

Discrimination

Employer Concerns About Liability Loom As Push for Ban-the-Box Policies Spreads

The push to remove from job applications questions about whether a prospective employee has been convicted of a crime is gaining momentum nationwide, advocates and opponents of this effort told Bloomberg BNA in late July.

Many employers continue to push back against blanket approval of ban-the-box policies, arguing that they have an obligation to keep workplaces safe and avoid negligent hiring or employment discrimination claims. In some cases, they are working with advocates to hammer out a proposal that holds appeal for both sides.

“The potential for lawsuits, that’s really what this is about,” Jack Mozloom, a spokesman for the National Federation of Independent Business’s New England and mid-Atlantic region, told Bloomberg BNA July 31.

“Most of these proposals we’ve seen make it easier for employers to be sued on the basis of some discriminatory action if they refuse to hire people with a felony record,” he said. “That’s an enormous danger for small business owners.”

Hawaii was the first state to approve a ban-the-box law, in 1998, according to the National Employment Law Project, which is tracking the developments.

Today, more than 60 cities and counties and 12 states have enacted laws and policies that require public or private employers, or both, to remove the question about criminal history from job applications, NELP said in its latest update, released in July and titled “State-wide Ban the Box: Reducing Unfair Barriers to Employment of People With Criminal Records.”

The laws generally allow employers to ask about a job applicant’s criminal conviction record later in the hiring process, such as during the interview phase or when a job offer is made. In addition, they frequently exempt employers that are required to conduct criminal background checks or when the position involves minors or other vulnerable populations.

NELP said about 70 million people in the U.S. have some sort of criminal record, and nearly 700,000 return to communities annually after being released from jail or prison.

When job-seekers convicted of a crime can’t find a job, they end up either “going back to jail or working under the table,” Marina Streznewski, executive direc-

tor of the D.C. Jobs Council, told Bloomberg BNA July 22.

“Some get lucky,” she said, “because they encounter people willing to give them a shot.”

Stigma Tied to Criminal Record. Many, however, are not so lucky, proponents of ban-the-box laws said.

“There’s a lot of stigma with a criminal record; too often an employer doesn’t hear beyond that,” Michelle Natividad Rodriguez, a senior staff attorney at NELP’s office in Oakland, Calif., told Bloomberg BNA July 22. “By delaying the question, you give the person an opportunity to show who they are and what their skills are.”

NELP said in its state update, “In an era of extreme mass incarceration, these fair chance campaigns provide a platform to educate the public about the stigma of a criminal record and the real consequences to our society of depriving millions of Americans with past convictions of economic stability.”

“There’s a lot of stigma with a criminal record; too often an employer doesn’t hear beyond that,” said Michelle Natividad Rodriguez, a senior staff attorney for NELP.

The nonpartisan organization also said that “many advocates embrace as the next step in the evolution of these policies” more ban-the-box initiatives geared toward private employers.

Five states—Hawaii, Illinois, Massachusetts, Minnesota and Rhode Island—now prohibit private as well as public employers from posing questions about a job applicant’s conviction history until later in the hiring process, NELP said.

Illinois Gov. Pat Quinn (D) recently signed “fair hiring” legislation that will bar most employers from making inquiries into job applicants’ criminal histories until the interview phase of the hiring process (139 DLR A-5, 7/21/14).

The District of Columbia Council unanimously approved a bill recently that would bar most private employers from asking about a job applicant’s criminal conviction record until a conditional job offer is made

(137 DLR A-9, 7/17/14). D.C. enacted a law in 2011 that restricts public employers' inquiries about a job applicant's criminal history until later in the hiring process.

Ban-the-Box Laws Vary. Ban-the-box laws are not identical. Some, such as the city of Baltimore's law, involve harsher penalties than most of their counterparts in other locations.

Baltimore's Fair Criminal-Record Screening Practices ordinance, approved in April by the city council and signed May 29 by Baltimore Mayor Stephanie Rawlings-Blake, covers the majority of employers in that city that have 10 or more employees. Like most of the other laws, it excludes facilities or employers that provide programs, services or direct care to minors or vulnerable adults.

It also bars employer questions about a job applicant's conviction history until after a conditional job offer is made. In addition, the law provides administrative and judicial review of and remedial relief for violations.

"Uniquely, the ordinance provides for misdemeanor criminal charges and a fine to be levied against employers who violate the law," NELP said in a resource guide that highlights ban-the-box laws in U.S. cities and counties.

The fine must be no more than \$500 or imprisonment for no more than 90 days, or both a fine and imprisonment for each offense.

Rawlings-Blake released a statement in April that said passage of the ordinance would be a critical component to "not only helping to reduce unemployment, but also improving public safety by addressing recidivism."

"When it comes to the crime fight, we have to use every tool available, which includes creating opportunities for those who have paid their debt to society and want to turn their lives around," she said. "Access to a good job can make the difference between a repeat offender or a productive member of society."

Business Leaders Urge Caution. Business leaders contend that, if such legislation is not hammered out carefully, it might do more harm than good.

"All businesses have very legitimate concerns about workplace safety and potential liability for making a bad hire," Beth Milito, senior executive counsel for the National Federation of Independent Business, told Bloomberg BNA July 31. The NFIB has 350,000 members, primarily employers with fewer than 10 employees, she said.

"The real risk for the employer is a discrimination claim by the individual or the EEOC, claiming the employer is using a job applicant's criminal history to discriminate," Chicago-based management attorney Brian Arbetter, a partner with Sheppard, Mullin, Richter & Hampton LLP, told Bloomberg BNA July 30.

In 2012, the EEOC approved updated enforcement guidance on potential discrimination resulting from employers' use of individuals' arrest and conviction records to make hiring and other employment decisions (80 DLR A-1, 4/25/12).

The guidance states that although Title VII of the 1964 Civil Rights Act does not bar use of criminal background checks, employers may violate Title VII if they intentionally discriminate among individuals with similar criminal histories or if their policies have a disproportionate adverse impact based on race, national origin, or another protected category, and employers cannot demonstrate "business necessity."

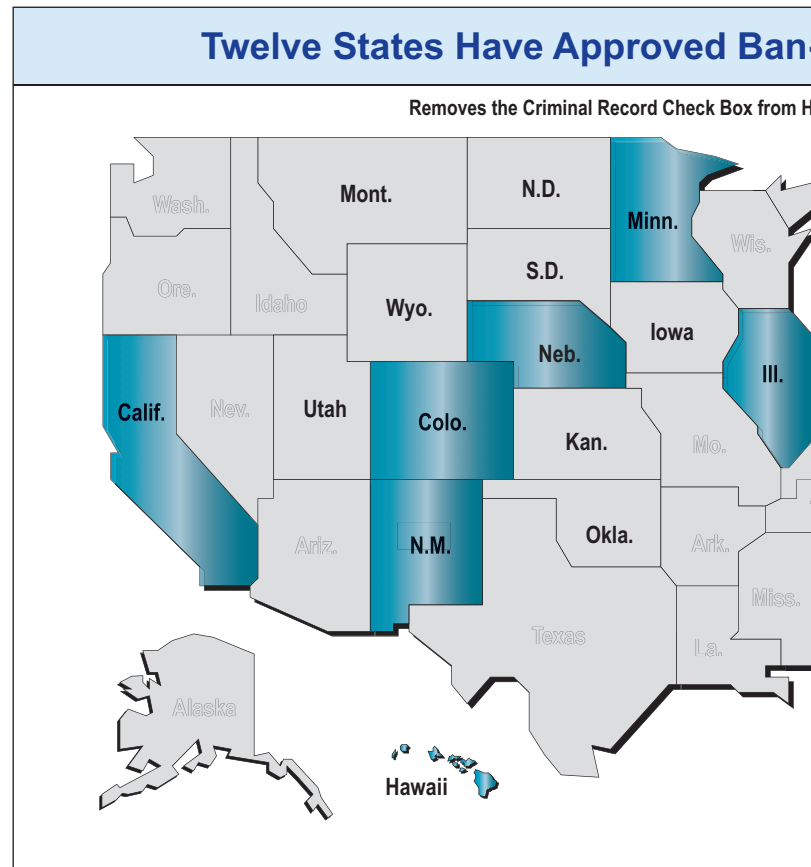
Milito said many ban-the-box policies exempt employers that have 10 employees or less, but some do not.

In Minnesota, for example, all employers, regardless of how many employees they have, are covered under that state's law.

In addition, Milito said the laws can prove time-consuming, especially for small businesses, which often don't have human resource personnel to oversee the hiring process.

"It can be challenging for a small business to make nuanced hiring decisions or postpone a background check until later in the process," she said, "particularly if public safety is paramount."

Arbetter echoed Milito. "Because of these types of laws, it's possible employers will waste time by getting much deeper in the hiring process with a candidate who has a criminal history and who could be disqualified,



To request permission to reuse or share this document, please contact permissions@bna.com. In your request, be sure to include the following information: (1) your name, company, mailing address, email and telephone number; (2) name of the document and/or a link to the document PDF; (3) reason for request (what you want to do with the document); and (4) the approximate number of copies to be made or URL address (if posting to a website).

but the employer won't know that immediately," he said.

If a job candidate's criminal history subsequently disqualifies him or her for a job, he added, "the employer has spent a lot of time and has to start its hiring process over."

Tips and Pointers. Arbetter advises affected employers to change their job applications to remove criminal history inquiries.

"If it's an interview position, don't ask about criminal history until after the interview," he said.

If it involves a non-interview position, such as for a data-entry or computer-coding job, he said, "make the offer letter conditional. Say, 'To qualify for the position, we will have to conduct a criminal history background check.'"

Arbetter also said if an employer uses a third-party vendor to conduct criminal background checks, and the vendor begins its vetting process electronically based on the job application, "work with vendors to make sure criminal history elements are not pulled up automatically."

In addition, he said, "From a discrimination protection standpoint, it's always good to try to have a good reason why you're picking someone for a job over other people." Having a written note explaining that "probably can help," in case an applicant not selected alleges employment discrimination, he said.

"When defending companies over hiring and not hiring," he said, "the paperwork—retaining the files—is always what matters the most."

Some Businesses More Open to Policy Change. By design or default, some employers are adopting ban-the-box policies quicker than others.

Rodriguez cited Target Corp., Wal-Mart Stores Inc. and Bed Bath & Beyond as examples of national retailers that no longer ask about an applicant's conviction record during the initial phase of the hiring process.

In April, Bed Bath & Beyond agreed to take steps to comply with New York laws barring automatic disqualification of job candidates with criminal convictions (78 DLR A-11, 4/23/14).

A state investigation of the company began in May 2013 after the attorney general's office learned that an HR manager for the New Jersey-based business had told participants at a job fair that it doesn't hire individuals with felony convictions, regardless of any evidence of rehabilitation.

Bed Bath & Beyond said at the time, and in a written statement it sent July 29 to Bloomberg BNA: "Although the Settlement does not include any admission that we violated any of these laws, we are in agreement with the Attorney General that employment opportunities should remain open to individuals with criminal histories that have been rehabilitated. In advancement of that goal, we fully cooperated with the Attorney General's investigation and as part of our agreement will continue to share information with the Attorney General that demonstrates our continued compliance with these laws."

In Minnesota, Ben Gerber, manager of energy and labor/management policy at the Minnesota Chamber of Commerce in St. Paul, told Bloomberg BNA July 31: "A lot of our members have had amazing success hiring convicted felons. But that doesn't take away from the

fact that there's always the risk of negligent hiring lawsuits later on."

The National Association of Criminal Defense Lawyers said in a report released in May, "There should be meaningful tax credits for hiring or housing those with convictions."

Other recommendations the NACDL made in "Collateral Damage: America's Failure to Forgive or Forget in the War on Crime" included:

- free bonding to provide insurance to cover employee dishonesty for those who hire individuals with convictions; and

- immunity from negligent hiring liability relating to an opportunity or benefit given to a person with a conviction if the decision maker complies with federal, state and local laws and policies limiting the use of criminal records.

Gerber said immunity from negligent hiring liability is "actually what we would have liked to have seen" in the Minnesota law.

The NACDL report said, "Government at all levels must find creative ways to give employers, landlords and other decision-makers affirmative incentive to offer opportunities to those with convictions."

Bipartisan Push for Ban-the-Box Laws. In some cities, bipartisan efforts are under way to gain approval of ban-the-box policies.

The Minnesota chamber initially opposed that state's proposal, Gerber said, but ultimately remained neutral on it.

"Even when we opposed it, it had bipartisan support," he added. "Liberals and conservatives feel it's a religious duty to reintegrate people back into society."

Sarah C. Walker, founder of the Minnesota Second Chance Coalition, echoed Gerber. The coalition is made up of advocates for criminal justice reform policies and help lead the effort in that state to pass laws that cover public and private employers. The law affecting private employers took effect Jan. 1.

"Most organizations have moved away from tough-on-crime to a smart-on-crime stance," she told Bloomberg BNA July 31. "They say, 'We don't want people to come out of prison and never be able to work.'"

Walker said efforts to gain approval of ban-the-box policies are unfolding in Texas and Ohio.

In Georgia, Gov. Nathan Deal (R) "has indicated that the state will set an example for private sector employment by not automatically dismissing job applicants with a criminal history," NELP said.

"Gov. Deal has said he's going to issue an executive order to take the question off the application," Rodriguez told Bloomberg BNA.

She added that lawmakers in Nebraska recently passed ban-the-box legislation that affects public employment. Bipartisan efforts to gain approval of such policies also are under way in Indianapolis and Louisville, Ky., she said.

“Being able to see common ground on criminal justice reform is really hopeful,” Rodriguez said.

BY RHONDA SMITH

To contact the reporter on this story: Rhonda Smith in Washington at rsmith@bna.com

To contact the editor responsible for this story: Susan J. McGolrick at smcgolrick@bna.com

Text of NELP’s ban-the-box state report and resource guide is available at <http://op.bna.com/dlrcases.nsf/r?Open=rsmh-9mkhhx> and <http://op.bna.com/dlrcases.nsf/r?Open=rsmh-9mkhha>. The NACDL report is available at <http://op.bna.com/dlrcases.nsf/r?Open=rsmh-9mkhfl>.