

LEGAL MEMORANDUM

No. 198 | FEBRUARY 1, 2017

Mandatory “Ban the Box” Requirements May Do More Harm Than Good

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Abstract

Several public and private employers have undertaken “ban the box” initiatives that delay any inquiry into a job applicant’s prior criminal record until later in the hiring process. Such initiatives began as and should remain voluntary efforts designed to reduce the barriers to lawful employment that many qualified ex-offenders face. Yet some states have begun to mandate ban the box policies. In addition, some localities have crafted unduly burdensome and overly broad mandates, and at least two (Baltimore, Maryland, and Columbia, Missouri) have made it a crime to violate a ban the box ordinance. Such overcriminalization takes ban the box fervor too far. Further complicating the landscape, the U.S. Equal Employment Opportunity Commission has published Enforcement Guidance on the use of criminal records in employment decisions and has sued private employers, alleging unlawful discrimination for not following its guidance. This is both unsound and possibly unlawful. Ban the box initiatives, while laudable, should remain simple, workable, and above all voluntary.

Should private employers be able to ask a job applicant about a potential criminal record when they think it is appropriate, or must they wait to ask until lawmakers allow them to do so? While many employers have voluntarily agreed to “ban the box” by eliminating or delaying questions about a job applicant’s possible criminal record—and should be applauded for doing this—some states require them to do so. Some localities, including Baltimore, Maryland, and Columbia, Missouri, have gone a step further and have made it a crime for an employer to violate a ban the box ordinance either directly or indirectly (by asking the applicant oblique

KEY POINTS

- Many large businesses have voluntarily adopted a “ban the box” policy to help reduce high levels of recidivism often associated with government regulations and business policies that leave individuals with a criminal record little opportunity for gainful employment.
- While banning the box may be a good idea both from a moral perspective and as a business strategy, it is a decision that should be left up to each employer.
- The U.S. Equal Employment Opportunity Commission has sued employers for failure to follow its Enforcement Guidance in making hiring decisions in such cases. Its approach is unsound and may be unlawful.
- Some states and many localities mandate specific ban the box policies, and some localities have made it a crime for an employer to violate a ban the box ordinance either directly or indirectly.
- Criminalizing noncompliance with ban the box laws will only serve to fuel the burgeoning problem of overcriminalization.

This paper, in its entirety, can be found at <http://report.heritage.org/lm198>

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questions designed to elicit such information or by conducting a criminal background check).

In addition, employers covered by Title VII of the Civil Rights Act of 1964 should be aware that the United States Equal Employment Opportunity Commission (EEOC) has issued Enforcement Guidance specifying when employers may and may not ask a job applicant or employee about his or her criminal history. The EEOC has also filed claims alleging unlawful discrimination against some employers who have acted in contravention of that guidance.

Major Corporations Take the Pledge

One year ago, President Barack Obama spoke about how hard it can be for individuals with a criminal history to find employment¹ and, through executive action, required the Office of Personnel Management to “delay inquiries into criminal history” for federal job applicants, a practice known as “ban the box.”² In April 2016, the White House launched a voluntary Fair Chance Business Pledge for private-sector leaders to do the same and thereby “improve their communities by eliminating barriers for those with a criminal record and creating a pathway for a second chance.” Major corporations, including the Coca-Cola Company, Google, Koch Industries, Starbucks, and Uber, voluntarily signed on.³ As Mark Holden, General Counsel at Koch Industries, recently stated:

Few things are as important for people trying to rejoin society as having a job. According to the Justice Department, more than 650,000 incarcerated individuals return to their communities every year, and after years behind bars they desperately need a chance to find personal fulfillment and provide for themselves and their families. But a combination of government restrictions and business hiring processes too often leave them with few, if any, opportunities for gainful employment.

The results are as predictable as they are disheartening. When people with criminal records struggle to find work, they become much more likely to re-offend....

To help end this sad cycle, businesses should consider instituting a “ban the box” hiring policy. A 2009 study by Harvard and Princeton researchers

showed that checking the box on a job application that indicates a criminal record reduces the chances of a callback by 50%, with blacks hurt twice as much as white applicants with criminal records. By eliminating or delaying this question, candidates are less likely to be rejected before their qualifications are considered.

We employ this approach at Koch Industries—we officially removed the box last year, delaying the question until later in the hiring process. Before that, we had a process by which we reviewed a job candidate’s offense to determine whether it was job-related. Even if it was, we engaged in a further review into the nature of the offense and the time passed since its occurrence. The combination of these two policies has resulted in job offers to thousands of candidates with criminal records.

Many of those hired have been dedicated employees who have risen through the company’s ranks....

Hundreds of thousands of people with criminal records try to rejoin society every year, and they want to contribute to their communities and improve their lives. We can help them by breaking down barriers that stand in their way. No one should be judged forever based on what they did on their worst day—and everyone deserves a second chance.⁴

Helpful or Harmful?

A 2011 study of formerly incarcerated individuals supports that view, finding that employment is the single most important factor in reducing recidivism and that two years after their release, nearly twice as many employed as unemployed formerly incarcerated individuals had avoided another brush with the law.⁵ In addition, according to the Southern Coalition for Social Justice, the hiring of formerly incarcerated individuals by the City of Durham, North Carolina, increased nearly sevenfold during the first four years after the city’s ban the box law took effect.⁶

Some researchers, however, have suggested that adopting ban the box policies may do more harm than good by lowering the chances of employment for “young, low-skilled black...and...Hispanic men.”⁷ Specifically, private employers, if prohibited from

inquiring into an applicant's criminal background, may resort instead to assumptions or stereotypes based on observable characteristics such as race or gender in order to infer the likelihood that the applicant has a criminal history, thereby increasing racial or gender disparities beyond what they would have been had the employer been able to do a background check in the first instance.

Regardless of one's views about this scholarly disagreement, scholars at The Heritage Foundation have noted that ban the box initiatives, while laudable, should remain voluntary because there are many good reasons why employers might want to ask job applicants about any potential criminal history. For example:

- A criminal conviction is often relevant to job function. A business, for instance, might not want to hire someone who has been convicted of theft to run the cash register.
- Businesses are often on the hook in tort law under a negligent hiring or vicarious liability theory if they put their customers in danger and harm occurs. For example, hiring a person convicted of multiple assaults might be dangerous if that person is going to be in a high-stress, client-facing job.
- Whether it incurs liability or not, a business has its reputation on the line and could be harmed in the court of public opinion if it hires a released offender who then engages in misconduct.⁸

A Red Tape Nightmare

According to the National Employment Law Project, however, 24 states now require private employers to remove criminal record inquiries from their employment applications, and over 150 localities have also enacted some type of ban the box policy.⁹

A New York City ordinance, for example, makes it unlawful for any employer with four or more employees to “[m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant.”¹⁰ Such a prohibition could penalize an employer for asking any number of open-ended, seemingly innocent questions, such as:

- “Tell me about a time you made a mistake.” (“I robbed a guy several years ago.”)
- “Why is there a gap in your employment between [insert date] and [insert date]?” (“I was in prison.”)
- “Are you willing to relocate?” and “Are you willing to travel?” (“I would have to check with my parole officer.”)
- “What makes you uncomfortable?” (“Telling people about my criminal record.”)
- “What was your biggest failure?” (“Getting convicted for selling drugs.”)

Each question could “relate” to criminal history, and each one appears on a *Forbes* list of “50 Most Common Interview Questions.”¹¹

Even after a conditional job offer has been made, an employer in New York City has to cut through more red tape “before taking any adverse employment action based on” a post-conditional offer inquiry into criminal history, including “perform[ing] an analysis of the applicant under article twenty-three-a of the correction law and provid[ing] a written copy of such analysis to the applicant in a manner to be determined by the commission” while “allow[ing] the applicant...no less than three business days [to respond] and during this time, hold[ing] the position open for the applicant.”¹² According to the New York *Daily News*, the Mayor's Counsel said that “[w]e want New Yorkers back to work.” However, “business groups slammed the bill, calling it an unnecessary burden that will open employers to junk lawsuits,”¹³ since the ordinance authorizes a private right of action for ordinance violations—a potential field day for the plaintiffs' bar and disappointed job applicants.

Yet New York's ordinance is a compliance cakewalk in comparison to others, which have criminalized a private employer's inquiry into a job applicant's criminal history. According to a Baltimore ordinance, anyone who employs 10 or more “full-time equivalent employees in the City of Baltimore” is forbidden from taking any “direct or indirect conduct intended to gather information” with respect to whether a job applicant has a criminal record—at least, that is, until after the employer has made a conditional job offer. This language raises the same overbreadth problems contained in the New York

City ordinance but goes a step further by making any violation of the ordinance a misdemeanor carrying potential criminal penalties of imprisonment for up to 90 days and a fine of up to \$500.¹⁴

In 2014, the Columbia, Missouri, City Council unanimously approved a similar ordinance,¹⁵ which applies to any private employer “who employs one (1) or more individuals within the jurisdiction of [the] city, exclusive of parents, spouse or children of such person, and any person acting directly in the interest of an employer.”¹⁶ In Columbia, asking an applicant about his or her criminal history before a conditional job offer has been made is prohibited (subject to certain limited exceptions, such as when a local, state, or federal law or regulation requires specific employers to reject applicants with particular criminal convictions¹⁷). This was done in order to “create a more-level playing field for offenders who are looking for employment after incarceration.”¹⁸ Leveling the playing field is certainly an apt analogy, considering the consequences: Any employer who does “inquire, question or otherwise seek information as to whether an applicant has ever been arrested for, charged with, or convicted of any crime [before] the applicant has received a conditional offer of employment”¹⁹ “shall be deemed guilty of a misdemeanor,” punishable by fines up to \$1,000, imprisonment for up to 30 days, or both.²⁰

Neither the Baltimore ordinance nor the Columbia ordinance has any standard of criminal intent to distinguish those who stumble into a conversation about prior arrests from those who intentionally violate the law. The Supreme Court of the United States recently revitalized the fundamental presumption that a criminal conviction requires proof of criminal intent,²¹ and in recent testimony before the House Oversight and Government Reform Committee, Federal Bureau of Investigation Director James Comey stated: “We don’t want to put people in jail unless we can prove they knew they were doing something they shouldn’t do.”²² Yet under these ordinances, that is exactly what could happen.

The EEOC’s Controversial Enforcement Guidance

Employers who are covered under Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, national origin, and sex,²³ should also be aware that the EEOC has

adopted the controversial position that because African American and Hispanic men are arrested and convicted of crimes at a higher rate than white men, an employer’s use of background checks may be discriminatory if it disproportionately affects African American or Hispanic men when it comes to hiring, promotion, or retention decisions. In 2012, the EEOC published an Enforcement Guidance document²⁴ expressing the view that such a practice would constitute discrimination based on racial or national origin unless the employer can demonstrate that the practice of automatically excluding an applicant from being hired or an employee from being promoted or retained based on a criminal conviction is related to the position in question and consistent with business necessity. To satisfy this standard, the EEOC states that “the employer needs to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.”²⁵

Moreover, the EEOC takes the position that exclusion based solely on an arrest record can never be job-related and consistent with business necessity.²⁶ In that document, the EEOC also laid out “best practices” for employers to follow to avoid liability under Title VII that include a detailed procedure for employers to follow in order to assess an individual job applicant’s criminal history.²⁷ The EEOC even went so far as to note that “[a]n employer’s evidence of a racially balanced workforce will not be enough to disprove disparate impact” if it can be shown that the practice deprived “a disproportionate number of Title VII-protected individuals of employment opportunities.”²⁸

Some critics and commentators have expressed the view that the EEOC’s guidance rests on flawed assumptions about crime, recidivism, and small-business owners’ capacity to implement the details of EEOC policies.²⁹ Moreover, the West Virginia, Colorado, Alabama, Georgia, Kansas, Nebraska, Montana, South Carolina, and Utah Attorneys General signed a letter to the EEOC Chair to express three main concerns:

- By following state and local law that differs from EEOC policy, covered employers could be found liable for discrimination under Title VII;

- Insofar as that proves to be true, the EEOC's guidance violates the sovereignty of states to administer their own law and policy; and
- The EEOC's "true purpose may not be the correct enforcement of the law, but rather the illegitimate expansion of Title VII protection to former criminals."³⁰

The EEOC Chair's response was hardly reassuring. In a letter to the nine state attorneys general, she stated that "it is not illegal for employers to conduct or use the results of criminal background checks," and the 2012 guidance "does not supersede any state or local laws" on that issue; yet "Title VII does" supersede all state and local law that "requires or permits an act that is inconsistent with the federal statute," and "the EEOC's Guidance is simply reciting and applying the text of Title VII, which sets forth the principle that federal law preempts contradictory state or local law."³¹ Her letter concludes with a reference to "two recently-filed EEOC lawsuits" against private employers which "challenge criminal history screening processes that the Commission alleges have a disproportionate impact on African-Americans and are not job related and consistent with business necessity, in violation of Title VII."³²

Is the EEOC's Enforcement Guidance Binding?

The State of Texas responded to this by filing a lawsuit in the United States District Court for the Northern District of Texas seeking a declaration that the EEOC's guidance is an unlawful end-run around the Administrative Procedure Act, which, among its other purposes, sets the rules for agency rulemaking.³³ The district court ruled that the state lacked standing to bring its case.³⁴

On appeal, the Fifth Circuit Court of Appeals disagreed, holding that Texas has standing to seek relief in federal court.³⁵ The court described the EEOC's Enforcement Guidance as "a policy statement couched in mandatory language that is intended to apply to all employers" and observed that the EEOC never "contended that it does not intend to follow the Guidance to its full extent."³⁶ The court scolded the EEOC for "nevertheless arguing that the Guidance cannot be reviewed," noting that "the EEOC exploits the limitations of its enforcement authority,

while denying that state agencies will face legal consequences should they fail to follow the Enforcement Guidance's directives."³⁷

However, the court has since withdrawn that opinion, vacated the district court's judgment, and instructed the district court to reconsider the case "in its entirety"³⁸ in light of the United States Supreme Court's recent holding in a case with similar issues. In *U.S. Army Corps of Engineers v. Hawkes Co.*,³⁹ the Supreme Court held that an agency guidance document known as a "jurisdictional determination," which the Army Corps of Engineers issued under the Clean Water Act, was subject to judicial review.⁴⁰ Texas's case remains pending.

The EEOC did suffer a stinging rebuke, however, in a federal case it filed against a private employer alleging that the employer's use of background checks was racially discriminatory because of the disparate impact it had on African American job applicants. In *EEOC v. Freeman*, United States District Court Judge Roger Titus dismissed the case, concluding that the report by the EEOC's expert contained a "mind-boggling number of errors" and was fatally flawed.⁴¹ In his opinion, which was affirmed on appeal,⁴² Judge Titus added that there were many legitimate business reasons to conduct background checks on job applicants, stating:

For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable.⁴³

It is unclear, of course, whether the EEOC will continue to adhere to this controversial Enforcement Guidance in the new Administration. For now at least, employers risk the possibility of a lawsuit if they fail to follow the EEOC's guidance document.

Conclusion

As many believe and some employers can attest, banning the box may be a good idea both from a moral perspective and as a business strategy, but whether or not to do so is a decision that should be

left up to each employer. Moreover, if a state or locality decides, however unwisely, to mandate a ban the box policy, it should certainly not turn violations into criminal offenses, which would only serve to fuel the burgeoning problem of overcriminalization.

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Endnotes

1. One study found that having a criminal record can reduce the likelihood of receiving a callback or job offer by nearly 50 percent. Devah Pager, Bruce Western, & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. 195, 199 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3583356/>.
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12. New York, N.Y., Ordinance 2015/063, *supra* note 10.
13. Erin Durkin, *Mayor's Office Supports Ban Against Asking About Convictions*, N.Y. DAILY NEWS (Dec. 4, 2014), <http://nydn.us/1LXz2PZ>.
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16. COLUMBIA, MO., CODE OF ORDINANCES ch. 12, art. V, § 12-32, §§ 12-90–12-94 (2014), available at https://www.municode.com/library/mo/columbia/codes/code_of_ordinances?nodeId=PTIICOOR_CH12HURE_ARTVEMOPQUAP_S12-94PEVIAR.
17. See *id.* The process of discerning whether such laws or regulations even exist may not be so easy or inexpensive. As *The Wall Street Journal* reported in 2015, "[w]ith a federal grant, the American Bar Association spent more than four years looking through federal and state laws and regulations for [civil laws and regulations related to] criminal convictions. Researchers found more than 46,000 of them, about 60% to 70% of which are employment-related. Experts estimate tens of thousands more are embedded in local ordinances." Joe Palazzolo, *5 Things to Know About Collateral Consequences*, WALL ST. J. (May 17, 2015), <http://on.wsj.com/2frOdKQ>.
18. Denney, *supra* note 15.
19. COLUMBIA, MO., CODE OF ORDINANCES ch. 12, art. V, § 12-90 (2014).
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24. See generally U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (hereinafter *Enforcement Guidance*). The EEOC bases its discrimination analysis on disparate impact theory, arguing that the use of criminal background checks has a "disproportionate impact" on African Americans. See *id.*; *Griggs v. Duke Power Company*, 401 U.S. 424, 431-32 (1971) (cited in *Enforcement Guidance* as authority to bring disparate impact claims under Title VII).
25. *Enforcement Guidance*, *supra* note 24, at 14.
26. *Id.* at 12.
27. *Id.* at 25.
28. *Id.* at 10.
29. See U.S. COMM. ON CIVIL RIGHTS, *ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S CONVICTION RECORDS POLICY*, 289 (2013) (statement of Commissioner Peter N. Kirsanow, joined by Vice Chair Abigail Thernstrom and Commissioner Todd Gaziano), available at http://www.eusccr.com/EEOC_final_2013.pdf. In turn, many employers are right to be concerned that the EEOC policies could increase the risk of liability under Title VII. See Hans A. von Spakovsky, *The Dangerous Impact of Barring Criminal Background Checks: Congress Needs to Overrule the EEOC's New Employment "Guidelines,"* HERITAGE FOUNDATION LEGAL MEMORANDUM No. 81 (May 31, 2012), available at <http://bit.ly/2f7RLkJ> (arguing that the "new Guidance places employers in a vicious 'Catch 22' situation: Business owners will have to choose between conducting criminal background checks and risking liability for supposedly violating Title VII or following the EEOC's Guidance, abandoning background checks, and risking liability for criminal conduct by employees.").
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31. Letter from Jacqueline A. Berrien, Chair, U.S. Equal Emp't Opportunity Comm'n, to Nine State Att'ys Gen., *What You Should Know: EEOC's Response to Letter from State Attorneys General on Use of Criminal Background Checks in Employment* (Aug. 29, 2013), available at https://www.eeoc.gov/eeoc/newsroom/wysk/criminal_background_checks.cfm#fn4.
32. *Id.*
33. See *Texas v. E.E.O.C.*, No. 5:13-CV-255-C, 2014 WL 4782992, at *4 (N.D. Tex., Aug. 20, 2014), *rev'd*, *Texas v. E.E.O.C.*, 827 F.3d 372 (5th Cir. 2016), *reh'g en banc granted, opinion withdrawn, and vacated and remanded*, *Texas v. E.E.O.C.*, 838 F.3d 511 (5th Cir. 2016).
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37. *Id.*
38. *Texas v. E.E.O.C.*, 838 F.3d 511(5th Cir. 2016).
39. 136 S.Ct. 1807 (2016).
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42. *EEOC v. Freeman*, 778 F.3d 463 (4th Cir. 2015).
43. 961 F. Supp. 2d at 785.