Avoiding the Pitfalls of New "Ban the Box" Laws when Hiring Drivers and Other Employees

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In an effort to give individuals with criminal records a "fair chance" at re-entering the workforce and productive society, there has been a push, backed by the Equal Employment Opportunity Commission, worker advocacy groups, and the current administration, to enact so-called "Ban the Box" legislation. In general, Ban the Box laws prohibit employers from inquiring into a job applicant's criminal history on an employment application (giving the law its nickname, by banning the inclusion of a box that must be checked to indicate a criminal history), or inquiring into an applicant's criminal history at any time prior to the making of a conditional job offer, or, in some jurisdictions, prior to conducting a first interview.

Under Ban the Box laws, criminal history still may be inquired into—and background checks run—but only after the applicant has been evaluated on the ability to perform the job, without the stigma of a criminal conviction hanging over the applicant's head.

Currently, seven states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island) and Washington, D.C. have enacted Ban the Box laws that affect almost all private employers, which includes trucking and transportation firms. Many other states have enacted more limited Ban the Box laws for public employers (e.g., state agencies and municipalities), which, in some instances, also apply to private firms that hold state contacts. Additionally, over 50 municipalities have enacted their own Ban the Box laws (such as Boston, Buffalo, Chicago, San Francisco, Philadelphia, and Seattle), which in many instances apply to private employers. Ban the Box advocates continue to lobby more states and municipalities to follow suit, and it is likely that Ban the Box legislation will be enacted in more and more states and municipalities.

Readers may now be scratching their heads saying, but the Federal Motor Carrier Safety Regulations (FMCSR) contain rules and regulations for employment applications involving applicants applying to drive commercial motor vehicles. (*See* 49 C.F.R. § 391.21). Section 391.21 also has been adopted in most states. The

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FMCSR *specifically requires* applicants completing a commercial driver application to provide, among other information: (1) a list of all convictions for violations of motor vehicle laws or ordinances (other than parking) for the prior 3 years; and (2) a statement detailing any denial, revocation or suspension of their driver's license.

So how can trucking companies reconcile the Section 391.21 requirements with the limitations of inquiry into criminal history under state or local Ban the Box laws?

For any driver positions governed by Section 391.21 – positions requiring the operation of a truck with a Gross Vehicle Weight Rating (GVWR) of 10,001 pounds or above – commercial motor carriers can avail themselves of exemptions written into the Ban the Box laws—most of which contain an explicit exemption in instances where federal or state laws require employers to exclude applicants with certain criminal convictions from employment. However, in these instances, carriers must be careful to only request criminal history information on the initial application that is specifically required under Section 391.21 (as noted above). Do not push the limits and ask more – you will be able to do so either at the interview stage or once the conditional offer of employment has been made.

Motor Carriers also cannot take a one-size-fits-all approach to their employment applications. For those in Ban the Box jurisdictions, while you are permitted (required) to make certain criminal history inquiries on your applications for commercial drivers, you may not do so for any non-driving positions (or for driving positions only requiring the operation of trucks with a GVWR of 10,000 pounds or less). A good practice for some carriers is to use one "master" application, augmented by different supplements for different positions. For example, individual supplements could be created for drivers, sales, IT, and support staff (and different supplements also are useful for carriers with hiring sites in multiple states/municipalities that may have conflicting employment laws and ordinances). As always, but especially when dealing with statutory/regulatory schemes that may differ between the various locations out of which a carrier operates, seek guidance from competent transportation/employment counsel before making any changes to your applications or hiring practices to ensure compliance.

For more information on labor and employment issues in the transportation industry, contact Michael Hughes or Heather Bailey.