

State Rules Register Alert

October 8, 2014

Ban the Box Facts on Three Jurisdictions

This Alert Includes Ban the Box Facts on Three Jurisdictions:

1. **Washington DC**
2. **Illinois**
3. **New Jersey**

1. Washington DC

D.C. Official Code §24-1351, Title I, Part B et. seq.

The question currently being asked is: "When is this effective"? The District lists October 31, 2014 as the estimated effective date. Their laws become effective after a Congressional review period and publication. Therefore there is not an exact effective date known when their council passes an act.

The Ban

The restriction in regard to inquiring into a criminal record can only be made: "After making a conditional offer of employment". This restrictions does not apply to:

1. Employers with ten or fewer employees within the District of Columbia.
2. Employers required by federal or District law or regulation to consider an applicant's criminal history. In the District of Columbia area, there will be employers in the surrounding states that might have ten or more employees who work within the District. This Act will cover those employees.
3. Courts are not included within the definition of employer.
4. Companies whose mission is to obtain employment for those with convictions.

Empolyment Decisions

The new Act prohibits employers from considering non-convictions except for pending matters. An employer must consider 7 factors if they choose not to hire someone with a conviction. This is not just a hypothetical exercise because a rejected applicant can request a "Statement of Denial" wherein the employer must address each of these 7 factors when explaining why they did not hire the applicant. If the employer does not do this, then there is a rebuttal presumption that the employer's rejection was without a legitimate business reason. The factors that employers are to consider are:

1. The specific duties and responsibilities necessarily related to the employment sought or held by the person.

2. The bearing, if any, of the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more of such duties or responsibilities.
3. The time which has lapsed since the occurrence of the criminal offense or offenses.
4. The age of the person at the time the occurrence of the criminal offense [editor's note: The law gives no hint as to whether this refers to someone being young or old at the time of the conviction. [I have thought that you give a break in regard to something a person did when they were young and stupid, but the EEOC seemed to be thinking that this really relates to crimes by older people.]
5. The frequency and seriousness of the criminal offense[s].
6. Any information produced by the person or produced on his behalf in regard to his rehabilitation and good conduct since the occurrence of the criminal offense.
7. The public policy that it is beneficial generally for an ex-offenders to obtain employment.

If an applicant is rejected, he or she may request, within 30 days, that the employer provide them a copy of any and all records that the employer considered in regard to the applicant, including the criminal records and that the employer provide a written Statement of Denial which articulates a legitimate business reason for the rejection and demonstrates consideration of each of the 7 factors set forth above. In addition, the Statement of Denial advises the applicant of his or her opportunity to file an administrative complaint with the Office of Human Rights Enforcement.

Enforcement

This Act is enforced exclusively by the District's Office of Human Rights. That agency may level substantial fines dependent upon the size of the employer. No private cause of action is created by this law.

2. Illinois

Illinois has passed "Ban the Box" legislation which will be effective January 1, 2015 (HB 5701). This act is unique unto Illinois in regard to when an employer may inquire into the criminal record of an applicant as well as what employers/employees are exempt.

The following employers or employees are exempt from this law:

1. Employers having less than 15 employees during the current or past calendar year. "Any agent" of an employer is included in the employee count. Since the term "agent" is not defined, this creates significant ambiguity in the act and will certainly lead to litigation because your accountant, attorney, etc. can be an agent at times for certain purposes. Are they counted?
2. Employers who are required by law to deny employment to those with certain convictions.
3. Employees who must be bonded and where certain convictions will disqualify that person from being bonded.
4. Employees who are covered by the License Emergency Medical Services Systems Act ("EMTs").

Employers may notify applicants that certain convictions will disqualify them from employment. This will help prevent the processing of those who cannot be hired. This applies to all employers, not just those within the above exceptions.

The act specifically applies to "employment agencies". This is defined as a company that: "Procure for employees opportunities to work for an employer". Is this a headhunter? Is it an employment placement service? Is it a college placement office? Does it apply to a temporary employment service? Again, the law is vague, but it would appear that it could cover all of the above.

When may an employer or an employment agency inquire of an applicant's criminal history? Illinois has adopted a two level approach:

1. If an employer conducts interviews: it may inquire after the employer determines if the applicant is qualified for the position and has selected the individual for an interview. This suggests that an employer may obtain criminal record information before the interview, but after the applicant is notified of the interview.
2. If the employer does not do interviews, then the criminal history inquiry is delayed until after a conditional job offer has been made.

Pure "Ban the Box" laws do not directly apply to background screening companies. These laws do not restrict what a CRA can report. These laws simply set up the timing when an employer may request information in regard to an individual's past criminal record. These laws do not restrict the obtaining of employment or education verifications, social security number verifications, civil judgments, tax liens or even credit reports, to name a few.

There does not appear to be a private cause of action under this law. The Department of Labor can assess fines and bring civil actions to enforce the Act and collect fines.

3. New Jersey

The New Jersey "Ban the Box - Plus" (P.L. 2014, Chapter 32, AB 1999), signed by the Governor in August and will become effective: "The first day of the seventh month next following the date of enactment". We calculate this to be March 1, 2015. This Act covers the following subjects:

1. Ban the Box
2. Pre-empts all city ordinances, except for city employees.

Ban The Box Facts

- The law applies to employers that have more than 15 employees over 20 weeks. The law does not state what weeks are to be considered. The immediate past 20 weeks, or 20 weeks that occurred 5 years ago? Can an employer fall into and out of coverage over time?
- It includes job placement, job referral agencies and other employment agencies.
- It excludes federal employers.

- The following employers/employees are exempt:
 - employers having less than 15 employees;
 - where a criminal background check is required by law and certain arrests and/or convictions can disqualify an applicant, such employers including but not limited to law enforcement, corrections, the courts, homeland security or emergency management can advertise that a criminal record check is required and/or that certain records will disqualify an applicant;
 - those employers that are a part of a program to hire those with criminal records.
- **The following employees are excluded:** Domestic servants, independent contractors (but interns and apprentices are included), directors and trustees.
- **When can an employer inquire?** Inquiries cannot be made from the time the applicant makes inquiry for employment or the employer makes inquiry to the individual and ending with the first interview in person or by any other means.

An interesting provision of law allows the employer to make an inquiry regarding criminal history disclosed during the hiring process if provided voluntarily by the applicant. Thus if an applicant says I have a conviction for X, the employer can clearly ask about the disclosed conviction record at that time and we assume also the circumstances surrounding that offense. The language is again vague and states that: "the employer may make inquiries regarding the applicant's criminal record". This would seem to allow a full check, but that seems inconsistent with the intent of this law."

Pre-Emption of Local Laws

The statute specifically pre-empts any existing or future city or county ordinates, resolution, law, rule or regulation regarding the subject matters found in this law: "Ban the Box". However, lower level government entities may adopt policies that relates to their own employees. **This negates the existing Newark ordinance for private employers.**