

What You Need To Know About “Ban the Box” and Fair Chance Hiring Laws

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Municipalities across the country, including some here in South Carolina, are adopting so-called “Ban the Box” ordinances. These laws are designed to prevent employers from asking job applicants about their criminal histories, a practice which is often seen as unfair and discriminatory. As Ban the Box laws expand, there’s a good chance that more cities in our state will adopt them. Rosen Hagood is staying ahead of the curve and is ready to advise employers on changes to the legal landscape.

Job applicants are familiar with the check box that appears on applications asking them if they have a criminal record. Advocates for individuals with criminal records have argued that asking about this question stigmatizes the approximately 77 million Americans whose convictions and arrests make it difficult to secure employment. One factor in reducing criminal recidivism is stable employment, but allowing more individuals to enter the workforce is also a plus for the economy.

Ban the Box, however, is not without criticism. Employers are primarily concerned that not being allowed to ask the question could expose their workplaces to potential crime. This, in turn, means possible liability in the event an employee gets injured or even killed by someone with a past arrest or conviction for a violent crime.

These laws are often part of a broader framework of what are called fair chance hiring laws. Fair chance laws are based on best practices recommendations previously put forth by the EEOC, and include:

- Delaying background checks until after making a conditional offer of employment
- Prohibiting employment advertisements that include the phrase “background check required”
- Abolishing job interview questions about an applicant’s criminal history
- Restricting an employer’s ability to consider criminal convictions

The challenge for employers is that there is no national Ban the Box law, at least not for private employers. President Trump signed the Fair Chance to Compete for Jobs Act, but that will apply (starting in December 2021) only to federal agencies and federal civilian and defense contractors. In the meantime, there’s a patchwork of state and local laws and ordinances that have enacted varying forms of Ban the Box. Some, but not all, apply to private businesses. Employers who hire from across the country must therefore comply with different, sometimes

confusing, regulations.

Another challenge: how can an employer balance its legal obligation to provide a safe working environment with the requirements imposed by Ban the Box? Accusations of negligent hiring present a real liability threat, so employers consider it their duty to inquire as to past convictions. And while employers are generally allowed to run background checks, use of the information may be restricted. Some jurisdictions even allow applicants to challenge adverse hiring decisions made on the basis of background check results.

Remember, even though Ban the Box may not exist in your jurisdiction, it could become an issue if you recruit from cities, counties, or states that have such laws. So what's the best course of action for an employer? Start with these steps:

- Determine whether Ban the Box applies in any way to your business
- Find out when you can conduct a background check (e.g., only when a conditional offer of employment is made)
- Find out which criminal records may, or may not, be considered during hiring
- Understand the steps required to reject, terminate, reassign, or fail to promote an individual based on his or her background check (known broadly as adverse action)

Finally, talk to one of our experienced employment attorneys. As more municipalities in South Carolina consider Ban the Box and other fair hiring laws, our team is keeping an eye on all legal developments that affect employers. We know you have questions about your obligations to both protect the rights of job applicants and provide a safe working environment. This can be especially challenging if your business has a national or multinational reach. That's why so many employers turn to the trusted legal counsel of Rosen Hagood.

Call us today to learn more about how we can serve you and your employment law needs.