

REMEMBER TO THINK OUTSIDE THE BOX: BAN-THE-BOX LAWS ARE NOT THE ONLY RESTRICTIONS ON CONSIDERATION OF AN APPLICANT'S CRIMINAL HISTORY

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A growing chorus of cities, counties, and states have passed “ban-the-box” laws that restrict when and how employers can consider an applicant’s or employee’s criminal history. Currently, thirteen states (California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico Oregon, Rhode Island, Vermont, Washington) and eighteen cities and counties (Austin, Baltimore, Buffalo, Chicago, Columbia (MO), District of Columbia, Kansas City (MO), Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George’s County (MD), Rochester, San Francisco, Seattle, Spokane, and Westchester County (NY)) have ban-the-box legislation for private employers.

However, employers often forget that use of an individual’s criminal history in making employment decisions may also violate the federal prohibition against employment discrimination under Title VII of the Civil Rights Act. For instance, an employer’s neutral policy to exclude applicants from employment based on certain criminal conduct may disproportionately impact individuals of a certain race or national origin.

Recently, Dollar General Corp. agreed to pay \$6 million to resolve a discrimination suit brought by the United States Equal Employment Opportunity Commission over the use of Dollar General’s broad criminal background check policy that purportedly discriminated against African-American applicants and employees. In addition to the monetary settlement, Dollar General must hire a criminology consultant to develop and implement a new criminal background check policy. The consent decree also requires Dollar General to update its reconsideration process and make it clear to rejected applicants that they may provide information to support reconsideration of their exclusion. The consent decree further enjoins Dollar General from discouraging individuals with criminal backgrounds from applying. Finally, Dollar General must provide reports to the EEOC about the implementation of any new criminal history checks and reconsideration processes.

This case reminds employers that, regardless of their state and local ban-the-box laws, criminal conduct exclusions must have some demonstrable business necessity and connection to the job at issue. EEOC guidance advises employers to consider the nature of the crime, the time elapsed, the

nature of the job, and then provide an opportunity for individualized assessment. The individualized assessment should give the applicant the opportunity to demonstrate that the exclusion does not properly apply to him. Relevant evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents or criminal conduct;
- The length of consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Employers should continually ensure that their criminal background check policies comply with all local, state, and federal laws – including Title VII.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on any state-specific laws or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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