



## **“Ban-the-Box” Legislation Limits Inquiries About Criminal Background Checks**

*A growing number of state and local jurisdictions are enacting “ban-the-box” legislation that limits an employer’s ability to ask about criminal convictions on employment applications. Some jurisdictions are imposing stiff penalties for violating the new law. Do you know if your state or county is joining this growing movement?*

One of the screening tools employers use to vet applicants is a background check into a candidate’s criminal and financial history. Generally, the first step is to ask an applicant to check a box in response to a question on the employment application about criminal convictions. A number of states and local jurisdictions, however, have passed or are looking into legislation that prohibits this inquiry on employment applications. The philosophy behind the “ban-the-box” movement is to ensure that applicants with a criminal history receive consideration of their candidacy without being prejudiced by their criminal backgrounds. In fact, a few major national employers have already banned the box from their employment applications.

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Ban-the-box legislation typically limits an employer's ability to ask about criminal convictions on employment applications and delays the inquiry during the application process. Depending on the jurisdiction, some provisions may also require employers to demonstrate that an inquiry about criminal backgrounds is job-related and further restrict the scope and type of background check, depending on the position.

The ban-the-box philosophy does not advocate elimination of all criminal record checks, but instead supports delaying such inquiry to later stages of an interview process. Proponents of the ban-the-box campaign highlight the statistics that point to a higher number of individuals in protected classifications having criminal convictions, which makes it more difficult for such candidates to transition to gainful employment as part of their re-entry process. Opponents of ban-the-box legislation cite to potential employer liability based on claims arising from or concerning workplace safety and security, such as negligent retention, hiring or supervision.



## LEGISLATION

There is no federal ban-the-box legislation. However, the Equal Employment Opportunity Commission (EEOC) recommends that employers remove criminal history questions from job applications and delay such questions until the interview process. See [EEOC Enforcement Guidance on Consideration of Arrest and Conviction](#)

Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 issued April 25, 2012.

A number of states have enacted varying versions of ban-the-box legislation. While the majority of jurisdictions only cover public employers, there appears to be some support for applying such laws to private employers. As of January 2015, thirteen states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Rhode Island) and the District of Columbia have adopted some form of ban-the-box legislation, limiting a public employer's ability to make inquiries regarding an applicant's criminal background at the application stage. Of these thirteen states, six states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Rhode Island) and the District of Columbia impose the prohibition on private employers. In Minnesota and Massachusetts, employers are expressly prohibited from asking about arrests at any time during the hiring process if the arrests did not result in convictions.

In the absence of federal or state statutes, local jurisdictions are passing their own legislation to address this issue. Major cities such as San Francisco, Chicago, Atlanta, New York, Philadelphia, Boston and Seattle have passed some form of ban-the-box legislation. The laws in San Francisco, Chicago, Philadelphia and Seattle cover private employers and public employers, while Atlanta, New York and Boston only extend the prohibition to public employers.

The general trend reflects an increase nationally in localities passing similar legislation. For instance, while Virginia has not enacted statewide measures banning the box, as of January 2015, thirteen Virginia counties or cities have promulgated ordinances or legislation prohibiting criminal conviction question on a job application for public employers. Most of these policies permit questions regarding criminal history where the position may relate to public safety. Moreover, public employers in Alexandria, Danville, Fairfax County, Fredericksburg and Virginia Beach may only conduct a background check after a conditional offer is made or finalists are selected.

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### FINES & PENALTIES

An employer may be subject to different types of penalties for failure to comply with the state or locality's ban-the-box requirements. In most jurisdictions, a monetary fine may be assessed. For example, in Minnesota, the employer may be ordered to pay anywhere from \$100 to \$500 per violation, capped between \$100 and \$2,000 per month depending on the size of the employer. In Philadelphia, the civil penalty for a violation is up to \$2,000. In Seattle, a violating employer is liable for up to \$750 for the first violation and up to \$1,000 for each subsequent violation, and may be required to pay the Seattle Office for Civil Rights attorney's fees for investigating ordinance violations. In the District of Columbia, upon the finding of a violation of the ban-the-box law, depending on the size of the employer, the employer may be fined up to \$5,000 per violation.

One of the strongest penalties can be found in Baltimore City, where a violation of its ban-the-box ordinance may result in a misdemeanor with penalties of up to \$500 and 90 days' imprisonment. The Baltimore Community Relations Commission may also award back pay, reinstatement, attorneys' fees and compensatory damages, including damages for emotional distress and expenses incurred in seeking other employment.

While none of the jurisdictions mentioned above provide for a private cause of action for a violation of a ban-the-box law, employers should be mindful of anti-retaliation provisions within these laws. For instance, the ordinances in Maryland's Prince George's County and Montgomery County contain anti-retaliation provisions protecting individuals who oppose an employer's violation of the ordinance or participate in a related investigation or hearing.

### BAN-THE-BOX CLAIMS

If you have questions about the ban-the-box law or policy as it relates to your specific jurisdiction, please contact Yooru Pak at [yooru.pak@wilsonelser.com](mailto:yooru.pak@wilsonelser.com).

Yooru Pak has significant experience defending property owners, managers and boards of associations in agency investigations and lawsuits asserting claims of discrimination under local, state and federal fair housing laws. She also counsels clients on fair housing issues, such as FHEO training, disability assessments and compliance reviews.

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Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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