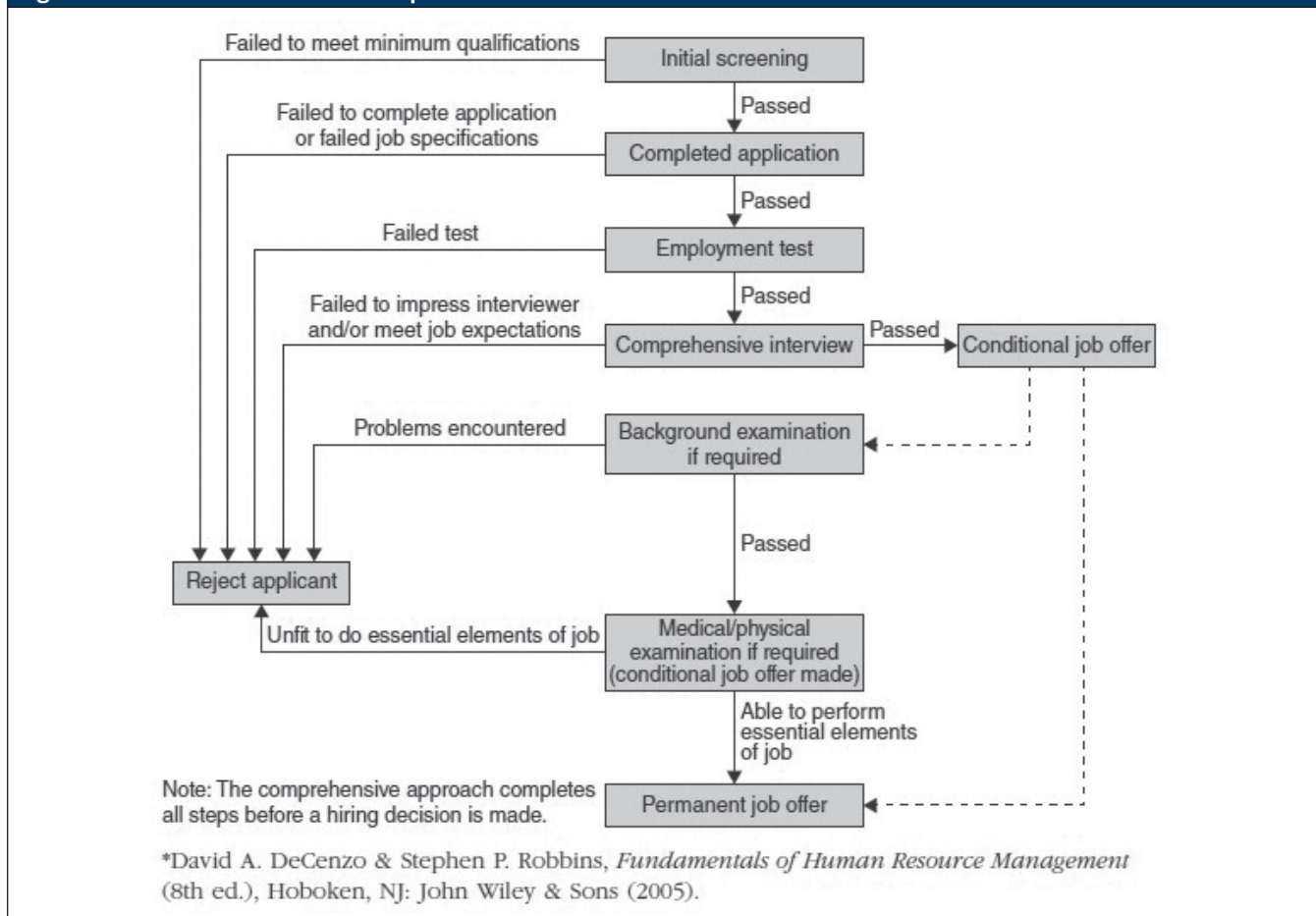
Have you ever been convicted of a felony? YES NO

If yes, explain: _____

The Ban the Box campaign is part of the broader human resources management employee selection protocol. Generally, selection activities follow a standard pattern similar to that in Figure 2 that begins with an initial screening interview and concludes with the final employment decision. The selection process typically consists of eight steps:

1. Initial screening interview;
2. Completing the application form;
3. Employment tests;
4. Comprehensive interview;
5. Background investigation;
6. Conditional job offer;
7. Medical or physical examination; and
8. Permanent job offer.

Figure 2. The Selection Process. Adapted from DeCenzo and Robbins*



Each step represents a decision point requiring some affirmative feedback for the process to continue and seeks to expand the organization's knowledge about the job applicant's background, abilities, and motivation. Ban the Box advocates want to move inquiries from step 2 to step 5 and believe that postponing the question gives a prospective employee an opportunity to explain the circumstances of the crime, to point out how long it has been since it was committed, and to present evidence of rehabilitation. As one Ban the Box advocate has explained, "We're not asking anyone to hire ex-felons. It's about giving them the opportunity to interview with the employer, sell themselves, and tell their own story."⁴

Background

Considerable social stigma results from persons being labeled a criminal in U.S. society. The disgrace associated with a criminal record is reported to have a number of adverse consequences for individuals, including difficulty in finding a spouse,⁵ attenuating the probability of being admitted and receiving funding to attend a university,⁶ hindering a person's ability to secure rental housing,⁷ impeding a person's ability to vote,⁸ and engendering negative health outcomes.⁹ A person with a criminal record also finds it burdensome to secure quality and enduring employment because employers view people who possess a criminal record as untrustworthy, lacking relevant job skills, and inclined to steal.¹⁰

According to the Justice Department¹¹ between 60 and 75 percent of former inmates cannot find work in their first year out of jail. The report further indicates that black offenders have twice as much difficulty in getting called back for an interview once they have checked the box indicating that they have a criminal background. It is estimated that more than one in four Americans currently has a criminal record.¹² These criminal records can be readily accessed for a nominal fee by the general public, including employers, landlords, and insurance companies among others *via* computer databases,¹³ resulting in millions of criminal background checks being conducted each year in the U.S.¹⁴ About 92 percent of employers inquire about the criminal histories of perspective employees¹⁵ and nearly 25 percent of the entire U.S. male workforce would generate a hit from a criminal record search.¹⁶

Employers believe that they can mitigate their vulnerability to civil liability by not hiring potentially dangerous employees,¹⁷ despite the fact that workplace violence is typically perpetrated by nonemployee strangers¹⁸ and that an individual with a criminal record is less likely to commit a crime in the workplace than an employee who

has never been convicted.¹⁹ Studies find that the stigma of an arrest,²⁰ criminal conviction,²¹ and incarceration in prison²² all act to reduce a person's earnings in the labor force, which is salient when one considers that unemployment or a low wage amplifies criminal activity generally,²³ and criminal recidivism specifically.²⁴ It also appears that unemployment has a greater effect on repeat offending than on first-time offending. In response to such problematic situations, states and local jurisdictions have passed Ban the Box ordinances.

State and Local Ban the Box Regulations

The delay in asking about a job applicant's unlawful background promoted by Ban the Box advocates is intended to prevent employers from relying on an applicant's criminal history as grounds for disqualification at the inception of employment, particularly if the person's past offenses bear no rational relationship to the job sought. Beyond this basic requirement, there is considerable variance among the statutes and ordinances, especially in terms of what information an employer may consider and when an employer may inquire into an applicant's criminal background.

Typically, Ban the Box laws impose restrictions on employer inquiries into criminal histories by limiting: (1) what can be asked of prospective employees prior to their hire, (2) when the inquiries can be made, and (3) how far back into the criminal history record the employer can investigate.²⁵ Often, the policies vary in the following ways: (1) the type of employers covered, (2) the positions that are included, (3) the stage at which criminal history information may be considered in the applicant screening process, and (4) the extent to which they provide guidance to employers on how to evaluate criminal history information in the screening process.²⁶ The majority of Ban the Box laws apply only to public employers, but blanket Ban the Box laws impacting all sectors, including private employers, are on the rise.

Today, over 100 cities and counties have adopted Ban the Box ordinances including Baltimore, Buffalo, Newark, Philadelphia, Seattle, Montgomery County (MD), Alameda County (CA), Muskegon County (MI), Travis County (TX), and Cumberland County (NC). The movement shows no signs of slowing down and indeed appears to have gone viral.²⁷ There are a total of 19 states representing nearly every region of the country that have adopted the policies—California (2013, 2010), Colorado (2012), Connecticut (2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Maryland (2013), Massachusetts (2010), Minnesota (2013, 2009), Nebraska (2014), New Jersey (2014), New Mexico (2010),

New York (2015), Ohio (2015), Oregon (2015), Rhode Island (2013), Vermont (2015), and Virginia (2015). Seven states—Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island—have removed the conviction history question on job applications for private employers, which advocates embrace as the next step in the evolution of these policies.²⁸

State, county, and local jurisdictions typically exempt jobs in law enforcement, child or nursing care, schools, or other areas in which other laws require background checks for safety or security reasons. These laws generally do not apply to employers that are required by state or federal law to screen applicants for criminal history, nor do they apply to law enforcement hiring.²⁹ On the other hand, some laws require that employers not ask about misdemeanors, arrests without convictions, or convictions that are expunged or annulled. Some do not allow the checks without the applicant’s permission. Some other laws say applicants cannot be disqualified if their convictions do not relate to the type of work they would be doing.

While it is beyond the scope of this article to examine all state Ban the Box laws, the Hawaiian statute is briefly summarized. In 1998, Hawaii became the first state to adopt a fair-chance law as applied to both public and private employment.³⁰ The statute prohibits employers from inquiring into an applicant’s conviction history until after a conditional offer of employment has been made. The offer may be withdrawn if the applicant’s conviction bears a “rational relationship” to the duties and responsibilities of the position sought. Under the ordinance, employers may only consider an employee’s conviction record within the most recent 10 years, excluding periods of incarceration.

Although Hawaii’s statute extends to private employers, prospective employees of the federal government are excluded. Employers that are expressly permitted to inquire into an individual’s criminal history for employment include the Department of Education, counties, armed security services, certain health care facilities, and detective and security guard agencies among others.

Research by D’Alessio, Stolzenberg, and Flexon³¹ found the Hawaiian ordinance to be effective in increasing employment for ex-offenders and simultaneously reducing recidivism for such individuals. These researchers analyzed longitudinal data drawn from the State Court Processing Statistics program dataset (1990–2004) to ascertain whether the imposition of Hawaii’s Ban the Box law in 1998 improved the safety of Hawaiians by decreasing felony offending among ex-offenders in Honolulu County. The researchers found that Hawaii’s Ban the Box law substantially improved the job prospects of ex-offenders and attenuated felony offending among individuals with a

prior criminal conviction. Even after accounting for factors commonly associated with criminal offending, D’Alessio *et al.*’s³² results show that felony offending among those possessing a prior criminal conviction was substantially reduced in Honolulu following the implementation of Ban the Box. This is important because those who can find steady work are less likely to return to prison and are better equipped to assume the mainstream social roles of spouse and parent.³³

With respect to local ordinances, consider The San Francisco Fair Chance Ordinance (FCO)—also known as the Ban the Box Ordinance—passed in 2014 by the City and County of San Francisco for employers with 20 or more workers doing business with these governmental entities.³⁴ Here employers are barred from asking applicants about their criminal history until after the first live interview or following a conditional offer of employment. Additionally, under this law, employers are restricted from looking at certain types of arrests or convictions anytime in the hiring process. Further, employers can *never* inquire about or consider the following:

1. An arrest not leading to a conviction, except for unresolved arrests;
2. Participation in a diversion or deferral of judgment program;
3. A conviction that has been dismissed, expunged, otherwise invalidated, or inoperative;
4. A conviction in the juvenile justice system;
5. An offense other than a felony or misdemeanor, such as an infraction; or
6. A conviction that is more than seven years old, the date of conviction being the date of sentencing.³⁵

Particularly troubling is that part of the statute regarding convictions and the seven-year period that is counted from the date of sentencing. The San Francisco look back period is seven years even if a person has been in custody during those seven years. The reason this is critical is because a person could have been convicted seven years and one day ago for a serious offense, and then the day after they get out of custody, an employer would not be legally able to consider such an offense.³⁶ This is a significant departure from the other 57 counties in California that operate on a rule that a person needs to be custody free for seven years before a conviction becomes too old for a background check firm to report.

Specific city and county ordinances vary widely but all remove questions about criminal convictions from public-sector employment, and some require that government contractors or vendors also remove the box. A smaller number of ordinances expand the policy to include private employers. Ordinances also vary as to how much they

delay criminal history inquiries. Some policies require simply removing criminal history questions from job applications, while some delay criminal record inquiries until after conditional offers of employment are made.³⁷ Given this momentum, federal legislation now appears to be just over the horizon.

Ban the Box at the Federal Level

The Obama Administration's My Brother's Keeper Task Force gave the movement a boost when it endorsed hiring practices "which give applicants a fair chance and allows employers the opportunity to judge individual job candidates on their merits as they reenter the workforce."³⁸ More recently, President Obama has announced new steps he is taking to make it easier for Americans with a criminal record to become productive members of society, including banning the box on federal job applications. Lawmakers in Congress, led by Democratic Senator Cory Booker of New Jersey and Republican Senator Ron Johnson of Wisconsin, have been working on federal Ban the Box legislation, and Mr. Obama called on members of Congress to pass legislation with respect to this topic.³⁹ Democratic presidential candidate Hillary Clinton has stated that "... as president I will take steps to 'ban the box,'..."⁴⁰

The EEOC has likewise endorsed removing the conviction question from the job application in its 2012 guidance making clear that federal civil rights laws regulate employment decisions based on arrests and convictions.⁴¹ This guidance went on to recommend, as a best practice that employers not ask about convictions on job applications. Moreover, in making this endorsement, the EEOC sanctioned Ban the Box reasoning that an employer is more likely to objectively assess the relevance on an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience. Furthermore, the EEOC has initiated litigation and otherwise attempted to use its enforcement powers to reform employers' policies in this regard.⁴²

Disparate Impact and Ban the Box

The 2012 EEOC Enforcement Guidance⁴³ also warned employers that categorically excluding job applicants based on arrest and conviction records may well violate VII of the Civil Rights Act of 1964. The EEOC explained that neutral but broad-sweeping criminal records policies can have the effect of disproportionately screening out racial minorities, particularly African Americans and Hispanics, due to markedly higher arrest and conviction rates among these groups. The agency staked out a position that the mere existence of an arrest record is

never an appropriate basis on which to deny someone an employment opportunity. With respect to conviction records, the EEOC declared that covered employers may face "disparate impact" liability under Title VII unless they use targeted criminal records screens, which are "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question,"⁴⁴ and/or provide an "individualized assessment" whereby excluded applicants have an opportunity to show that the "business necessity" rationale for the exclusion does not apply to them. In other words, employers must be able to articulate why the specific type of crime for which an excluded applicant was convicted made him or her unsuitable for the specific position in question.⁴⁵ It is important to note that there are no strict, objective standards courts must follow when evaluating whether an employment practice is job related and consistent with business necessity.⁴⁶

In order for a plaintiff to succeed in challenging an employer's criminal records policy under Title VII's disparate impact provision he or she does not need to show that the employer intended to discriminate. Instead, they must establish that the employer's consideration of criminal history information has a disproportionate adverse impact on a group protected by Title VII. For example, if the employer's policy prevented a large number of Hispanic American applicants from getting a certain position but it did not have a similar impact on white applicants, a plaintiff could highlight that differential to support their *prima facie* case. Even if the plaintiff meets their burden, the employer can avoid liability by establishing a valid business necessity defense. To do so, an employer would likely present evidence showing that consideration of criminal history information is necessary to identify applicants who will successfully perform the job's functions. However, if the plaintiff then identifies a "less discriminatory alternative" (*e.g.*, the employer's policy disqualifies anyone with any criminal conviction, but the plaintiff shows that applicants with only misdemeanor convictions would be just as capable of performing the job as those with no criminal record), he or she may still prevail.

Importantly, Title VII's disparate impact provision does not preclude employers from conducting background checks; it simply requires that such checks not be used in a way that has an adverse impact on protected classes and is not necessary for the positions at issue. As one court recently explained, "it is not the mere use of any criminal history ... generally that is a matter of concern under Title VII, but rather what specific information is used and how it is used."⁴⁷

Employer Concerns

“The removal of this little check box potentially makes life easier for job seekers with a criminal past, but it has created much confusion and frustration for employers” according to Angela Preston, vice president of compliance and general counsel at EmployeeScreenIQ, a background screening firm.⁴⁸ While employment is critical to ex-offenders’ successful reintegration into society, prospective employers have their own set of interests when considering whether to hire ex-offenders. Although many employers would like to give qualified ex-offenders a second chance, they are averse to taking risks that they feel could threaten their workplace or reputation. In particular, many employers do not want to be the first to employ a recently released offender; rather, they are more comfortable considering someone who had already established a positive track record after their release. Completion of transitional employment has been described by some as “evidence of rehabilitation.”⁴⁹

Opponents of Ban the Box measures indicate the laws raise the stakes for potential litigation and penalties, complicate the hiring process, and erode safety and security. They say that employers are in the best position to assess their hiring needs and that it should generally be up to each employer to determine when in the hiring process criminal history information is most relevant. From a risk mitigation and due diligence perspective, employers need to be informed about job applicants’ past history as it is important to maintaining a safe work environment, especially if there is a criminal past. In the interest of transparency, it is beneficial for human resources to know relevant information as early in the process as possible if the goal is to make informed decisions.⁵⁰

Thus, many employers are pushing back and arguing that they have an obligation to keep workplaces and customers safe. They claim that employers that hire convicted offenders are exposed to negligent hiring or workplace violence claims, particularly if they knew about, or failed to diligently discover an employee’s criminal record. Additionally, many employers are concerned that Ban the Box statutes and ordinances create conflicts with other laws that prohibit them from hiring persons convicted of certain crimes in workplaces such as schools or hospitals. Asking small employers to wait until they are ready to offer someone a job before asking about a criminal record is “kind of wasting the business owners’ time.”⁵¹

But these concerns, while valid, can likely be mitigated. Ban the Box rules do not prohibit consideration of criminal histories altogether. Generally speaking, they merely delay consideration of applicants’ criminal background

and, in some cases, prohibit employers from considering certain records altogether. Accordingly, employers should remain vigilant about screening applicants with criminal backgrounds, only doing so later than they may have in the past.

Additionally, Ban the Box rules do not trump other laws specifically prohibiting employers from hiring individuals with certain criminal records. For example, federal law excludes an individual who has been convicted of certain crimes in the previous 10 years from working as a security screener or otherwise having unescorted access to the secure areas of an airport. There are equivalent restrictions under federal, state, and local laws for law enforcement officers, child care workers, bank employees, port workers, elder care workers, and other occupations. Ban the Box statutes should not preempt such laws and regulations.⁵²

Ban the Box rules may also pose challenges for employers that receive large numbers of applications *via* the Internet. Some of these employers use facially neutral policies, such as a policy automatically excluding persons who have been convicted of crimes, to selectively remove undesirable applicants without having to expend time and resources determining whether such people are otherwise qualified for the job. These kinds of automated exclusions based on criminal records are specifically impacted by Ban the Box policies and can no longer be used in jurisdictions that have passed an ordinance applicable to private employers and contractors. However, there are other screening techniques that employers can use to weed out large numbers of people without running afoul of Ban the Box rules. Employers can establish noncomparative, objective criteria that are relevant to performing the job. Such criteria could include, depending on the circumstances, requiring applicants to have a degree or certain number of years’ experience in a particular field, requiring certain licenses or certifications, requiring fluency in a particular language, or requiring availability during certain times of the day or week. If an employer still has a large pool of applicants, it may use random sampling techniques to limit the number of people contacted for an interview and, at this point, may eliminate applicants whose criminal convictions affect their ability to do the job in question.

In sum, Ban the Box laws are intended to stop employers from removing applicants in the initial screening process because of a conviction or arrest before they have had a chance to consider the applicant based on his or her job-related qualifications. To this end, employers must remove any inquiry into an applicant’s criminal history at the beginning of the screening process. Once an employer makes a decision to hire the applicant, the employer can conduct a criminal background check. At that point, if an

employer discovers that the applicant has been convicted of a crime, the employer should make an individualized assessment as to whether it should hire or reject the applicant for reasons that are job related and consistent with business necessity. To ensure that employers are making individualized, job-related assessments of applicants, the EEOC advises that employers establish targeted screening procedures that take into consideration the nature of the crime, the time elapsed since the offense was committed, and the nature of the job sought.⁵³ Waiting until later in the application process to conduct criminal background checks may cause practical concerns for employers, such as potentially losing qualified candidates due to delays in the screening process. However, these employers should take comfort in the fact that the Ban the Box rules are not designed to force them to hire individuals with criminal records that legitimately disqualifies them from the job.

Nevertheless, organizations are concerned about liability they incur because of ex-offenders. Under the common law doctrine of *respondeat superior*, an employer is often held to be vicariously liable for the tortious acts of its employee, committed within the scope of his or her employment or in furtherance of the employer's interests. Claimants have relied upon alternative negligence theories, including negligent hiring and retention as bases for employer liability. Most jurisdictions have recognized these theories are viable mechanisms for the imposition of employer liability. The principal difference between negligent hiring and negligent retention claims is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness. The liability inquiry primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background. The fundamental purpose of negligent hiring law is to protect people from employers that do not exercise due care in hiring employees. If an employer conducts a proper investigation, it will not hire the dangerous employee, and the employee will not be in a position to harm a third party.⁵⁴ As the Supreme Court of Minnesota noted in one of the nation's leading negligent hiring cases, "an employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public."⁵⁵ Such liability is a major concern for employer and a verdict in favor of the plaintiff can be very costly for employers. A report completed in 2001 estimated that employers lose approximately 72 percent of negligent hiring cases, with the average settlement just over \$1.6 million.⁵⁶

In its simplest form, negligent retention can be charged when an employer knew, or should have known, that an employee was unqualified to be in the position he was working in, allowed him to stay in the position anyway, and an injury or violation of rights was caused by the employee in the normal scope of duty.⁵⁷ The tort of negligent retention considers it the employer's responsibility to become aware of problems with employees that may indicate they are unfit for the job at hand; and furthermore to take action, such as investigating, discharging, or reassigning the employee in order to reduce the employee's risk of harm to others. Generally, an employer is held liable for negligent hiring/retention, when that employer has somehow been responsible for bringing a third person into contact with an employee, whom the employer knows or should have known is predisposed to committing a wrong under the circumstances that create an opportunity or enticement to commit such a wrong.⁵⁸

With the passage of Ban the Box statutes and their restrictions on employer criminal background checks, however, legislatures across the country are now voicing an aversion to employers performing criminal background checks on prospective employees. Thus, employers are placed in a no-win situation: the common law encourages employers to conduct background checks on prospective employees to mitigate any foreseeable risk of injury, but with the passage of Ban the Box regulations, legislatures can be seen as complicating the background checks that employers can conduct. The result is a "legal minefield" in which employers face liability for not only refusing to hire ex-offenders, but also for hiring ex-offenders who later recidivate.⁵⁹

Compliance Assistance For Employers

Given the growing trend to enact laws regulating the use of criminal background checks in the hiring process, employers, especially those who operate in multiple jurisdictions, should review their current criminal records check policies and practices with the following considerations in mind (see Table 1). A discussion of each factor follows.

Ban the Box Guidelines for Employers

1. Develop a Narrowly Tailored Written Policy for Screening Applicants and Criminal Conduct

As many as 100 million Americans have criminal records making the use of criminal records as a blanket "no hire" policy problematic.⁶⁰ Additionally, the EEOC Compliance

Table 1. Ban the Box Guidelines for Employers

1. Develop a Narrowly Tailored Written Policy for Screening Applicants and Criminal Conduct
2. Follow the Adverse Action Process of the Fair Credit Reporting Act
 - A. Disclosure
 - B. Authorization
 - C. Pre-Adverse Action
 - D. Waiting Period
 - E. Take Adverse Action
3. Revise Employment Applications and Policies That Inquire into Criminal History in the Initial Screening in Jurisdictions That Have Enacted Ban the Box Rules
4. Past Convictions Are Permissible Considerations in Most Cases, but Arrests Are Not
5. Keep All Criminal Records Confidential and Keep Records of the Basis for an Adverse Employment Decision

Guidance⁶¹ indicated that no exclusions should be based on mere fact of criminal record since such policies cause disparate impact on minorities. Consequently, employers should develop a narrowly tailored screen defined as a demonstrably tight nexus to the position in question. Additionally, the EEOC endorsed the three “Green Factors” identified in *Green v. Missouri Pacific Railroad*,⁶² in which the court found a complete bar on employment based on any criminal activity, other than a traffic violation, unlawful under Title VII. The three factors suggesting a targeted screen for employers include (1) the nature and gravity of the crime, (2) the time elapsed since the conviction and/or completion of the sentence, (3) and the nature of the job. In addition to the *Green* Factors, where arrest records show no conviction, the 2012 EEOC Guidance⁶³ requires the employer to evaluate whether the arrest record reflects the applicant’s conduct.

With respect to Green Factor 1, employers may want to consider the harm caused, the legal elements of the crime, and the classification of the offense (*e.g.*, misdemeanor vs. felony). Regarding Green Factor 2, organizations could include the evaluation of recidivism in their analysis. In Green Factor 3, firms are encouraged to examine more than just a job title and to evaluate specific duties, essential functions, circumstances (*i.e.*, supervised or not), and environment (*e.g.*, in a home, at a factory) for a particular position. Furthermore, the EEOC also requires that employers consider the use of an “Individualized Assessment” in cases where an applicant is rejected due to this

three-part Green Factors test. Individualized assessment is discussed in greater detail in step 2 below.

2. Follow the Adverse Action Process of the Fair Credit Reporting Act

The products of background checks, known as consumer reports, include both credit reports and criminal background reports. The EEOC and the Federal Trade Commission (FTC) co-published two technical assistance documents to help employers⁶⁴ and job applicants and employees⁶⁵ to better understand how the agencies’ respective laws apply to background checks performed for employment purposes. The laws enforced by the EEOC and the FTC intersect on the issue of employment background checks and both agencies have adopted existing obligations under federal antidiscrimination laws and the Fair Credit Reporting Act (FCRA)⁶⁶ —the federal law that promotes the accuracy and privacy of information in the files of consumer reporting agencies and credit reports.⁶⁷

This step is placed second because several of its conditions involve actions required *before* a background check is conducted. It should be noted that “Adverse Action” is defined as, a denial of employment or any other decision for employment purposes based in whole or in part on a consumer report that adversely affects any current or prospective employee.⁶⁸ If this happens, then the specific procedure outlined below must be followed. Additionally, because much of the discussion of the adverse action process is relatively new, it is presented in greater detail.

Under federal law, there is a required sequence that must be followed in order to be in compliance with the FCRA. Employers face significant exposure associated with background check practices if they fail to comply with the straightforward technical requirements of the FCRA. There are legal consequences for employers that fail to get an applicant’s permission before requesting a consumer report or fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the FTC, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

The five basic steps to FCRA compliance include:

1. Disclosure;
2. Authorization;
3. Pre Adverse Action;
4. Waiting Period; and
5. Taking Adverse Action.

The terms background check and consumer report are treated the same and are used interchangeably in the following discussion. We now take a closer look at each step. First, be aware that *before* a background check is conducted, Disclosure and Authorization are required.

Disclosure

The applicant should be informed that employers can require a background check and can ask questions about an individual's background and that a consumer report is going to be obtained and included in the hiring decision. This disclosure must be a stand-alone document and not positioned among any other notices, disclosures, or consent forms. Consumer reports include criminal records, driving records, employment verifications, education verifications, and credit checks. The employer must seek the same background information for all individuals.

Authorization

The job applicant should provide written consent for the report to be obtained. Where a background check is prepared by an outside company, called a credit reporting agency, employers must ensure it complies with the FCRA. Further, the employer must certify to the third party preparer that the individual was notified of the background check; the individual gave written permission to obtain a report; the employer complied with the FCRA's requirements; and the employer will not discriminate against the individual in violation of federal, state, or local law.

Pre-Adverse Action

Section 604 of the FCRA requires that employers provide to the consumer, before taking any adverse action based on a consumer report, a copy of the report and a summary of consumer's rights under the FCRA. This is referred to as the Pre-Adverse Action letter, since it must be sent before the adverse action is taken so as to give applicants an opportunity to dispute the accuracy of report. In other words, if an employer has a report and believes that the information contained in the report may impact the hiring decision, then at that time the employer must send the Pre-Adverse Action letter. A Pre-Adverse Action sample letter from IntelliCorp is available for review.⁶⁹ Employers are not required to keep positions open during the dispute process. That said, understanding the intent of the adverse action process is to allow the applicant an opportunity to dispute, and keeping the position open enables the intent to be seen through. On the other hand, many organizations do not have the luxury of keeping positions open for an extended time period.

The employer should also provide a copy of the consumer report from the organization that furnished the report to the job candidate along with "A Summary of Your Rights Under the Fair Credit Reporting Act" available on

the consumer information page of the FTC's web site.⁷⁰ Additionally, the employer should offer the contact information for the consumer reporting agency (name, address, and phone number) that generated the report, and tell the individual that the consumer reporting agency did not make the adverse decision and therefore cannot provide a reason for it. The employer must also advise the individual that he or she can obtain an additional free report from the consumer reporting agency within 60 days.

Once a company has completed the pre-adverse action process outlined here, the EEOC also requires that the firm conduct an individualized assessment prior to taking adverse action. This "individualized assessment," according to the EEOC Guidance⁷¹ document, must be comprised of the following factors:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts (*e.g.*, education/training);
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Waiting Period

The employer must wait before deciding not to hire, giving the applicant time to respond to the negative information and dispute the information in the consumer report. Providing individuals the opportunity to explain may expose, among other things, the possibility that the record was made in error, identifies the wrong person, or is otherwise incomplete. If the applicant offers a reasonable explanation or paperwork mistake then the applicant can be hired. If there is no response and/or the information is correct, then do not hire and continue with the Adverse Action.

There is no specific period of time an employer must wait after providing a pre-adverse action notice and before taking adverse action against the candidate, but Congress has provided that 5 business days is a reasonable time period to wait after the pre-adverse action letter before taking adverse action.⁷² While there is no required method, sending the letter by mail with return receipt or getting the applicant to sign for it, provides evidence that they received it. If firms have the ability to send the letter by

email with return receipt, it can show that it was received and opened.

Take Adverse Action

If the applicant does not dispute the information, employers are required to send an adverse action notification letting the candidate know that they were not hired due to the information uncovered during the consumer report. In the Adverse Action letter (the second notice), the employer must notify the consumer of the fact that adverse action has been taken based on a consumer report and include in that disclosure the following:

- The name, address, and phone number of the consumer reporting agency that furnished the report;
- A statement that the consumer reporting agency did not decide to take the adverse action and is unable to provide the consumer with specific reasons for the action;
- A notice of a consumer's rights to obtain another free copy of his or her report from the consumer reporting agency within 60 days; and
- The individual has the right to dispute the accuracy or completeness of any information in the report.⁷³

A sample letter from IntelliCorp is available for review.⁷⁴

3. Revise Employment Applications and Policies That Inquire into Criminal History in the Initial Screening in Jurisdictions That Have Enacted Ban the Box Rules

In those jurisdictions that have enacted Ban the Box rules, employers should remove questions about criminal histories from employment applications. Employers should also eliminate practices that automatically or categorically exclude persons with an arrest or a conviction. Instead, they should develop, generally speaking, narrowly tailored policies and procedures that provide for individualized assessments of the applicant's circumstances.

4. Past Convictions Are Permissible Considerations in Most Cases, but Arrests Are Not

Generally, arrest records do not establish that criminal conduct has occurred. Many arrests do not result in criminal charges or convictions, and many are incomplete insofar as they do not report final dispositions. Moreover, under some Ban the Box laws and ordinances, for instance in Massachusetts and Minnesota, employers are expressly prohibited from asking about arrests that did not result in conviction. If an arrest is discovered, however, and the jurisdiction does not outright prohibit inquiring about it, the conduct underlying the arrest may justify an adverse employment action. As an example, if a person seeking a position as a teacher was arrested for indecent exposure to a minor, that conduct may be grounds for rejecting the

applicant, even if the arrest did not result in a conviction. Conviction, in contrast, will usually serve as sufficient evidence that a person engaged in particular conduct.

5. Keep All Criminal Records Confidential and Keep Records of the Basis for an Adverse Employment Decision

It is generally a good practice for employers to keep detailed records of employment decisions. The EEOC's Uniform Guidelines on Employee Selection Procedures require employers to maintain, and have available for inspection, records about selection devices. These Uniform Guidelines require employers to maintain records in order to disclose the impact that their selection procedures have on persons identifiable by race, sex, and certain ethnic groups. In the context of criminal records checks, employers should consider monitoring whether conducting such checks excludes a disparate number of people in a protected classification group. Employers that maintain records detailing how a criminal record affects a hiring decision and demonstrating that the employment decision was made based on an individualized assessment of the candidate, even if he or she was ultimately rejected because of a criminal record, will be in a defensible position should discrimination charges later be filed by the applicant. It is recommended that documents be kept seven years if an individual is hired and five years if not hired.⁷⁵ Finally, it is recommended that all information with respect to criminal background checks can be viewed by a person with a need to see for hiring.

Summary and Conclusions

Legislation and executive orders barring discrimination and unfair employment practices with regard to various factors were initiated in the early 1960s and have expanded to include (a nonexhaustive list) gender/sex, age, race, color, veteran status, disability, national origin, religion, pay, pregnancy, genetic information, sexual orientation, sexual harassment. Today, ex-offenders appear to be joining these groups in receiving additional protections because of Ban the Box laws.

The underlying issue with respect to Ban the Box directives is that the use of criminal records is difficult because it involves important American values that seem to be in conflict with each other. On one hand, Americans value public safety and a safe workspace with honest and qualified employees. On the other hand, society has a strong belief in second chances, and that a person's past should not hold that person back forever, particularly for more minor offenses. America is country that prides itself on

second chances and is not a nation of “one strike and you’re out.”⁷⁶ Understanding that a criminal record can be a lifelong barrier to economic security and mobility—with adverse effects on families, communities, and the entire U.S. economy—organizations should craft policies to ensure that individuals with criminal records have a fair shot at a decent life by removing unreasonable barriers to employment, since research indicates that stable employment is one of the best predictors of successful reentry and desistance from crime.⁷⁷

The issue is how to draw lines that both protect innocent people and, at the same time, do not burden ex-offenders, their families, and the taxpayers by creating a permanent class of unemployed or underemployed people. Unless ex-offenders can get jobs, they cannot become taxpaying and law abiding citizens, and taxpayers end up building more prisons than they do schools or hospitals. It is a matter of finding a good balance.

The Ban the Box movement seems successful and deserves credit for making tremendous progress in mitigating the challenges faced by ex-offenders. State and local entities have led the way followed by private companies such as Walmart, Target, Starbucks, and Home Depot.⁷⁸ Now the federal government is showing growing interest in Ban the Box as an important civil rights concern.

Ex-offenders and their advocates prefer a criminal background check later in the application process, while employers prefer to conduct criminal background checks as early as possible.⁷⁹ In response to these constituencies, Ban the Box statutes run the gamut for when employers are allowed to conduct background checks, ranging from just after the first interview all the way to conditional offers of employment. But an employer that waits until later in the interview process will have a more difficult time disproving employment discrimination based on the applicant’s prior criminal history. For instance, suppose an applicant lacks a substantial work history. The employer nevertheless believes the applicant is qualified, and offers the applicant a conditional offer of employment, pending the background check. The employer then discovers that the applicant actually has a prior criminal history. At this stage in the application process, the employer will find it difficult to prove that the applicant was not hired because of his or her criminal background

but was, instead, not hired based on his or her lack of work history. Fearing an employment discrimination suit, the employer reluctantly hires the individual, opening the employer to the pitfalls of negligent hiring and negligent retention law.⁸⁰ It is no wonder, then, that most employers prefer to conduct criminal background checks as early as possible.

However, allowing employers to conduct criminal background checks at a very early stage in the application process has its own problems. Namely, employers that conduct criminal background checks too early will do so “before most ex-offenders had any chance to demonstrate their ability to successfully hold the jobs for which they were applying.”⁸¹ Furthermore, while studies show that a criminal record reduces the likelihood that an applicant will be offered a second interview or a job by nearly half, employers are more likely to hire ex-offenders after the first interview, even if they later discover a criminal history.⁸²

Thus, an employer that conducts criminal background checks too early could potentially miss out on otherwise superior candidates—candidates that the employer would have hired after they had gotten to know them, despite the later discovery of their criminal history. However, an employer that conducts a criminal background check too late into the interview process will, at best, disqualify the ex-offender, wasting valuable time and money spent during the interview process, and potentially opening itself to anti-discrimination litigation, or, at worst, end up hiring the ex-offender in order to avoid the potentially costly anti-discrimination litigation, only to later end up defending a negligent hiring case in court.

While there are pros and cons with respect to this legislation, it is a worthy effort at tackling employment discrimination against ex-offenders. Research shows that “the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens.”⁸³ Thus, it is in everyone’s best interests, including employers, to support Ban the Box legislation. Of course, employers have a legitimate concern over Ban the Box provisions that limit their ability to conduct criminal background checks, and it is hoped that this review will provide employers with sufficient guidance to effectively implement this relatively new antidiscrimination legislation.

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