

Articles

Check Yourself. *Ban the Box.*

More Cities Prohibit Criminal Background Checks

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We previously told you about the growing movement to “Ban the Box,” which goes beyond prohibiting a “criminal history or conviction” question on an employment application, and it is now impacting private employers in Texas.

There are currently 21 states that have joined the “Ban the Box” movement. In addition, more than 100 cities and counties across the country have passed legislation restricting employers’ ability to conduct criminal background checks. Now, with the passing of the Fair Chance Hiring Ordinance (“Ordinance”), Austin has become the first city in Texas to ‘Ban the Box’ for private employers.

The Ordinance became effective April 3, 2016—less than two weeks after it was passed—and applies to any “person, company, corporation, firm, labor organization, or association that employees at least fifteen individuals whose primary work location is in [Austin] for each working day in each of 20 or more calendar weeks in the current or preceding calendar year,” as well as to “an agency acting on behalf of an employer.” The Ordinance prohibits covered employers from soliciting or considering criminal history information about a job candidate absent a conditional offer of employment. The Ordinance is broadly written and covers virtually any type of employment—*i.e.*, full-time work, part-time work, temporary or seasonal work, contract work, casual or contingent work, work through the services of a temporary or other employment agency, and participation in a vocational, apprenticeship or education training program.

In addition to candidates applying for a position, the Ordinance prohibits a covered employer from taking adverse action against incumbent employees (*e.g.*, failure to promote) based on criminal history unless the employer has a “good faith belief that the individual is unsuitable for the job based on an individualized assessment conducted by the employer.” Individual assessments conducted must include, at a minimum, an evaluation of three necessary elements: (1) the nature and gravity of any offenses in the individual’s criminal history; (2) the length of time since the offense and completion of the sentence; and (3) the nature and duties of the job that the individual holds or for which the individual has applied. Similar to the requirements under the Fair Credit Reporting Act, the Ordinance requires that any adverse action taken by employers must be communicated to the candidate or employee in writing.

Notably, the Ordinance provides limited exceptions for certain businesses, and the City of Austin is delaying implementation of the administrative penalties for violations of this Ordinance for one year—penalties include up to \$500 for each violation. However, the ability of aggrieved individuals to file complaints with the Equal Employment/Fair Housing Office can occur immediately. Therefore, employers doing business in major cities, especially those in Texas, should immediately begin to consider implementing changes to their hiring policies and procedures, including but not limited to, published job descriptions, employment applications, offer letters and interviewing guidelines to stay in compliance with this ever growing trend.

For assistance with creating compliant pre-employment processes and long-term monitoring of employer practices, please contact the Andrews Kurth Labor & Employment team.