

# Job Posting and Ban the Box

## Labor & Employment Law Update

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Over 33 states and 150 cities, counties and municipalities have enacted Ban-the-Box laws that prohibit employers from asking about an applicant's criminal record or criminal history prior to the applicant being selected for an interview or, if there is no interview, prior to a conditional offer of employment.

But did you know that Ban-the-Box laws can also impact your job posting or advertisement?

Yes, these laws can, and much like the Fair Credit Reporting Act (FCRA) and Americans with Disabilities Act (ADA), Ban the Box laws are being used by "professional plaintiffs" to go after employers for technical violations.

For example, New Jersey, New York City, Washington and Wisconsin's Ban the Box laws specifically prohibit employers from asking applicants about their criminal history before making a job offer – including in job postings. In those jurisdictions, having job postings or advertisements that state: "background check is required," "clean criminal history," "no felons," "no criminal background," or any other language that expresses any limitation in the hiring of an individual, directly or indirectly, based on his or her arrest or criminal background violate the law.

While the majority of Ban the Box laws do not expressly include prohibitions of such language in job postings and advertisements, employers now have potential exposure if they decide to include language of that kind. For example, an applicant could argue that while a state or local law does not expressly prohibit using language regarding criminal history in a job posting or advertisement, by doing so the employer is, in essence, unlawfully seeking criminal history information from job candidates. Additionally, if the state or local law prohibits discrimination against individuals with arrest records, the same legal argument the EEOC uses for Title VII discrimination claims based on arrests or convictions could be used – i.e., that the use of arrest records has a disparate impact on individuals of certain protected classes by eliminating, for example, more African American or Hispanic applicants as compared to applicants outside those groups.

Thus, while Ban the Box seems pretty straightforward, it is important to understand the details of each state and local law that may apply to your business. Moreover, it is important to review your job postings, advertisements and recruiting materials to make sure that they are up to date and not creating

potential liability for you.

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