

How Can Employers Reconcile the Federal Motor Carrier Safety Regulations with Growing “Ban the Box” Laws?

Labor & Employment Law Update

By Jeffrey Risch and Sara Zorich on April 8, 2015

The Federal Motor Carrier Safety Administration Regulations (FMCSR) set forth rules and regulations for employment applications involving applicants applying to drive commercial motor vehicles. (*See* 49 C.F.R. § 391.21). Section 391.21 has been adopted in most states (for example, Illinois law recognizes Section 391.21 pursuant to Title 92 of the Illinois Administrative Code).

FMCSR specifically requires applicants completing a commercial driver application to (1) list all violations of motor vehicle laws or ordinances (other than parking) of which the applicant was convicted for in the prior 3 years and (2) provide a statement setting forth the details and facts of any denial, revocation or suspension of their driver's license.

In recent years, a growing number of states, in addition to local municipalities, are passing “Ban the Box” laws that prohibit employers from inquiring into criminal convictions on their written applications for employment or at any time prior to a conditional job offer. In fact, as of January 1, 2015, the Illinois Job Opportunities for Qualified Applicants Act (a.k.a. “Ban the Box”) bars private employers with 15 or more employees from asking about, requiring disclosure of, or considering an applicant's criminal history, until the employer has notified the applicant of his or her selection for an interview or until a conditional job offer has been made.

So how are employers supposed to reconcile Section 391.21 requirements with the limitations of inquiry into criminal conduct under local or state “Ban the Box” laws? Employers who have job positions governed by Section 391.21 should recognize and rely on any expressed exceptions under such local or state laws. For instance, Illinois’ “Ban the Box” law permits employers to ask about convictions on an application if “employers are required to exclude applicants with certain criminal convictions from employment due to federal or State law.” (820 ILCS 75/15(b)(1)). However, employers must be very careful to only request information on the initial application that is specifically required under Section

391.21.

An additional hurdle for employers is that some states have anti-discrimination laws that limit otherwise permissible inquiries. As an example, the Illinois Human Rights Act (IHRA) prohibits private employers with 15 or more employees from asking applicants about any sealed or expunged criminal record of conviction. However, once again there is an exception to the IHRA when the request is "otherwise authorized by law." Since 49 C.F.R. 391.21 requires an employer to inquire about ALL violations of motor vehicle laws of which the employee was convicted in the past three years on an application, this is an exception to the IHRA and no qualifying language regarding sealed or expunged records is required. But again, any inquiry into other types of convictions not covered by FMCSR (after selection for interview or conditional offer is made) must have the qualifying language required under the IHRA.

Bottom Line: Employers cannot follow a one size fits all approach with employment applications. Trucking companies throughout the United States, and particularly in the Midwest, must review their applications for drivers of commercial vehicles to ensure they are complying with the requirements under federal, state and local laws.

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