

“Banning the box” in employee hiring

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ABSTRACT

This article provides an overview of “ban the box” legislation affecting employers’ hiring practices by directly impacting pre-employment inquiries into a job applicant’s criminal background. Individuals with a criminal history experience significant difficulty finding employment, often due to employers’ use of blanket policies that automatically exclude job applicants with a criminal history. “Ban the box” legislation, currently enacted in 17 states and over 100 cities/counties, limits the use of criminal history in the employment process and gives ex-offenders the opportunity to get beyond the job application and have a better chance at being offered a job. Banning the box moves the question about criminal background to later in the screening and hiring process but does not prohibit a criminal background check prior to making a job offer. Proponents of ban the box legislation argue that its benefits are that it reduces unemployment, decreases repeat offending, increases an employers’ pool of talented and qualified employees, and prevents race discrimination resulting from disparate impact. Employers have expressed concerns that ban the box could lead to safety risks, negligent hiring lawsuits, inefficient and time-consuming hiring processes, and potentially greater racial discrimination when employment decisions are made based on stereotypes rather than actual information on criminal background. Practical implications for employers and areas for research are discussed.

Keywords: ban the box, criminal background check, employee hiring, employment law, discrimination, equal employment opportunity

INTRODUCTION

Approximately 70 million adults in the U.S. – more than one-fourth of the adult population - have criminal arrests or convictions (National Employment Law Project, 2015a), and approximately 9 million ex-offenders are released from jail each year (National Reentry Resource Center, 2014). Individuals with a criminal history experience significant difficulty finding employment, with unemployment rates as high as 75% for ex-offenders who have been out of prison for one year (NBC News, 2009). There are a number of reasons why ex-offenders do not get hired, such as stereotypes of ex-offenders as “untrustworthy, lacking relevant job skills and possessing an inclination to steal” (D’Alessio, Stolzenberg, & Flexon, 2015). Many companies routinely and automatically exclude job applicants with a criminal history, without any examination of their job qualifications. Under such policies, applicants often get no further in the application process than filling out the job application, potentially excluding them from jobs for which they may be otherwise qualified (J.J. Smith, 2014), or they might not bother applying at all knowing they will be automatically excluded from further consideration for the job due to their prior conviction.

“Ban the box” legislation aims to address this issue by limiting the use of criminal history in the employment process and giving ex-offenders the opportunity to get beyond the job application and have a better chance at being offered a job. Campaigns by civil rights, religious, and social advocacy groups have led to ban the box legislation in some states and cities/counties prohibiting employers from including a “check box” question on employment applications asking if the applicant has ever been arrested or convicted of a crime, thus removing the job applicant’s obligation to check off a “Yes” or “No” answer. In effect, this forces the employer to, at least initially, consider the prospective employee based on factors other than a criminal history, which may have no rational relationship to the job for which they are applying (Alvarez, Dreiband, Jorgensen, & Marshall, 2014).

The purposes of this article are to provide a brief overview of ban the box legislation, describe the rationale for ban the box legislation, examine employers’ concerns with ban the box, and discuss practical implications for employers and areas for research.

BAN THE BOX LEGISLATION

It is first important to understand what ban the box legislation does not do. Ban the box does not prohibit employers from performing criminal background checks. Background checks are legal under the Fair Credit Reporting Act (FCRA) (Federal Trade Commission, 2012). About 92% of employers conduct criminal background checks on job candidates, although this varies across job categories and industry segments (Society for Human Resource Management (2010). In addition, ban the box legislation does not require employers to hire job candidates with a criminal background, nor does it make criminal history a protected group or prohibit employment discrimination against ex-offenders.

Essentially, ban the box moves the question about criminal background to later in the screening and hiring process. According to the National Employment Law Project (NELP), a major advocate of ban the box legislation, it is a “fair chance” approach (NELP, 2015a) that helps improve the employment prospects of ex-offenders by giving all job applicants the opportunity to be considered on job qualifications without automatically being excluded due to criminal history.

Currently, 17 states (California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Rhode Island, Vermont, and Virginia), and more than 100 cities/counties have enacted ban the box legislation (NELP, 2015b). The specific requirements of ban the box laws vary by state and city. It is beyond the scope of this article to review the differences in legislation among states and cities, but in general, these laws vary in several ways (Alvarez et al., 2014; Entin, 2015; NELP, 2015b). First, the laws vary by type of employer covered. In most areas, ban the box laws only apply to public employers, although in some areas the laws also apply to private employers. Second, laws vary with respect to the stage in the hiring process when the employer is allowed to ask the job candidate about their criminal history. For example, inquiries about criminal background may be prohibited until after the candidate has been selected for an interview, after the first interview has been completed, or after a conditional offer of employment has been made. Ban the box laws can also include exemptions for certain types of jobs, such as law enforcement and health care, and jobs requiring interaction with children, the elderly, and the disabled.

WHY BAN THE BOX?

The major argument in favor of ban the box legislation is an economic one (NELP, 2015a). Due to the stigma associated with having a criminal record, ex-offenders experience more difficulty in finding employment versus those without records (Pager, 2003; Pager, Western, & Sugie, 2009). Many ex-offenders might not even bother applying for jobs at all if they know that they will be asked to “check the box” and will thus be automatically disqualified from a job (J.J. Smith, 2014; Winnick & Bodkin, 2008). Extended unemployment of ex-offenders negatively impacts their economic well-being and the well-being of their families, as well as creating a drain on the economy as a whole (Jones Young & Powell, 2015). The Center for Economic and Policy Research estimates that the reduced employment of ex-offenders costs the U.S. \$57 to \$65 billion a year in the form of lost output of goods and services (Schmitt & Warner, 2010).

In addition, to the extent that ban the box promotes employment, it benefits society because recidivism, or repeat offending, is reduced (Berg & Huebner, 2011; Raphael & Winter-Ebmer, 2011). According to one study, approximately 40% of ex-offenders return to prison within three years of their release (National Reentry Resource Center, 2014). The economic costs of crime on society are substantial, with an estimated \$179 billion spent annually by the government on crime control efforts (McCollister, French, & Fang, 2010). Stable employment enhances rehabilitation and ex-criminal offenders who are employed are less likely to be repeat offenders, thus improving public safety and minimizing the negative impacts of crime on society. Programs and policies, including legislation such as ban the box, that indirectly contribute to lower repeat offending and thus helps prevent crime, can help reduce crime-related costs. Substantial research documents a positive correlation between unemployment and recidivism (D’Alessio et al., 2015).

From a human resource standpoint, policies automatically excluding anyone with a criminal conviction can potentially cause the employer to lose qualified employees, making it more difficult to manage labor shortages and hire for hard-to-fill jobs (Jones Young & Powell, 2015). A criminal history might have no rational relationship to the job for which an applicant is applying for (Alvarez et al., 2014). According to Paul Heroux, a business owner and convicted

felon, “the box does a tremendous disservice to employers as well. By blindly screening out a significant portion of the applicant pool, employers narrow their talent pool and may be missing out on some of the best and brightest candidates - people who may turn out to be among the most grateful and hard-working employees” (Heroux, 2015).

A key legal argument in favor of ban the box is that pre-employment inquiries on criminal background can result in race discrimination resulting from disparate impact (Concepción 2012; Kuhn, 2013; Loafman & Little, 2014), a violation of Title VII of the Civil Rights Act of 1964 (U.S. Equal Opportunity Commission, 1964). Disparate impact occurs when an employer has in place a policy (for example, a hiring policy) that disproportionately screens out a particular racial group, even if the policy is seemingly neutral or racial discrimination is unintentional. African Americans and Hispanics of all ages and both sexes are imprisoned at higher rates than Whites (Carson & Sabol, 2012), and it is estimated that about 1 in 3 African American men and 1 in 6 Hispanic men will be imprisoned during their lifetime, compared with 1 in 17 White men (U.S. Equal Opportunity Commission, 2012). Therefore, African Americans and Hispanics, and especially African American and Hispanic men, are disproportionately excluded from job opportunities when employers use a policy of automatically disqualifying applicants with a criminal record. Even if the employer were not basing employment decisions on overt prejudice or intentional discrimination against racial minorities, disparate impact could still occur under such policies. An employer can successfully defend against a charge of disparate impact when they can show that a hiring practice is job related and consistent with business necessity (U.S. Equal Opportunity Commission, 2012). However, in many cases it would be difficult for an employer having a broad hiring policy that excludes anyone with a criminal history to advance a successful “business necessity” defense (J.J. Smith, 2014).

EMPLOYERS’ CONCERNS WITH BANNING THE BOX

Employers have expressed safety concerns with ban the box legislation, arguing that employees, customers, and the public could be at risk if there are restrictions in asking about the criminal history of job applicants (Alvarez et al., 2014; “Criminal checks,” 2014; R. Smith, 2014). In most workplaces, employers are legally responsible under the Occupational Health and Safety Act for providing a workplace free from hazards that could cause death or serious harm to employees (U.S. Department of Labor, 1970). Thus, any constraints on hiring which prevent employers from inquiring about criminal history, especially for those job applicants who have been convicted of a violent crime, are at conflict with legal mandates for workplace safety. Employers are also concerned about the risk of negligent hiring lawsuit due to workplace violence, harassment, theft, or other acts of unlawful behavior by an employee (Alvarez et al., 2014; Holzer, Raphael, & Stoll, 2006; Krell, 2012; Schmitt & Warner, 2010). An employer may be held legally liable in a situation where they hired someone whom they knew, or should have known, was dangerous, and that individual causes harm to others in the performance of his or her job (“How to avoid,” 2006). Negligent hiring could also occur when an employer did not take reasonable precautions to avoid hiring someone with a criminal history who gains access to and steals sensitive or confidential information in the workplace (Hansen, 2006). However, although employers’ concerns about safety risks and negligent hiring are legitimate, these concerns are mitigated by the fact that, as pointed out earlier, ban the box legislation does not prohibit employers from conducting background checks at a later stage in the hiring process.

Employers are also concerned that ban the box could result in an inefficient and time-

consuming hiring process. The employer could be forced to spend more time in the hiring process if they cannot disqualify some applicants at the initial screening of application. This could be significant for large employers who receive thousands of applications via the internet (Alvarez et al., 2014). It could also be an unreasonable burden for small employers who have limited time and resources to devote toward the hiring process. Ban the box is especially problematic when it prohibits inquiring about criminal history prior to making a conditional offer of employment. The employer would be forced to conduct virtually the entire selection process up until making a conditional offer, and only then could conduct a criminal background check that could potentially disqualify a candidate who would have been disqualified with an initial “check box.” This would negate the time and resources spent on that candidate, resulting in having to start over in the screening process (R. Smith, 2014). Additionally, waiting until later in the application process to conduct a criminal background check could potentially cause an employer to lose qualified candidates because of delays in candidate screening procedures (Alvarez et al., 2014).

As noted earlier, an argument in favor of ban the box legislations is that it minimizes racial discrimination. Ironically, however, ban the box could potentially lead to increased, rather than decreased, discrimination against racial minorities when it results in employment decisions based on perceived likelihood of having a criminal background, rather than actual information on criminal background. Without initial information about an applicant’s criminal history, the employer might instead act on stereotypes and assume that African American and Hispanic applicants have convictions, and seek to disqualify them for purportedly other reasons (Holzer et al., 2006). African Americans who do not have a criminal record face significantly greater employment discrimination than whites with a criminal record (Pager 2003; Pager et al., 2009). A study by Holzer et al. (2006) found that employers were more likely to hire African Americans, and especially African American men, when they did a criminal background check than when they did not do a check. In other words, in the absence of the check box, employers use race as proxy for likelihood of criminal history, resulting in the racial discrimination that ban the box proponents are trying to avoid.

IMPLICATIONS FOR PRACTICE AND RESEARCH

Because state and local laws vary widely, employers should be aware of what kinds of information can be collected from job applicants regarding criminal background, and at what stage in the hiring process such information can be requested from applicants. For companies operating in multiple states, as with other human resource policies and practices, employers must decide whether to use a state-by-state approach, in which they adhere to the regulations differentially in each state, or to implement a standardized approach of avoiding the “check box” nationwide, regardless of differences in state laws. For example, Target, a large national retail chain, is based in Minnesota, a ban the box state. In 2013, Target voluntarily decided to remove questions about job applicants’ criminal histories in all locations nationwide, even in states where there was no ban the box legislation (“Target ‘bans the box,’ 2013). Other large corporations have enacted similar practices.

Employers should also be aware of the rapidly growing ban the box legislation. From 2013 to 2014, the number of jurisdictions passing ban the box laws increased by more than 200% (NELP, 2015c). Although there is no federal ban the box law at present, employers may want to consider modifying screening and hiring procedures now in anticipation of a possible ban the

box law at a federal level in the future (O'Neill, 2012). The NELP and other advocates are promoting and garnering support for a "federal fair chance policy" that would promote a uniform requirement for employers (O'Connell, 2014; NELP, 2015c).

Regardless of whether they are located in areas where ban the box laws are in place, employers need not eliminate the use of background checks prior to making an employment offer, but they are advised to follow "best practices" for the use of criminal history. The FCRA requires employers to inform the job applicant that criminal background information might be used in employment decisions and gives applicants the right to dispute findings (Greenwald, 2015.) To avoid disparate impact, the U.S. Equal Employment Opportunity Commission (EEOC) (2012) recommends that employers follow several steps in judging each job applicant's situation individually rather than implementing blanket policies that automatically exclude anyone convicted of a crime (Cary, 2013). First, employers should consider the nature and gravity of the crime. A job candidate should only be excluded when the employer can show a clear relationship between the type of criminal offense and potential workplace harm. Misdemeanors may be given less weight than felony convictions. Second, employers should consider the amount of time that has elapsed since a job candidate's criminal conviction, giving less recent offenses less weight than more recent offenses. However, the EEOC does not provide specific guidance as to reasonable time windows. Third, employers are advised to consider to what extent a criminal conviction bears relationship to the nature of the job and factors such as the circumstances and environment under which the job is performed. For example, excluding a job applicant with a serious criminal conviction is a justifiable business necessity in job settings where the position entails carrying out job duties in private homes or interaction with vulnerable individuals, versus a job that requires working in a warehouse.

Empirical research is needed that examines the outcomes of ban the box legislation. D'Alessio et al., (2015) published a study documenting significantly reduced repeat offending following the implementation of Hawaii's ban the box legislation, but research on the impact of ban the box on recidivism should be extended to other geographic areas. In addition, research should document the extent to which ban the box laws have encouraged ex-offenders to apply for jobs and the increase in the number of ex-offenders who are hired (J.J. Smith, 2014). Research is also needed that addresses employers' concerns with ban the box laws. Management researchers could focus on employers' experiences with implementing ban the box laws. In particular, studies could examine how it has influenced on human resource management policies and practices and the effectiveness and efficiency of the employee hiring process.

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