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Obama Bans the Box for Federal Agency Jobs: Are Contractors Next?

Private employers consider removing criminal history inquiry from applications

BY DOUG CHARTIER
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The Obama administration has taken the latest step to “ban the box.”

President Barack Obama announced Nov. 2 his order for federal agencies to delay the consideration of applicants’ criminal backgrounds when hiring for most positions. While the mandate applies only to federal government employers, Congress is currently considering a bill that will not only codify the president’s order but also extend it to federal contractors.

Private employers, particularly those doing business with the U.S. government, may be wondering how long until they will be required to omit the criminal history inquiries from their job applications nationwide.

Many employers include on job applications a box that applicants are required to check if they have been convicted of a felony or a misdemeanor. Advocates for criminal justice reform and nondiscrimination have pushed to outlaw that checkbox out of concerns that it can unfairly preclude qualified candidates early in the screening process if they have any conviction in their background.

As part of that movement, Obama is di-

“We knew this was coming, but certainly the next step in the evolution of this ban-the-box movement is laws that are going to cover private employers,” Fano said.

The question is when, and whether private employers should proactively ban the box ahead of a federal mandate. Obama cited Walmart and Target among corporations that were already phasing out the criminal history checkbox on their applications.

“The larger employers are feeling it already because they’re located in multiple jurisdictions,” Fano said. Private employers are starting to look at their locations, determine the location with the strictest screening law or ordinance and make that their company-wide policy on criminal history inquiry, he added.

Colorado is among the 19 states to have passed some version of a ban-the-box law already. Colorado’s version is limited to state agencies, which can’t run a background check until they consider the applicant a finalist or make a conditional offer to that applicant.

Seven states include private employers in their ban-the-box laws. Besides the states, more than 100 U.S. municipalities and counties have passed their own ban-the-box



ATTORNEYS SAY STATES WILL INEVITABLY FOLLOW THE WHITE HOUSE’S LEAD IN LEAVING CRIMINAL HISTORY OUT OF EMPLOYMENT APPLICATIONS.

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The decision to ban the box ahead of any federal mandate depends on the employer, the size and the types of positions it needs to fill, Fano said. A blind removal of the criminal history question isn’t necessarily warranted in all cases.

“I don’t think we’ve reached that tipping point yet,” Fano said. “But the evolution of this process is that there will be ban-the-box laws governing all employers in all states eventually.”

There are reasons why employers might choose to hold onto the box where it’s still lawful. Employers have been held liable for not performing a sufficient background check on hires who later committed a crime similar to one they committed in the past, Fano said.

If the employer is merely delaying that part of the screening process, the safety and liability concern “may be muted,” but there are limits to what an employer can do once it discovers adverse criminal history later on, especially once an offer has been made, Fano said. “The further you get on the continuum, the harder it is to extricate yourself from the employment of this individual.”

The next nationwide employers to see that scenario might be federal contractors, given the logical next step from federal agency ban-the-box rules.

Last month, a congressional ban-the-box bill cleared a Senate committee with bipartisan support. If passed, the “Fair Chance Act” would not only codify a ban-the-box rule on federal agency jobs but also for private companies hiring for positions within the scope of a federal contract. Criminal history could only be inquired about once the applicant reaches the conditional offer stage.

In its current form, the bill carries exceptions for certain positions, including those in law enforcement and national security or those that involve interaction with minors or

security clearance.

Even if Congress bans the box for positions within the scope of a federal contract, “there could be bleed there,” Prokott said. A company could hire an employee with no expectation to include him or her in the scope of a federal contract, and hence lawfully include the criminal history question on that individual’s application. But if that employee gets pulled into future federal projects, it’s unclear whether the employer would therefore be in noncompliance given the original application.

When it comes to ban-the-box measures, federal contractors should be “especially diligent in keeping up with developments” at this point, according to David Powell, a shareholder with Ogletree Deakins in Denver.

In the meantime, Powell said, his firm tends to point clients toward the Equal Employment Opportunity Commission’s guidance on the criminal history issue, as an employer’s handling of criminal history plays into other discrimination claim risks beyond the box.

The EEOC’s 2012 guidance includes three factors in which criminal history may be linked to hiring decisions: the nature and gravity of the offense and conduct, the time elapsed since the offense or completion of a sentence, and the nature of the job sought.

The EEOC also recommends that employers not ask for an applicant’s arrest records on applications or consider sealed records at any point.

“The key in all of this ... is to do an assessment to determine ... the impact of that conviction,” Powell said. “I do think that as a rule of thumb you should make sure whatever information you rely upon is job related and that you do an individualized assessment.”

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Ron Fano, labor and employment attorney

recting the Office of Personnel Management to modify its rules to delay inquiries into criminal history. Many agencies have already taken that step, according to the Nov. 2 fact sheet released by the White House.

“What we’re suggesting is, when it comes to the application, give folks a chance to get through the door,” Obama said in the speech announcing the order. He also expressed the hope that removing criminal history questions from applications “becomes a basic principle across our society.”

This development doesn’t come as a surprise, said labor and employment attorney Ron Fano, Denver office managing partner of Spencer Fano.

measures, according to the National Employment Law Project.

If a large employer is accepting employment applications nationwide that uniformly ask about criminal history, there’s a good chance it is violating ban-the-box laws somewhere, said Dan Prokott, who practices labor and employment law out of Faegre Baker Daniels’ Minneapolis office. Minnesota is one of the states with a private employer ban-the-box law.

“I continue to think it’s wise for larger employers across the U.S. to think critically before they include questions asking about criminal history in their applications,” Prokott said.