



# New Year, New Ban-The-Box Laws

Insights

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2017 is shaping up to be a year of continued growth for ban-the-box laws nationwide. It's time for employers to get creative and develop strategies for hiring outside "the box."

## What Are "Ban-The-Box" Laws?

Ban-the-box laws are aimed at delaying the point in time during the hiring process when you can ask applicants about their criminal history. The "box" being "banned" is the one an applicant must check on the initial application disclosing prior criminal history ("Have you ever been convicted of a crime?"). The underlying concern about these inquiries is that employers often automatically discard applications when the "yes" box is checked, adversely impacting certain groups of applicants in a discriminatory way.

Given the near-continual process of interviewing and hiring at businesses with high turnover, the hospitality industry is particularly affected by ban-the-box laws. As these new laws continue to spread and evolve, it is necessary to pay attention and re-strategize your hiring practices to keep up. Currently, 24 states and over 150 cities and counties have adopted statewide ban-the-box policies. Nine states now require private employers to remove conviction history questions from job applications altogether. While the first wave of these laws applied only to public employers, many are now being extended to private employers as well.

An increasing number of jurisdictions are adopting policies that take ban-the-box laws a step further, such as incorporating the stringent best practices of the 2012 U.S. Equal Employment Opportunity Commission (EEOC) guidance on the use of arrest and conviction records in employment decisions, or adopting creative strategies such as targeted hiring. These "fair chance" laws require employers to consider the job-relatedness of a conviction, time passed, mitigating circumstances and rehabilitation evidence before making a hiring decision.

## The Evolution Of Ban-The-Box Policies

Since the ban-the-box movement began in Hawaii in 1998, this civil rights initiative has become increasingly widespread. In 2016 alone, employers in Connecticut, Vermont, Austin (TX), and Los Angeles (CA) were forced to comply with ban-the-box laws. Here is a quick summary of the most recent of these laws.

Austin, Texas

The Austin City Council passed the Fair Chance Hiring Ordinance on March 24, 2016. This ordinance prohibits most employers from asking questions about or considering an applicant's criminal history until after it has extended a conditional offer of employment. The ordinance appears broad enough to arguably cover all types of workers, including temporary, seasonal, contract, and contingent workers, as well as those participating in a vocational or educational training program such as an apprenticeship.

In addition to the restriction on the timing of inquiries as to an applicant's criminal history, Austin employers also may not publish job information stating that criminal history automatically disqualifies a candidate from consideration. Employers also may not refuse to consider an applicant who submits an application without providing criminal history information. The ordinance further prohibits Austin employers from taking adverse action against an applicant based on criminal history unless the employer has a "good faith belief that the individual is unsuitable for the job based on an individualized assessment conducted by the employer."

## Vermont

Vermont's ban-the-box law was passed in May 2016 and will go into effect July 1, 2017. The definition of "employee" under Vermont's law appears broad enough to arguably protect independent contractors. Further, Vermont's law requires employers to wait until an interview or until they have deemed the applicant qualified for the position before inquiring about the individual's criminal history.

However, Vermont employers can ask about criminal convictions on the employment application if: a federal or state law creates a mandatory or presumptive disqualification for the position based on a conviction for one or more types of criminal offenses; a federal or state law or regulation directs an employer not to employ a person who has been convicted of one or more types of criminal offenses; or the application questions are limited to the types of criminal offenses subject to the disqualification or obligation. Unlike other similar laws, Vermont's law does not address whether employers are prohibited from seeking an applicant's criminal history as part of a background records search or investigation.

## Connecticut

Connecticut's ban-the-box law was passed in June 2016 and went into effect on January 1, 2017. It permits employers to make criminal background inquiries if they are obligated pursuant to federal or state law to do so for the position in question, or if a position requires a security, fidelity, or equivalent bond.

Contrary to other ban-the-box laws, Connecticut's law appears to permit the inquiry at any time during the hiring process as long as it is not on the initial employment application. Another notable difference is the Connecticut law appears to permit alternative types of inquiries into criminal

history during the application process, such as criminal background checks conducted by a consumer reporting agency.

## Los Angeles, California

Los Angeles very recently enacted its own Fair Chance Ordinance, which just took effect on January 22, 2017. The Los Angeles Ordinance is among the most restrictive in the country for private employers. It prohibits employers with ten or more employees from inquiring about an applicant's criminal history until after making a conditional offer of employment. But it doesn't stop there.

An employer doing business in Los Angeles may not withdraw a conditional offer of employment or otherwise refuse to employ an applicant based on criminal history until after completing a written assessment. The written assessment must "effectively link" the applicant's specific criminal history with risks inherent in the duties of the prospective job.

In accordance with EEOC guidance, an employer must also allow an applicant to complete the "Fair Chance Process" prior to taking any adverse action due to conviction history. This process requires employers to provide the applicant with a written notification of the proposed adverse action, a copy of the written assessment, and any other information supporting the proposed action. The applicant then has a chance to provide documentation regarding the accuracy of the criminal history report, which the employer must consider and use to complete another written assessment. If the employer still decides to move forward with the proposed adverse action, it must provide the applicant with notice and a copy of the final assessment.

## How To Navigate Ban-The-Box Laws

So how should employers navigate the national maze of ban-the-box laws, particularly if operating in multiple cities or states with varying – and sometimes conflicting – ban-the-box laws? While many employers are concerned by the rate at which ban-the-box laws seem to be spreading, there are several potential solutions.

At a minimum, you should evaluate whether you need to revise your existing employment application to remove "the box" and any questions related to criminal history. Similarly, you should review tangential hiring documents, such as job advertisements, for parallel improper language.

Second, you should review your hiring process and procedures to ensure compliance with ban-the-box laws, including the timing of criminal background checks. This may also include a review of policies and procedures as they relate to hiring workers from staffing agencies to address any potential joint employer issues.

Third, you should consider providing training to employees who conduct job interviews or are involved in hiring decisions to ensure that they don't make premature inquiries into an applicant's criminal history. This may include preparing written objective guidelines for interview questions and hiring procedures.

Finally, it may be prudent to identify risks inherent in specific job duties so an applicant's specific criminal history can be "effectively linked" to those risks should that situation arise. This, too, may require written objective documentation memorializing potential links between crimes and specific job duties.

## **Conclusion**

Overall, the national legislative trend continues to embrace banning the box. Given the cost and administrative headache of complying with different laws across the country, and the seemingly inevitable spread of these laws into your place of business, you might consider placing limits on obtaining and using criminal background information now, even if the law in your jurisdiction does not yet require it.

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