New "Ban-the-Box" Legislation Eliminates the Easy Button for Avoiding Negligent Hiring Liability

Andrew A. Beerworth

Most employers, including those within the retail and restaurant industries, typically conduct criminal background checks on job applicants before making hiring decisions. If properly crafted and implemented, background screening policies allow employers to minimize the risk of employee theft and fraud, ensure a safe workplace for all employees, and avoid liability for negligent hiring. One of the ways in which employers have traditionally screened candidates is by including a specific question about criminal arrests, charges and/or convictions on the job application itself. The job application, however, has become a problematic means of screening applicants in recent years.

In a 2012 Enforcement Guidance Memorandum, the U.S. Equal Employment Opportunity Commission (EEOC) warned employers that categorically excluding job applicants based on arrest and conviction records may well violate VII of the Civil Rights Act of 1964.[1] The EEOC explained that facially neutral but broad-sweeping criminal records policies can have the effect of disproportionately screening out racial minorities, particularly African Americans and Hispanics, due to markedly higher arrest and conviction rates among these groups. The EEOC staked out a position that the mere existence of an arrest record is never an appropriate basis on which to deny someone an employment

[1] *EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, Number 915.002 (April 25, 2012). http://www.eeoc.goc/laws/guidance/arrest_conviction.cfm. Last visited: November 25, 2014.

opportunity.[2] With respect to conviction records, the EEOC declared that covered employers may face "disparate impact" liability under Title VII unless they use "targeted" criminal records screens which are "narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question," and/or provide an "individualized assessment" whereby excluded applicants have an opportunity to show that the "business necessity" rationale for the exclusion does not apply to his or her particular circumstances.[3] In other words, employers must be able to articulate why the specific type of crime for which an excluded applicant was convicted made him or her unsuitable for the specific position in question.

The EEOC also addressed so-called "ban-the-box" laws which prohibit employers from even asking about an applicant's conviction history in an application. Ban-the-box laws generally prohibit employers from inquiring into an applicant's criminal background until after an applicant has been selected for an interview or a conditional offer of employment is made. Alluding to the ban-the-box movement, the EEOC approvingly remarked that "[s]ome states require employers to wait until late in the selection process to ask about convictions."[4] It went on to recommend, as a best practice, "that employers not ask about convictions on job applications."[5] In making this recommendation, the EEOC endorsed the "ban-the-box" policy rationale that "an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience."[6]

At the time of the EEOC's 2012 memo, only five states—Connecticut, Hawaii, Massachusetts, New Mexico and Minnesota—had statewide ban-the-box legislation.[7] In the two years since, another

---

[2] *Id.* at § V(B)(2).
[3] *Id.* at § V(B)(4).
[4] *Id.* at § V(B)(3).
[5] *Id.*
[6] *Id.*
[7] Conn. Gen. Stat. § 46a-80; HRS §§ 378-2, 378-2.5; M.G.L. Ch. 6 §§ 151B, 168-173; N.M. Stat. §§ 28-2-1 et seq.; Minn.Stat. § 364.021.

eight states—California, Colorado, Delaware, Illinois, Maryland, Nebraska, New Jersey and Rhode Island—have enacted ban-the-box statutes.[8] Although some of these statutes apply only to public employment, the statutes in Hawaii, Illinois, Massachusetts, New Jersey, Rhode Island and Minnesota apply to private employers as well.[9] Minnesota and Rhode Island not only ban criminal conviction questions from job applications but also prohibit employers from ever inquiring whether an applicant has been arrested.[10] Various cities and counties in an additional 17 states—Florida, Georgia, Indiana, Kentucky, Louisiana, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington and Wisconsin—have adopted ban-the-box hiring policies by ordinance, resolution or administrative action, and several of them apply to both public and private employers.[11] The movement has even inspired some degree of voluntary compliance. A 2013 amendment which extended Minnesota's law to private sector hiring prompted the Minneapolis-based retailing juggernaut, Target Corporation, to ban the box in locations nationwide.[12]

Employers in most jurisdictions have a common law duty to exercise reasonable care in hiring to prevent foreseeable risks of harm to customers and the general public.[13] Negligent hiring claims often involve an employee's intentional (if not altogether criminal) act of harming a third party, and the employer's general liability policy may not cover such claims.[14] Courts in some jurisdictions have

---

[8] Cal. Labor Code § 432.9; C.R.S. § 24-5-101; 19 Del. C. § 711; Ill. H.B. 5701; Md. State Pers. & Pens. Code § 2-203; Neb. LB 907, § 12; N.J. AB 1999; R.I. Gen. Laws §§ 28-5-6, 28-5-7.

[9] National Employment Law Project, *Ban The Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records*, at p. 2 (September 2014).

[10] Minn. Stat. Ann. § 364.04; R.I. Gen. Laws § 28-5-7(7).

[11] *Supra* note 9 at pp. 16-54.

[12] *Id.* at p. 7.

[13] *See, e.g., Mindi M. v. Flagship Hotel, Ltd*, 439 S.W.3d 551, 557 (Tex.App. 2014)("An employer is negligent if the employer hires, retains, or supervises an employee whom the employer knows, or by the exercise of reasonable care should have known, is unfit or incompetent, and whose unfitness or incompetence creates an unreasonable risk of harm to others because of the employee's job-related duties").

[14] *See, e.g.*, 7A Couch on Ins. § 103:31 (3d ed.1997)("There is a difference of opinion regarding the coverage of negligent hiring and supervision claims where the person hired or supervised has committed an intentional tort. Some courts hold that claims based upon negligent supervision or hiring are covered, while other courts hold that the intentional-acts exclusion also operates to exclude coverage for negligent supervision or control of the wrongdoer"); *Westfield Ins. Co. v. Tech Dry, Inc.*, 336 F.3d 503, 508 (6th Cir. 2003)(noting that "courts have reached differing conclusions about whether

imposed a duty on employers to perform pre-employment background checks[15] and employers in certain industries are statutorily required to do so.[16] Even in the absence of an affirmative statutory or common-law duty, many employers recognize that background checks show diligence in vetting job candidates and, therefore, provide much of the ammunition needed to successfully ward off negligent hiring claims.[17]

In an effort to minimize their tort liability and maximize efficiency in the hiring process, employers have historically required all applicants to divulge criminal background information at the earliest possible point—the application itself. This screening tactic is now disfavored under Title VII and prohibited in several states and municipalities across the country. Given recent developments at the federal, state and local levels, employers in the retail and restaurant industries should review their job applications and criminal record screening policies to ensure compliance with Title VII and any ban-the-box statute, code, ordinance or directive that may apply. Employers can and should remain vigilant in investigating prospective employees and protecting themselves from negligent hiring claims, but in some instances criminal background checks and employment decisions based on them should be made later on in the hiring process. Although the job application was once an employer's "easy button" for excluding applicants who may have increased exposure to negligent hiring claims, the law is now moving away from the application as an acceptable screening tool.

---

negligent hiring constitutes an accident and, more specifically, about whether negligent hiring claims are covered where the person hired or supervised has committed an intentional tort").

[15] *See, e.g., Mindi M.*, 439 S.W.3d at 557 (expert testimony regarding hiring practices within the hospitality industry provided basis for imposing duty on employer to conduct criminal background checks of applicants); *Spencer v. Health Force, Inc.*, 107 P.3d 504 (N.M.2005)(employer had common law duty to conduct criminal background check before hiring in-home caregiver); *Munroe v. Universal Health Servs., Inc.*, 596 S.E.2d 604, 607, n. 4 (Ga.2004)(holding that employers in "more sensitive businesses" who fail to conduct criminal background checks of job applicants may be held liable for negligent hiring even absent a statutory duty).

[16] *Supra* note 1 at § VI(A).

[17] *Id.* at n. 52 (noting that 55% of employers surveyed cited the need to reduce liability for negligent hiring as the reason for conducting criminal background checks of job applicants).