The case for uniform ban-the-box laws

Robert S. Nichols and Amber K. Dodds

Abstract

Purpose – *The purpose of this paper is to assess the public policy benefits of ban-the-box laws, the administrative burden for employers created by disparate approaches to these laws among various states and cities and the value of adopting a federal ban-the-box law with a preemptive effect.*

Design/methodology/approach – *The paper uses a descriptive research method that examines statistical data regarding the recidivism and sustained employment and examples of states' laws regarding restrictions or requirements of when criminal history inquiries can be made during the hiring process, notice requirements related to use of criminal history information and limitations on employment decisions based on criminal history information.*

Findings – *The paper finds that, given the public policy interests at stake and the relationship observed between recidivism and sustained employment, it is difficult to argue that states and local ban-the-box requirements are not rational and well-intentioned. However, a federal ban-the-box law with preemptive effect is likely the only viable solution for employers overburdened by this disparate approach to ban-the-box.*

Originality/value – *This paper provides an examination of why a federal ban-the-box law with preemptive effect is an attractive alternative to the current disparate approach to regulating criminal history inquiries by different states and local governments.*

Keywords *Employment, Recidivism, Criminal history, Ban-the-box, Fair chance laws, Multistate employers*

Paper type *Viewpoint*

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Statistical data confirm that obtaining employment is crucial to minimize recidivism for persons with criminal records. Ban-the-box laws represent a legitimate tool for enhancing employment opportunities for the substantial segment of the available American workforce with a criminal history.

The pattern that has developed, however, of ban-the-box provisions on a state and local level with widely disparate substantive and procedural requirements creates a daunting administrative burden for human resource professionals – particularly for multistate employers. A uniform standard for ban-the-box requirements applicable throughout the USA would allow for the intended public policy interests to be effectively served without causing employers to face the significant costs associated with a patchwork of standards across different states and localities.

The importance of employment to avoid recidivism

Criminal history is an obstacle to employment

According to the US Department of Justice's Bureau of Justice Statistics (BJC), at of the end of 2012, just over 100 million individual offenders were in the criminal history files of the state criminal history repositories. www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf. At the same time, the digitization of criminal history data has made it more accessible to employers.

The net result has been that an increasingly significant percentage of Americans face obstacles to employment based on a past conviction, deferred adjudication or other

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Sustained employment reduces recidivism

The BJC reports, based on a 2005 study, that “[a]bout two-thirds (67.8 per cent) of released prisoners were arrested for a new crime within 3 years, and three-quarters (76.6 per cent) were arrested within 5 years”. www.bjs.gov/index.cfm?ty=pbdetail&iid=4986

Needless to say, the negative effects for the public at large of these extraordinarily high recidivism rates are substantial. Costs borne by society resulting from repeat offenders include the direct effects of the additional crimes committed and the expense of criminal justice adjudication and further punishment, whether it be incarceration, probation or otherwise.

As a result, a critical public policy goal must be to reduce recidivism. Studies show that the single greatest predictor of a reduced likelihood of recidivism is sustained employment. www.cjcj.org/uploads/cjcj/documents/The_Post-Release.pdf

Accordingly, there is no doubt that society is far better off when individuals with criminal records can obtain and sustain employment.

Increasing employment rates for individuals with criminal histories

Unfortunately, unemployment among ex-offenders is extraordinarily high. According to the US Department of Justice’s National Institute of Justice (NIJ), “[s]urvey results suggest that between 60 and 75 per cent of ex-offenders are jobless up to a year after release”. www.nij.gov/topics/corrections/reentry/pages/employment.aspx

The greatest difficulty associated with achieving higher rates of employment for persons with criminal records is the negative views of many employers as to the suitability of these individuals for employment – often without regard for whether there is any rational basis for that concern given the offense previously committed and the job at issue.

The NIJ reports that research “has shown that most employers are reluctant to hire applicants with criminal records. In a study conducted in New York City, for example, a criminal record reduced the likelihood of a callback or job offer by nearly 50 per cent (28 per cent for applicants without a criminal record versus 15 per cent of applicants with)”. www.nij.gov/topics/corrections/reentry/pages/employment.aspx

Consequently, a key question is how to encourage employers to consider offering past offenders an opportunity for employment.

In this connection, the NIJ has observed that research indicates “employment prospects for applicants with criminal records improved when applicants had an opportunity to interact with the hiring manager, particularly when these interactions elicited sympathetic responses from the manager”. www.nij.gov/topics/corrections/reentry/pages/employment.aspx

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“Although individual characteristics of employers were significant, the researchers concluded that personal interaction between the applicant and prospective employer was in itself a key factor in a successful hiring”. www.nij.gov/topics/corrections/reentry/pages/employment.aspx

States and local governments respond with “Ban-the-Box” laws

“Ban-the-box laws”, or what are sometimes termed “fair chance laws”, share the common feature of prohibiting an employer from inquiring into an employment applicant’s criminal history until some point in the hiring process beyond the applicant’s initial contact with the employer through an application or otherwise. Some ban-the-box laws restrict inquiries into the individual’s criminal record until after submission of an application for employment, or until after the first interview or until some other later point in the process, including, in a growing number of jurisdictions, until after a conditional offer of employment is made.

However, in a variety of states, these laws entail additional restrictions or requirements beyond just dictating when criminal history inquiries can be made during the hiring process.

Specifically, in some states and municipalities, for example, the State of Hawaii and the City of Los Angeles, employers’ use of criminal history information to exclude an individual from a job is only permissible when the employer can establish some rational nexus between the criminal conviction or convictions at issue and the specific job sought.

Additionally, a variety of jurisdictions, for example, the State of Massachusetts and the cities of New York, Los Angeles and Philadelphia, require that the applicant be provided with certain information or documentation – such as a copy of the criminal history record at issue or an opportunity to respond to the negative criminal history.

Importantly, only some of the state and local governments adopting ban-the-box laws have extended these laws to cover private-sector employers. In many other cases, the ban-the-box restrictions apply only to public-sector employers and/or government contractors.

The National Employment Law Project currently identifies nine states as having ban-the-box restrictions applicable to private-sector employers: Vermont, Hawaii, Rhode Island, Connecticut, Oregon, New Jersey, Illinois, Massachusetts and Minnesota. www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf

Importantly, a very extensive list of major cities has extended ban-the-box laws to private-sector employers including cities such as New York, Chicago, Los Angeles, Austin, Portland, San Francisco, Seattle and Baltimore.

While some employers that operate in only a few localities might conclude that they do not need to be concerned with ban-the-box restrictions because the limited number of jurisdictions in which they operate do not currently have any legal restrictions, those employers need to bear in mind that many other state and local governments currently are considering adopting ban-the-box restrictions and it is very likely that the list of states and cities with these laws will continue to grow rapidly in the coming years.

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Burden of compliance with widely varying requirements

A major concern for businesses and human resource professionals associated with ban-the-box laws, irrespective of whether they agree with the underlying policy goals, is that the widely differing requirements of the various state and local laws adopted across the USA make establishing hiring procedures consistent with all of these laws extraordinarily difficult.

With regard to the disparate approaches among these laws as to when during the hiring process an employer can make a criminal history inquiry, multistate employers have found that the only manageable approach is to adopt the most conservative position as to timing of the criminal history inquiry – typically, delaying the criminal history inquiry until a conditional offer is made to an applicant.

Limitations on the use of criminal history information

However, a more troubling variation among these laws for employers is the restrictions that apply in different jurisdictions as to under what circumstances criminal history can be used to deny an applicant employment.

For example, in the State of Hawaii not only are employers barred from making criminal record inquiries before a conditional offer of employment but businesses also may not discriminate against an applicant or employee based upon a conviction record unless the "prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position" [Haw. Rev. Stat. § 378-2.5(b)]. Another example of a state that restricts use of criminal history information is Wisconsin. While Wisconsin has not yet adopted a traditional ban-the-box law for private-sector employers, it does bar public- and private-sector employers from discriminating against an applicant or employee based upon a prior criminal conviction unless "the circumstances [of the crime at issue] substantially relate to the circumstances of the particular job" at issue. Section 111.335 (c), Wisconsin Statutes.

For example, in Hawaii or Wisconsin excluding an employee from an assembly line position in an industrial setting based on a prior child pornography conviction would likely be impermissible.

In addition to some states, a variety of the local governmental entities that have adopted ban-the-box laws have also imposed restrictions on when a criminal record can be used against an applicant or employee. For instance, under City of Los Angeles's ban-the-box ordinance, enacted in 2016, an employer not only must wait until a conditional offer of employment has been made to conduct a criminal history inquiry but also may not take adverse action based upon criminal history "unless the employer performs a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position sought by the applicant". http://clkrep.lacity.org/onlinedocs/2014/14-0746_ORD_184652_12-9-16.pdf

Additional notice requirements

Another significant complication for human resource professionals trying to deal with widely varying ban-the-box laws is unique notice requirements provided for in some of those laws. For example, in the State of Massachusetts, not only is the employer prohibited from making inquiries concerning criminal history on an initial written employment application but also must provide the employee with a copy of any criminal history record at issue prior to questioning the applicant about that history. https://malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256

Additionally, in Massachusetts, an employer that conducts five or more criminal background investigations per year must "maintain a written criminal offender record information policy" and must "notify an applicant of the potential adverse decision based on the criminal offender record information[,] [. . .] provide a copy of the criminal offender record information and the policy to the applicant [. . .] and provide information concerning the process for correcting a criminal record". https://malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256

Various notice requirements including requirements that employees be given copies of the relevant criminal history information and/or an opportunity to respond exist in a variety of other jurisdictions including under many local government laws such as those in Los Angeles, Seattle and San Francisco.

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Recommendations for an approach going forward

Ban-the-box laws are here to stay. The number of jurisdictions adopting these restrictions will only grow in the future. Further, given the public policy interests at stake and the relationship observed between recidivism and sustained employment, it is difficult to argue that these restrictions are not rational and well-intentioned.

The question, therefore, for government officials is how to minimize the burden of these restrictions for employers. As is the case with many areas of employment regulation for which there is a patchwork of varying state and local requirements, a worthwhile policy goal is developing a uniform standard that different jurisdictions can adopt and thus provide employers with a single consistent approach to compliance. However, because it is unlikely that a uniform approach among the various state and local governmental entities is achievable, a more realistic solution to the burden created by the current patchwork of ban-the-box restrictions is federal legislation creating a federal ban-the-box standard that explicitly preempts differing state and local restrictions.

While enacting that kind of federal legislation in the near term seems unlikely, a federal ban-the-box law with preemptive effect is likely the only viable solution for employers overburdened by this disparate approach to ban-the-box by different states and local governments.

In the meantime, employers need to undertake the following steps to avoid liability:

- Employers need to be fully versed in the restrictions that apply in each of the jurisdictions in which they operate or are actively recruiting. With many of the ban-the-box laws, there are no provisions that strictly limit the applicability of the law to employers who have facilities or employees within the jurisdiction at issue, and therefore, at least conceivably in some of these jurisdictions, the mere fact that an employer seeks or recruits employees there, may implicate the ban-the-box restrictions.
- Because the number of state and local governments with ban-the-box restrictions is rapidly growing, employers need to remain keenly aware of pending legislation.
- Because of the differing approaches as to when in the hiring process an employer can inquire about criminal history, particularly for employers operating in a variety of

jurisdictions, the only viable policy is to take the most conservative approach and delay criminal history inquiries until after a conditional offer of employment is made.

- Employers need to understand that even if they do delay criminal history inquiries until after an initial offer of employment, they still may face unique requirements in different jurisdictions relating to under what circumstances they can use the information to reject an applicant.
- Further, employers need to understand that different jurisdictions sometimes have unique notice requirements such as those mandating employees be provided with copies of their criminal information at issue or an opportunity to respond to the allegations of criminal history.

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Robert S. Nichols is a Partner. For more than 25 years, Robert Nichols has represented employers in litigation, administrative investigations and inspections and other actions concerning alleged occupational safety and health violations, discrimination, retaliation, harassment, wrongful discharge and other concerns related to employment. Bob frequently represents employers in matters pending with government agencies, including Occupational Safety and Health Administration (OSHA), state Occupational Safety and Health (OSH) agencies, the National Labor Relations Board (NLRB), Equal Employment Opportunity Commission (EEOC) and a variety of other federal and state agencies. He also provides day-to-day legal advice to employers with respect to occupational safety and health and all aspects of the employment relationship.

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