Insight

IN-DEPTH DISCUSSION

FEBRUARY 27, 2017

It's Not Just a Box: Understanding How "Ban-the-Box" Laws Go Beyond Your Employment Application

BY JENNIFER MORA

In 1998, Hawaii became the first state to "ban the box," prohibiting private employers from inquiring about a candidate's criminal history until the employer has made a conditional offer. It was not for another 12 years before another state, Massachusetts, followed suit and enacted similar legislation, although the Massachusetts statute permits employers to ask the question about criminal history during the interview process.

Upon enactment of the Hawaii and Massachusetts statutes, employers in these jurisdictions simply had to remove from their employment application the question that asks, "Have you ever been convicted of a crime?", which made compliance relatively straightforward. After Massachusetts passed its law, however, the ban-the-box movement has spread like wildfire at the state, county and city levels. At present, the following jurisdictions have laws that require employers to wait to ask the criminal question until a later point in the hiring process (*e.g.*, after an interview, after a conditional offer, etc.): Connecticut; the District of Columbia; Hawaii; Illinois; Massachusetts; Minnesota; New Jersey; Oregon; Rhode Island; Vermont; Cook County (Illinois); Montgomery County (Maryland); Prince George's County (Maryland); San Francisco (California); Los Angeles (California); Chicago (Illinois); Baltimore (Maryland); Columbia (Missouri); Buffalo (New York); New York City (New York); Rochester (New York); Portland (Oregon); Philadelphia (Pennsylvania); Austin (Texas); and Seattle (Washington).[1] Employers with multi-state operations have found it particularly challenging to stay ahead of new laws that seem to crop up a few times a year.

1 *See e.g.*, Jennifer Mora, Rod Fliegel, Allen Lohse, and Christina Cila, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law*, Littler Insight (Dec. 9, 2016); Jennifer Mora and Stephen Fuchs, *Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law*, Littler Insight (Feb. 25, 2016); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (June 12, 2015) (among many others which can be found on Littler's website).

Littler

©2017 Littler Mendelson, P.C. All rights reserved.

Employers might assume that merely removing the criminal question from the employment application complies with the ever-growing list of legal restrictions on consideration of criminal backgrounds. To the contrary, these laws may also have other requirements that apply to employers that consider criminal history as part of their selection process, even for those employers that have removed the criminal question from their job applications. In addition, these laws may even overlap with certain requirements that employers must follow under the federal Fair Credit Reporting Act (FCRA) when taking adverse action against someone with a criminal record.[2]

This Insight will briefly highlight the various additional ways in which ban-the-box laws impact an employer's use of criminal records for hiring and other employment decisions. Although this Insight cannot describe every requirement in these laws, it should give employers, particularly those operating in multiple states, a framework for determining whether they are in compliance and whether to seek assistance from counsel experienced in this increasingly complex area of the law.

Ordering a Criminal Background Check

Many employers believe that while they may have to remove the criminal question from their job applications, they still can order a criminal background check early in the process, such as before an interview or a conditional offer. Unfortunately, most of the ban-the-box laws prohibit employers from ordering the background check until a later point in the pre-hire process, such as after an interview or a conditional offer of employment. In **New York City**, employers should not even mention background checks to candidates until after a conditional offer has been made.

Job Solicitations and Advertisements

A small handful of jurisdictions regulate language that employers may or may not be able to include in job solicitations and advertisements about their consideration of criminal records or background checks generally. For example, the **San Francisco** ordinance provides that employers may not include in any "solicitation or advertisement that is reasonably likely to reach persons who are reasonably likely to seek employment" in San Francisco any language stating, directly or indirectly, that any person with an arrest or a conviction will not be considered for or apply for employment. **New Jersey** has a similar requirement. Moreover, in both **San Francisco** and **Los Angeles**, employers must affirmatively state in solicitations and advertisements that they will consider qualified candidates with criminal histories in a manner consistent with applicable law.

Workplace Postings

A few jurisdictions require that employers post a specific notice about the law in the workplace, such as on a bulletin board in a break room with other federal or state-mandated postings. **Los Angeles**, **Philadelphia** and **San Francisco** have prepared city-specific notices that should be posted at each workplace in the applicable city. In **Los Angeles**, the employer also must provide a copy of the notice to any labor organization that represents employees working in that city.

"Off Limits" Criminal Records and Individualized Assessments

A handful of ban-the-box laws prohibit consideration of certain types of criminal records. For example, in **Philadelphia**, employers may consider a conviction only if it occurred "fewer than seven (7) years from the date of the inquiry," provided that "any period of incarceration shall not be included in the calculation of the seven (7) year period."

2 Jennifer L. Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016).

Insight is published by Littler Mendelson in order to review the latest developments in employment law. Insight is designed to provide accurate and informative information and should not be considered legal advice.

San Francisco's ban-the-box law has the most comprehensive list of "off-limits" criminal records information, which states that employers may not consider: (a) an arrest not leading to a conviction (except for those considered "unresolved" under the law); (b) an individual's participation in or completion of a diversion or a deferral of judgment program; (c) a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (d) a conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system; (e) a conviction that is more than seven (7) years old (the date of conviction being the date of sentencing); or (f) information pertaining to an offense other than a felony or misdemeanor, such as an infraction.[3]

In addition to including certain "off-limits" criminal record information, several ban-the-box laws, including those in **New York City, Los Angeles, Seattle, San Francisco** and the **District of Columbia**, require employers to conduct an individualized assessment of the conviction before making the employment decision.[4] Nationwide employers may find it challenging to develop a single process for conducting these assessments because, while there is similarity as to the factors that must be considered, the factors are not identical. Moreover, as will be discussed in the next section, employers in **New York City** and **Los Angeles** must show the candidate the written assessment as part of the review process to provide the individual an opportunity to advise the employer of any new information that should be considered or provide the employer a reason to reconsider its preliminary decision. **Los Angeles** employers also must do a re-assessment if the candidate provides additional information for the employer to consider before making a final decision.

Notice Requirements

The FCRA requires that employers follow certain requirements if they intend to take "adverse action" against a candidate (whether a job applicant or an employee) based, in whole or in part, on the contents of a third-party background report (consumer report), before the adverse action is taken. Specifically, the employer must provide a "pre-adverse action" notice to the candidate before taking adverse action, which must include a copy of the consumer report and the Consumer Financial Protection Bureau's Summary of Rights. This requirement affords the candidate an opportunity to discuss the report with the employer before the employer takes adverse action. Once the employer decides to take the adverse action against the candidate or employee, the employer must then provide an "adverse action" notice to the candidate or employee.

Some ban-the-box laws take this process a step further by requiring: (1) a pre-adverse and/or an adverse action notice even if the criminal information is not derived from a third-party background report (e.g., through an applicant's or employee's self-disclosure or independent court records search); or (2) identification of the potentially disqualifying criminal record in the notice. Moreover, while the FCRA requires the employer to wait a reasonable period of time after sending the pre-adverse action notice to send the adverse action notice, some ban-the-box laws require an employer to wait a specific period of time. For example, in **Philadelphia**, an employer must wait 10 days to allow candidates an opportunity to provide the employer with evidence that their criminal records are inaccurate or to otherwise explain the information.

As mentioned above, in both **Los Angeles** and **New York City**, the employer must provide the candidate a copy of the employer's completed individualized assessment (discussed above) and a copy of any other record the employer considered in its assessment (such as any information an employer obtained

3 California separately regulates consideration of these types of records. *See* Jennifer Mora, *California Employers Are Subject to New Requirements When Using Criminal History*, Littler Insight (Feb. 21, 2017); Jennifer Mora, *California Amends Labor Code to Prohibit Employers from Using Juvenile Records in Employment Decisions*, Littler ASAP (Oct. 3, 2016).

4 Note that Article 23-A of the New York Corrections Law requires all New York employers, not just those in New York City, to conduct an eight-factor analysis of an individual's conviction when using it for employment purposes. This Insight, however, focuses only on the New York City ban-the-box law and does not delve into all legal issues in that state. Moreover, California employers may now have to conduct an individualized assessment when considering conviction records. Jennifer Mora, *California Employers Are Subject to New Requirements When Using Criminal History*, Littler Insight (Feb. 21, 2017).

Insight is published by Littler Mendelson in order to review the latest developments in employment law. Insight is designed to provide accurate and informative information and should not be considered legal advice.

from an internet search or directly from the county courthouse). If a **Los Angeles** employer completes a re-assessment of the criminal record in light of new information provided by the candidate, the employer must provide him or her with a copy.

In the **District of Columbia**, if a candidate believes that adverse action was taken based on a criminal conviction, the candidate may request, within 30 days after the adverse action, that the employer provide: (1) a copy of all records procured by the employer in consideration of the candidate; and (2) a notice advising of the right to file a complaint with the D.C. Office of Human Rights. The employer must respond within 30 days of the candidate's request for the information.

Thus, compliance with the FCRA will not satisfy some requirements under the ban-the-box laws, and employers should not rely on FCRA procedures in the ever-increasing number of jurisdictions with ban-the-box obligations.

Next Steps for Employers

Now more than ever, it is advisable for employers that use criminal history in pre-hire and other employment decisions take steps to ensure compliance with the various ban-the-box laws that require them to go beyond the FCRA and do more than removing a question from their job applications. Employers that use criminal history and operate in any of the ban-the-box jurisdictions should consider a privileged audit of their background check policies and procedures to ensure that:

- applicants and employees are being provided with the appropriate notices and given the requisite amount of time to consider the information before they lose a job opportunity;
- managers and those tasked with making decisions about whether to hire someone with a criminal record are not considering "off-limits" information, know how to respond when criminal record information is voluntarily disclosed by an applicant early in the pre-hire process, and are conducting an individualized assessment of the record;
- workplace notices are posted; and
- solicitation and job advertisements are drafted properly.

Finally, given the onslaught of class litigation against employers alleging violations of the FCRA, employers should continue to be mindful of their obligations under that federal statute and state fair credit reporting laws when using criminal background reports provided by third-party background screening companies.

Insight is published by Littler Mendelson in order to review the latest developments in employment law. Insight is designed to provide accurate and informative information and should not be considered legal advice.