



Ban the Box Legislation: Eclipsing the U.S.

Insights

9.01.17

Nationwide, there are approximately 29 states and over 150 cities and counties that have adopted some form of “ban the box” legislation. Although the legislation varies from one jurisdiction to the other, typically it requires employers to remove the criminal history check box from employment applications. This does not prevent employers from asking about criminal history, but it does limit when an employer can ask. Proponents believe that banning the box helps balance the inequities faced by convicted felons who are attempting to re-enter into the workforce; giving them a “fair chance.”

The Equal Opportunity Employment Commission (“EEOC”) has issued guidelines which recommend that employers not use the criminal history box before the interview process. The EEOC believes that using criminal history as a sole basis for pre-employment hiring decisions may violate Title VII because it disproportionately excludes minorities and men. As well, the EEOC instructs employers to judge applicants based on individualized assessments as opposed to blanket exclusions of any applicant who checks the “yes” box.

If you are an employer in a jurisdiction that does not currently have some fair chance law/ordinance, it is probably only a matter of time before it does, as the movement appears to be sweeping across the country. In addition to banning the box, legislation may contain other elements, including:

- Prohibiting employers from asking job applicants about criminal histories until after a conditional offer of employment has been made.
- An employer must consider numerous factors when deciding whether to hire an applicant with a criminal history.
- Certain notices must be given to the applicant if the employer is considering not hiring the applicant because of their criminal history.
- The employer must provide a written analysis of its decision making process to the applicant.
- Before making a final decision, the employer must give the applicant a certain number of days to respond to the written analysis, and if the applicant chooses to respond, the employer may have to provide the applicant with additional written analysis.

Navigating through these issues can certainly be difficult. Employers should (1) make sure that their current forms, policies, and procedures are compliant with any laws/ordinances in the

employer's different geographical locations; (2) Evaluate their processes to make sure the company does not have blanket exclusions of certain classes of applicants; and (3) when/if the company has an applicant that it is considering not hiring because of their criminal history, get help! Legal counsel can assist in making sure the EEOC factors and any other "fair-chance" factors are analyzed before making a decision, and documenting that analysis if the employer is required to provide a written analysis to the applicant.

Related People



Spencer W. Waldron

Partner

949.798.2170

Email