

## UNDERSTANDING “BAN THE BOX” LAWS

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“Ban the Box” is a national civil-rights movement backed by advocates for job applicants with criminal convictions. Proponents of these laws believe that expanding employment opportunities for individuals with criminal convictions is a major factor in lowering recidivism rates.

Generally the laws prohibit employers from asking about an applicant’s criminal-background history until later in the interview process. Most of these laws prohibit employers from including the *“have you ever been convicted of a criminal offense”* question on an employment application – thus “banning the box” – and instead limit employers’ ability to ask the criminal-history question until after a conditional offer of employment is made or after an applicant has been selected for an interview.

Advocates argue that “Ban the Box” laws reduce the barriers to obtaining employment for convicted criminals by allowing applicants to demonstrate their skills and qualifications prior to revealing their criminal histories.

### **A National Trend**

In August 2014 New Jersey joined a growing number of states prohibiting employers from asking about applicants’ criminal histories early in the hiring process. Thirteen states have passed statewide “Ban the Box” hiring laws covering public employers and six of those states (Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, and Rhode Island) along with the District of Columbia, include

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private employers in the ban. Nationwide, almost 70 cities and counties have adopted similar laws.

In its 2012 Guidance, the EEOC has endorsed removing the criminal-conviction question from job applications. Federal legislation – The Ban the Box Act – was introduced in the U.S. House of Representatives in 2012 but died in committee.

In addition to the criminal-conviction question ban, many of the “Ban the Box” laws contain additional requirements such as a test for employers that must be undertaken before asking about criminal history, limitations on the types of records employers can consider, and notification requirements to the applicant when criminal information is being used. Compliance can be time consuming and costly.

### **A Unique Challenge For Hospitality Employers**

Hospitality employers in “Ban the Box” jurisdictions must still treat the hiring process with diligence, but without full disclosure on an applicant’s qualifications – until later in the process. According to some studies, over 90% of employers conduct criminal-background checks for some job applicants and over 70% of employers conduct background checks on all potential new hires. This includes many hospitality industry employers.

Most decision makers want information about criminal behavior before bringing a candidate into the organization. The rationale is easy – employers want to identify candidates who are honest when filling out their applications, find those who display a history of good decision making and judgment, and reduce the risk of criminal behavior in the workplace and related civil liability by excluding those applicants who may be most likely to (re)engage in criminal activity at work. Hospitality employers also do so to avoid negligent hiring lawsuits – a lawsuit from a guest or customer, for example, based on a hotel’s failure to properly screen an employee who later does harm.

Despite these legitimate and important business concerns, the current regulatory climate has changed. It’s moving toward limited inquiry into only certain aspects of a candidate’s background, and then only when the information sought is relevant to the position; and in “Ban the Box” jurisdictions only later in the application process.

## Our Advice

If your property is in a “Ban the Box” jurisdiction you likely must remove the “box” asking about criminal history from the employment application. Develop a screening and hiring policy in compliance with “Ban the Box” laws and advise interviewing managers and recruiters that they cannot ask about criminal convictions until permitted by the law.

Employers with properties in multiple jurisdictions or who provide access to applications on a nationwide basis, now must consider the law and policy of each location, possibly ending up with different processes depending on where they’re located.

Options include: 1) removing the “box” from your application and asking the criminal-conviction question as a supplement to the application only in those jurisdictions where it is not prohibited; 2) including the criminal-conviction question on the application but providing instructions to applicants in covered jurisdictions not to answer the criminal-conviction question; or 3) having different applications in covered jurisdictions. Doing nothing is not the best option. The “Ban the Box” laws have various penalties including fines.

This is also a prime opportunity to review your hiring policies and ensure that all involved in the process are trained on the latest EEOC guidance and state laws regarding handling arrest records and convictions. Employers should not have a blanket prohibition on hiring individuals with convictions.

Instead, make hiring decisions based on the **nature** of duties, the **environment** where the work is performed and the **exposure** to certain types of customers or clients. For example:

- do particular employees have unsupervised access to guest rooms, guest property or work with guests in sensitive situations (such as a spa);
- are there specific state or federal standards that prohibit you from hiring individuals with a certain criminal history, such as may exist for babysitting services; and
- do employees make decisions about or have access to company (nonpublic) financial information, confidential guest information, inventory, cash or an equivalent, or company credit?

Employers in the hospitality industry will likely continue to conduct criminal-background checks on applicants. With good reason. These potential employees have access to your guests and customers, their personal belongings, and often credit card information. Prudent hospitality employers use criminal-background information to guard against hiring employees with criminal histories that may place your guests in harm's way.

In light of the national trend to limit the use of criminal-background checks in hiring decisions, hospitality employers must strike a balance between protecting your guests, customers, and employees on the one hand, and maintaining a meaningful and legally-defensible application and hiring and criminal-background check policy on the other.

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