

## Legal Sidebar

# Obama Announces Effort to “Ban the Box” in Federal Hiring

11/18/2015

---

Earlier this month, President Obama announced a new initiative to [“ban the box”](#) on federal job applications. The phrase “ban the box” refers to the section of employment applications that directs prospective employees to check a box if they have been arrested for, or convicted of, a crime. In his announcement, President Obama directed the Office of Personnel Management to create new rules that would prevent federal agencies from making inquiries into an applicant’s criminal history until a later stage in the hiring process.

In general, advocates of “ban the box” efforts have long sought such policies in order to give all job applicants, including otherwise qualified individuals who have a criminal history, a better chance to compete for a job. Although some federal agencies already follow this practice, the recent executive action would mandate that the policy is applied uniformly to all prospective federal employees. In addition, the new policy is expected to contain exceptions for positions that involve public safety.

It is important to note that efforts to “ban the box” have not been limited to the federal employment context. For example, [many](#) states, cities, and counties have “banned the box” on applications for public employment. A smaller [number](#)—including seven states—have “banned the box” on applications for private employment. Though such laws differ by jurisdiction, they generally do not completely prevent employers from inquiring into an applicant’s criminal history. Rather, these laws prohibit employers from asking about an applicant’s criminal history before a specified event in the hiring process has occurred (e.g., before the employer conducts an initial interview of the applicant or gives the applicant a conditional offer). Likewise, several private employers, including Walmart and Home Depot, have voluntarily adopted such policies.

In addition, the Equal Employment Opportunity Commission (EEOC) has taken the position that employment inquiries into a job applicant’s arrest or conviction record may be unlawful under some circumstances. Specifically, EEOC [guidance](#) states that such inquiries may constitute unlawful race discrimination in violation of [Title VII of the Civil Rights Act of 1964](#). Under Title VII, employers are prohibited from discriminating against job applicants and employees on the basis of race, color, national origin, religion, or sex. In addition to prohibiting intentional discrimination, the statute has long been interpreted by the courts to bar so-called [disparate impact discrimination](#), which may occur when an otherwise neutral employment practice that is not related to job performance has a discriminatory effect.

As a result, an employer who considers a job applicant’s arrest and conviction record may violate the law under certain circumstances. In an [early case](#), for example, a job applicant was refused a position as a railroad clerk based on a previous conviction for refusing military service. A federal district court held that the employer had violated Title VII because its policy of not hiring anyone with a criminal conviction other than a minor traffic offense had a disparate impact on the basis of race and was not otherwise justified by business necessity.

This does not mean that federal law requires employers to hire all applicants who have been convicted of a crime. Instead, employment policies are more likely to be upheld if they are flexible, particularly if an employer takes a tailored approach by considering how a job applicant’s offense relates to the job in question. Applying this standard,

courts have permitted employers to reject job applicants under a number of circumstances, including denying a banking job to a robbery convict and denying a [driving position](#) to an individual convicted of driving under the influence.

Meanwhile, legislation to “ban the box” is currently pending in Congress. Under the Fair Chance Act ([H.R. 3470/S. 2021](#)), federal agencies and federal contractors would be prohibited from inquiring into a job applicant’s criminal history until the individual reaches the conditional offer stage, although exceptions would be made for certain positions involving public safety. President Obama has [urged](#) Congress to pass such legislation.

Posted at 11/18/2015 09:37 AM