

Prepare now for Oregon's ban-the-box law

The state's new rule regarding background checks may be a trap for unwary employers

Dave's Killer Bread recently made waves when plans were announced to sell the local organic bread company to Georgia-based Flower Foods for \$275 million. Dave's Killer Bread had been making waves for years, however, for a practice of evaluating job applicants without regard to their criminal background. Though not going so far, a new Oregon law (HB 3025) also hopes to provide some applicants with a better shot at employment by making it unlawful for an employer to deny an applicant an initial interview based on his or her criminal conviction.

Under the new law, an employer may not ask an applicant to disclose the existence of a criminal conviction prior to an initial interview. Therefore, traditional employment applications asking applicants to "check a box" if they have been convicted of a crime will be unlawful; hence the "ban-the-box" moniker. If an employer does not have a formal interview process before making a conditional offer of employment, then it cannot ask about an applicant's criminal background be-



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fore making the conditional offer.

There are several limited exceptions to the law, including for law enforcement, criminal justice system employers, and "nonemployee" volunteers. There is also an exception if another federal, state or local law requires consideration of the applicant's criminal history.

Importantly, the law will not actually change what employers can consider when making a hiring decision; it only regulates the timing of when an employer can ask about and consider an applicant's criminal background. It does not affect the bottom line of what an employer may screen for in evaluating applicants.

Based on the fact that it is mostly a process and not a policy issue, it may be easy

to overlook this new rule, but that would be a mistake. The Bureau of Labor and Industries has been charged with enforcement and development of penalties for offending employers. Employers should use this as an opportunity to revisit their hiring processes and forms and ensure they are up to date before the law takes effect on Jan. 1, 2016.

At this point, it is unclear what constitutes an "initial interview" under the law; however, best practice would likely be to only ask for or check an applicant's criminal background after there has been a meaningful discussion with the applicant and opportunity for him or her to explain any criminal convictions, potential "false hits" on a criminal background search (such as an individual with an identical name), and rehabilitative efforts undertaken since the conviction.

The ban-the-box legislation dovetails with recent Equal Employment Opportunity Commission guidance on blanket rules denying employment to applicants with a criminal background. The EEOC's position was that denying employment to applicants convicted of a crime tends to have a disparate impact on certain minority populations. Similar to the new ban-the-box legislation, the EEOC guidance advocates for employers to perform individualized assessments of each applicant. In practical terms that means some form of discussion with an applicant about his or her criminal background before declining to extend an offer of employment, rather than adopt blanket policies prohibiting the hiring of applicants with a history of arrests or criminal convictions. Under both the new Oregon law and the EEOC guidance, an employer is free to both re-

quest and consider an applicant's criminal convictions during and after that initial interview.

The intent of the ban-the-box regulation is to provide Oregonians with a criminal conviction a second chance. Indications from the 13 states that have passed similar laws are that these types of rules do help reduce the roughly 60 to 70 percent unemployment rate for ex-felons. According to some studies, more than 50 percent of released prisoners are arrested again within a year, and more than 75 percent are arrested again within three years. Higher employment rates may reduce the number of repeat offenders by offering them an easier path to assimilate with society.

In any event, employers should remain vigilant when hiring, including carefully considering the potential risk and liability of hiring someone with a criminal conviction, and whether the conviction is relevant to the position. For example, someone who served time for check fraud might not be a good bank employee, and day care providers and schools can maintain absolute prohibitions on hiring anyone convicted of a crime against children. On the other hand, someone with an old misdemeanor DUII conviction and a compelling story about how that experience changed his or her behavior may not be a risky hire for a construction contractor.

Employers should review their applications and hiring practices now to ensure that they are in compliance with the new law so as not to be caught off guard come Jan. 1.

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