

Ban the Box: What is it and what does it mean for the Retail, Restaurant and Hospitality Industry?

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There is a movement quietly spreading across the country aimed at balancing the inequities faced by convicted felons who have served their time and are faced with re-entry into society.

What is it?

Ban-the-Box is a movement started by grass roots organizations to remove the criminal history check box from employment applications. Ban the Box has been the mantra of its supporters for allowing convicted felons to integrate back into society through a fair-chance pre-employment application process. However, concern about the uptick in recent years of negligent hiring, training, supervision and retention claims has caused employers to implement heightened screening processes to weed out individuals who have a higher chance of increasing liability.

In 2012, the Equal Opportunity Employment Commission ("EEOC") became involved when it began seeing an increase in pre-hire employment discrimination claims. In response, the EEOC prosecuted several national retail employers under Title VII with mixed results. Thus, the EEOC issued guidelines advising employers banning the use of the criminal history box **before** the interview process. According to the EEOC, using criminal history as a sole basis for pre-employment hiring decisions may violate Title VII because it disproportionately excludes minorities and men. The EEOC instructed employers to judge applicants based on individualized assessments as opposed to blanket exclusions of any applicant who checks the "yes" box. The EEOC reasoned that removing the criminal history question at the application stage of the hiring process places applicants with a criminal conviction on equal footing, initially, with applicants who do not have a conviction. This is not to say that employers **must** hire individuals with past criminal convictions. The guidelines do not suggest that such applicants cannot be asked about criminal history during the personal interview stage. There are also a few narrow exceptions to the requirement of fair chance employment. One exception requires the employer to demonstrate that it considers criminal history based on a business necessity or because the information is directly related to a specific job. Additionally, background checks for certain jobs are required by some federal and state laws.

What does it mean for the Retail, Restaurant, and Hospitality Industry?

As of June 2017, 24 states and over 150 cities and counties have adopted their own fair chance legislation. If your state or local government has not adopted fair chance legislation, it is only a matter of time before it does as the movement is sweeping across the country. Both Target and Walmart have already jumped on the "ban" wagon and removed the box from their employment applications on a national scale. Thus, all retail, restaurant, and hospitality service providers should review their hiring policies and determine whether they meet fair chance hiring guidelines. If not, have an attorney review your employment application and hiring policies and decide if they should be revised. Evaluate whether the application promotes blanket exclusions of certain classes of applicants. Conversely, if you have well-founded concerns about hiring convicted felons, consider developing or revising the company's business necessity and job related reason for doing so.

Demonstrating why information on an applicant's criminal history is essential to your specific hiring process is critical to defending against potential discrimination claims.