

SPECIAL ISSUE

brief



ENSURING COMPLIANCE WITH CRIMINAL BACKGROUND CHECKS

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ENSURING COMPLIANCE WITH CRIMINAL BACKGROUND CHECKS

I. Introduction

There has been an explosion of interest at the federal and state level for easing and/or delaying criminal background checks. For many employers, these changes do not have a significant impact on their employment practices. However, for the senior living industry, these developments raise specific issues.

In this Special Issue Brief, we will focus on federal and state requirements regarding the use of criminal background checks for employees and job applicants. At the federal level, the United States Equal Employment Opportunity Commission (“EEOC”) recently issued guidance regarding the proper use of background checks for current or prospective employees.

At the state and local level, we have seen a rising trend of “ban-the-box” laws, which prohibit employers from inquiring into an applicant’s criminal history in the initial stages of a job application (such as having a checkbox on a job application inquiring into whether a job candidate has ever been convicted of a crime). State and local ban-the-box laws vary widely, as discussed below, and in some cases, will not apply in the seniors housing context when other state laws require senior housing providers to conduct background checks of certain classes of employees. However, where there is no pre-existing state law duty to conduct background checks, seniors housing providers may be subject to federal and/or state requirements. Senior living employers should be mindful of their current hiring practices in light of changing state laws to ensure compliance.

II. Executive Summary

Federal anti-discrimination and credit reporting laws may be implicated when an employer runs background checks on employees or job applicants. Recently issued federal guidance provides employers with a list of best practices to ensure compliance with federal laws.

At the state level, most ban-the-box laws apply to public employers and agencies, but not private employers. For example, California recently enacted a statewide ban-the-box law (effective, July 1, 2014), which will apply only to state and local agencies. At the county and municipal level, however, ban-the-box laws occasionally cover private employers as well. For example, San Francisco, Seattle, and Philadelphia have passed ban-the-box legislation for private employers.

In the assisted living context, providers in nearly all states have independent duties under state law to obtain criminal background information for employees who perform certain resident-related, supervisory, or administrative functions, and to ensure that individuals convicted of certain crimes are not employed in these roles. Ban-the-box laws will not apply in this context. However, to the extent that state law requires only certain categories of employees to be background-checked (such as employees serving supervisory or caregiver functions), the provider may need to comply with state or local ban-the-box laws and federal guidance with respect to other employees for whom criminal background checks are not mandated by law.

In the independent living context, ban-the-box laws and federal guidelines are more likely to apply, since independent living is unlicensed in most states. In this context, the provider is treated like any other employer.

Even in unlicensed communities, however, providers may be able to rely on exceptions to state ban-the-box laws, where applicable (see section IV below). The provider should limit the scope of background checks only to those employees whose positions are considered sensitive, to exclude job candidates only for those types of crimes that would be relevant to the position (i.e., fraud, theft, violent crime, and elder/child/ domestic abuse), and to consider the length of time since the candidate was convicted or served out the sentence for the crime in question.

III. Federal EEOC Guidance

Employers may generally use background checks as part of their employee hiring, retention, and promotion practices. However, these procedures must comply with federal anti-discrimination and credit reporting laws, which are regulated and enforced by two different federal agencies. On March 10, 2014, the EEOC and U.S. Federal Trade Commission (“FTC”) issued joint guidance regarding the proper use of background checks in the employment context, clarifying employees’ rights and employers’ duties in conducting background checks that comply with federal law.¹

¹ “Background Checks: What Employers Need to Know,” available at: http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm.

The EEOC earlier had in place Guidance issued in 2012 regarding criminal background checks. Specifically, on April 25, 2012, the EEOC issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e*. Its stated purpose was as follows, according to the EEOC:

The Commission intends this document for use by employers considering the use of criminal records in their selection and retention processes; by individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and by EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

Below is a brief summary of how that Guidance impacts employers. The 2012 EEOC Guidance does not substantively change earlier law. However, it does put employers on notice that there is a new emphasis on the use of criminal background checks. The EEOC believes that “The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.”

A. Anti-Discrimination Laws

The EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964 (“Title VII”), which prohibits employers from engaging in discriminatory action on the basis of a protected class, which includes race, national origin, color, sex, religion, disability, and age. Violations of Title VII include running background checks on applicants of one race but not another, or using negative background check results as the reason for turning down applicants of one ethnic group while ignoring similar negative background check results for applicants of another ethnic group. In short, Title VII prohibits employers from taking an applicant’s protected class into consideration as part of the hiring process.

These, we can say, are “easy cases” of overt discrimination. However, Title VII also prohibits otherwise well-intentioned practices that appear neutral on their face but which result in discriminatory outcomes. In such cases, an employer’s intent or good faith is not relevant to whether the action is discriminatory under Title VII. For example, if an employer makes it a policy to exclude applicants who have minor drug or traffic convictions, and this policy results in the systematic exclusion of applicants of a certain race, ethnic background, or other protected class, this policy may still violate Title VII even though the employer had no deliberate intention of excluding such groups from its employment pool. Where there is a systematic exclusion of a protected class, and an unsuccessful job candidate challenges the denial of employment, the employer will have to show that there is a legitimate need to exclude individuals with certain criminal backgrounds, and the background check criteria are meaningfully related to expected job performance.

In legal terms, a background check policy that has the incidental effect of screening out one of the above-referenced categories is said to have a “disparate impact” on a protected class of individuals, and it may violate Title VII if the distinction being made is not job-related and therefore not “consistent

with business necessity.”² An employer can show that background check policy is consistent with business necessity by demonstrating some predictive relationship between the policy and the employee’s performance in the position.³ Although the burden is on the employer to show that there is a relationship between a background check policy and on-the-job performance, the employer does not need to show that the relationship is perfectly predictive. Rather, an action will generally be considered to be consistent with business necessity if there some relationship between the hiring criteria and the employee’s performance on the job or qualification for the job, and there is no reasonable “better way” to filter out unqualified employees.

Prior case law has found that criminal background checks satisfy the business necessity requirement when an employment position implicates public safety, or when an employee comes in contact with a vulnerable population.⁴ Factors in determining the business necessity of criminal background checks based on such an argument would include: (1) the nature and scope of a job applicant’s contact with vulnerable individuals; (2) whether the applicant is alone with the individuals; (3) the extent of the vulnerable individuals’ physical or mental limitations; (4) the nature and gravity of the crime in question; (5) the amount of time that has passed since the conviction or completion of the sentence, and (6) the nature of risk or harm the employer is seeking to avoid.⁵ Simply put, background check criteria must effectively measure the minimum qualifications of an employee for successful performance of the job in question.⁶

1. Unlicensed Seniors Housing Providers-Practical Advice

For unlicensed seniors housing providers, such as independent living providers in most states, Title VII may apply to hiring and background check practices. As noted, Title VII does not prohibit background checks, and may even permit practices that result in a disparate impact to a protected class, but only if there is a valid business necessity for the background check. In determining how a provider’s hiring and retention practices align with Title VII, it is important for the provider to consider the following questions:

1. What is our current criminal background check policy?
2. What are the potential harms we are trying to avoid?
3. How does our background check policy serve to reduce the risk of those harms?

² 42 U.S.C. §2000e-2(k)(1)(A)(i).

³ *El v. Southeastern Pennsylvania Transportation Authority* (“SEPTA”), 479 F.3d 232, 239 (3d Cir. 2007).

⁴ *Griggs v. Duke Power*, 401 U.S. 424 (1971); *El v. SEPTA*, 479 F.3d at 243.

⁵ *Id.*

⁶ *Lanning v. SEPTA*, 181 F.3d 478, 490 (3d Cir. 1999).

4. How dependent are our residents on the employees subject to background checks?
 - a. Do our residents have physical or mental limitations that would make them particularly vulnerable?
 - b. Do employees have access to residents' living quarters or personal property?
 - c. Do employees handle resident funds or access to resident accounts?
 - d. Are employees alone with residents at any time?
5. Is our background check policy overly broad?
 - a. Does it screen out too many types of irrelevant or harmless crimes?
 - b. Do we apply the policy only to the positions where criminal history is related to on-the-job performance?
 - c. Do we consider how long ago the crime occurred when deciding whether it should be the basis for an adverse employment action?

There is no set formula for determining business necessity, and it will be a fact-specific, case-by-case inquiry. If the employer finds that more of its answers to the above questions lean against its existing background check policies than in favor of them, it may be time to make some changes.

2. Licensed Seniors Housing Providers – Practical Advice

For providers that operate licensed communities, such as assisted living, memory care, and skilled nursing, there is often an independent duty under state law to conduct some level of background check on prospective employees, and to ensure that individuals convicted of certain classes of crimes are not employed by the community. Background checks conducted pursuant to state law requirements will always be considered a business necessity, because individuals with certain criminal histories are automatically excluded from working in such communities under state law, and because providers who hire or retain employees with certain criminal convictions may be subject to administrative, civil, or criminal penalties.

Nevertheless, assisted living and other licensed providers should determine when a background check is a legal requirement under state licensing and certification laws, and when it is not. When state laws require background checks only for certain categories of employees, EEOC guidelines may still apply to the remaining employees for whom background checks are not mandatory. A licensed community should still review its background check policies to make sure its policies do not screen more employee categories than required by state law. For those employee categories not covered by state law background check requirements, the provider should ask itself the same questions posed above to determine how its practices comply with Title VII.

3. Mixed Providers – Practical Advice

In the context of communities that provide a spectrum of residential and health care services, such as continuing care retirement communities (“CCRCs”) and multilevel retirement communities (“MLRCs”), a provider may find that the licensed parts of its community may be subject to state-mandated background check requirements, while the unlicensed parts are not. The special problem to be addressed here is possible “spillover” of employees from one part of the community to another. In addition to the questions already posed above, such providers should consider how much freedom employees have to circulate between licensed and unlicensed portions of a campus. Will employees have access to all parts of the community? If so, the provider may find that stricter background check requirements are necessary, even for the employees serving lower levels of care.

B. Federal Credit Reporting Laws

The FTC is responsible for enforcing the Fair Credit Reporting Act (“FCRA”), which is triggered when an employer runs a background check through a “consumer reporting agency.” A consumer reporting agency includes any company in the business of compiling background information on individuals. Despite the Act’s name, FCRA applies to all background information collected by such companies, not only credit information, but also financial and criminal background information.

FCRA does not apply, however, when an employer personally conducts a background check on an employee or candidate (for example, by contacting prior employers or references directly). FCRA also does not apply when a provider, in compliance with state law, requests a criminal background check from law enforcement authorities. State and federal law enforcement agencies are not considered “consumer reporting agencies” as contemplated by FCRA.

For employers who use third parties to compile background information reports, FCRA requires that certain procedures be followed before, during, and after obtaining the background information, described below.

1. Before the Background Check

Before obtaining background information on an employee or job candidate, the employer must get written consent from the candidate/employee, and must notify the candidate/employee that the employer might use this information in making employment decisions. The notice and consent must be in writing and in a stand-alone format separate from the employment application.⁷

⁷ 15 U.S.C. § 1681b(b).

2. Acting on the Background Check

If an employer plans to take an adverse employment action based on information uncovered by a company in the business of compiling background information, FCRA requires the employer to take certain steps before the adverse action. The employer must provide a copy of the report containing the adverse background information and a copy of the pamphlet “A Summary of Your Rights Under the Fair Credit Reporting Act,” so that the candidate/employee has the opportunity to explain any negative information. This pamphlet is typically provided by third party background checking services, and is also available online.⁸

After taking an adverse action, the employer must inform the candidate/employee that the action was based on information in the report, and that the company selling the report was not involved in the hiring decision. The employer must also provide the candidate/employee with contact information for the company that sold the report, and inform the candidate/employee of the right to dispute the accuracy of the report and get an additional free report from the reporting company within 60 days.

3. Record Retention

All personnel and employment records must be kept for at least one year from the date an employment action was taken, whether or not a candidate was hired. Following this period, an employer may dispose of the reports, but must do so securely, by shredding or otherwise destroying the information in such a way that it cannot be reconstructed.

4. Practical Advice

Unlike Title VII, there is no “business necessity” exception in the FCRA requirements. Whether a provider is a licensed, unlicensed, or mixed community, FCRA will apply if the provider hires a company or individual who is in the business of providing background check services to others for a fee. However, when a provider makes inquiry into the employee’s background directly, by contacting prior employers, references, or law enforcement officials, FCRA is not triggered.

Additionally, states may have their own consumer reporting laws that impose stricter requirements than FCRA, in which case the provider would have to comply with both state and federal credit reporting laws.

⁸ Available at: <http://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>.

IV. Ban-the-box laws: 11-state survey

As noted, states have increasingly begun to scrutinize employee background check practices. Employee rights, civil rights, and prisoner rights organizations have lobbied vigorously for states to enact ban-the-box laws which take criminal background inquiries off of employment applications, and typically require employers to hold off on conducting background checks until the employer has determined initial eligibility of the candidate for the job. Some states go further and prohibit background checks until *after* an offer of employment is made.

Ban-the-box laws are a complicated patchwork of state, county, and municipal law. As of the writing of this Brief, eleven states have enacted statewide ban-the-box legislation, and over 60 county and city jurisdictions in over 20 states have enacted similar local laws. This Brief will focus on eleven states that have large concentrations of seniors housing: Arizona, California, Florida, Illinois, Missouri, New York, Nevada, Ohio, Pennsylvania, Texas, and Washington.

For providers in other states, the National Employment Law Project (“NELP”) has compiled comprehensive surveys of state and city/county ban-the-box laws, which are readily available online.⁹ By comparing their state or local laws to those covered in this Brief, providers can still benefit from the recommendations made below.

A. ARIZONA

In Arizona, neither the state legislature, nor any county or city board in the state, has yet enacted ban-the-box laws. Because of the absence of state and local restrictions, senior care providers will need only to satisfy the federal standards described above, when applicable.

B. CALIFORNIA

California has enacted statewide ban-the-box laws, and numerous local jurisdictions have passed similar or more restrictive ban-the-box ordinances, described below.

1. State Law

California enacted AB 218 on October 10, 2013, and the law goes into effect on July 1, 2014.¹⁰ The law applies to state agency, city, county, and special district jobs, and removes questions about criminal convictions from applications for positions within these agencies (with the exception of law enforcement and other positions for which a criminal background check is required by law). AB 218 does not apply to private employers.

⁹ See “Statewide Ban the Box: Reducing Unfair Barriers to Employment of People with Criminal Records, April 2014,” available at: http://nelp.3cdn.net/d399b53681a89e5812_nqm6vuc4k.pdf. For county and municipal ban-the-box Ordinances, see “Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records, Resource Guide, April 2014,” available at: http://nelp.3cdn.net/f515a7fee71c2059d7_pym6br0lh.pdf.

¹⁰ Codified as Cal. Labor Code §432.9.

2. Local Law

Nine local jurisdictions in California have passed ban-the-box laws: the cities of Berkeley, Compton, Carson, East Palo Alto, Oakland, Richmond, San Francisco; and the counties of Alameda and Santa Clara. With the exception of San Francisco, the laws only apply to the city or county as a public employer (and to city contractors and vendors in the cities of Compton and Richmond). Accordingly, in all jurisdictions except San Francisco, county and local ban-the-box restrictions will not apply to senior care providers.

In San Francisco, the Fair Chance Ordinance goes into effect in August 2014. It applies to private employers located or doing business in San Francisco with 20 or more employees, and prohibits background checks before the first live interview, and then only if the applicant is otherwise qualified.¹¹ However, providers required by state law to conduct background checks, such as residential care facilities for the elderly (“RCFEs”) and CCRCs, are not covered by the Fair Chance Ordinance restrictions. For other unlicensed providers (such as independent living), and for facilities with both licensed and unlicensed components, San Francisco’s ban-the-box law may apply to part or all of the facility.

C. FLORIDA

Florida has not passed statewide ban-the-box legislation, but two cities have passed municipal ordinances: the cities of Jacksonville and Tampa. In both instances, the ordinances apply only to city employers, and prevent criminal background checks until after a conditional offer of employment has been extended to a candidate.

Neither state nor local laws in Florida currently restrict background check practices of private employers. Therefore, senior care providers in the state are not subject to any ban-the-box restrictions, although they will be required to satisfy the federal standards described in Section III above, if applicable.

D. ILLINOIS

The Illinois legislature has not yet enacted ban-the-box legislation, but in October 2013, the state governor issued an administrative order requiring all state agencies, commissions, and boards to amend their employment applications to remove questions related to criminal history. The administrative order does not apply to private employers.

The City of Chicago is the only local jurisdiction in Illinois to have adopted ban-the-box restrictions. The city has an executive order in place, issued by the Mayor in 2004, which applies to the Chicago Department of Human Resources and which removes inquiries about criminal history from the City’s job applications. The executive order does not apply to private employers.

¹¹ S.F. Police Code art. 49, §4904(f).

Illinois state and local rules apply only to public employers. Accordingly, senior living providers will not be required to comply with ban-the-box restrictions in the state, although they will still have to satisfy the federal standards, when applicable.

E. MISSOURI

The Missouri legislature has not passed statewide ban-the-box legislation. Among local jurisdictions, only Kansas City has passed a ban-the-box ordinance, which prohibits the City from inquiring about an applicant's criminal history until after it has been determined that the applicant is otherwise qualified for the position, and only after the applicant has been interviewed for the position. The ordinance does not apply to private employers.

Accordingly, senior living providers in Missouri are not subject to state or local ban-the-box requirements, although they will have to satisfy the federal standards, when applicable.

F. NEW YORK

New York does not have a statewide ban-the-box statute. Locally, the Cities of Buffalo and New York have passed ban-the box ordinances.

New York City's ban-the-box prohibition was introduced via executive order by the Mayor in 2011. It applies to the city and to contractors that contract with the Human Services Department. Neither the City nor City contractors can inquire into criminal backgrounds of job applicants until after the first interview. The prohibition does not extend to private employers.

Buffalo's ban-the-box ordinance applies to the City of Buffalo and its contractors as well as private employers of fifteen or more employees doing business in Buffalo. The law prohibits an employer from including criminal background questions on an initial job application, and only permits employers to conduct a background check after the first interview. The law is not applicable to employers hiring for positions where certain convictions or violations are a bar to employment in that position under New York state or federal law.¹²

Because New York state has not enacted statewide ban-the-box legislation, in-state providers need only be concerned about local ban-the-box ordinances. New York City's ban only applies to the City and its contractors, and therefore is not applicable to senior care providers. For unlicensed senior care providers located in Buffalo, and for facilities with both licensed and unlicensed components, Buffalo's ban-the-box ordinance may apply to part or all of the facility.

¹² Code of City of Buffalo §§154-25 – 154-29.

G. NEVADA

In Nevada, as is the case in Arizona, ban-the-box laws have not been passed by either the state legislature or any county or city board in the state. Therefore, Nevada providers will need only to satisfy the federal standards described in Section III above.

H. OHIO

In Ohio, ban-the-box legislation has not been enacted at the state level. At the city level, ordinances have been passed in the cities of Canton, Cincinnati, Cleveland, and Massillon. The laws in each city vary, but in all four cities the ordinances only apply to the city as an employer, and not to private employers.

Accordingly, in Ohio, senior care providers are not currently impacted by state or local laws, and will only be required to comply with federal standards, where applicable.

I. PENNSYLVANIA

The Pennsylvania state legislature has not passed statewide ban-the-box legislation. However, the Cities of Philadelphia and Pittsburgh have enacted city-wide ban-the-box ordinances. Pittsburgh's ordinances apply to city employment and to city contractors, and do not otherwise apply to private employers.

Philadelphia's ordinance applies to both the city and to private employers within city limits who employ ten or more employees.¹³ Employers may not inquire into an applicant's criminal history until after the employee has submitted an application and had a first interview (either by phone or in person). However, this prohibition does not apply if the background check is specifically authorized by any other applicable law.¹⁴

Therefore, Philadelphia's ban-the-box ordinance may apply to unlicensed providers, and to the unlicensed portions of communities with both licensed and unlicensed components. It will not apply to licensed senior care providers who must conduct background checks under state law, or to those providers that are otherwise authorized by law to conduct background checks.

¹³ Philadelphia Code §9-3500 *et seq.*

¹⁴ Philadelphia Code §9-3505.

J. TEXAS

Texas has not enacted a statewide ban-the-box law, but the City of Austin and Travis County have both passed versions of local ban-the-box laws. In both the Austin and Travis County versions, the restriction applies only to public employers.

Accordingly, senior care providers are not currently affected by Texas state or local laws, and will only be required to comply with federal standards, where applicable.

K. WASHINGTON

Washington state does not have statewide ban-the-box legislature. Locally, only the City of Seattle has enacted a ban-the-box ordinance which applies to private employers as well as to public employers.¹⁵ Under the ordinance, employers may only conduct a criminal background check after the employer has determined that the applicant is otherwise qualified for the job. The ordinance also requires that denial or discharge of an applicant or employee be based on a legitimate business reason for doing so, similar to EEOC's "business necessity" standard.

Seattle's restrictions will apply to all private employers that do business within city limits, and that employ one or more employees. In this sense, the law is potentially much broader than other local ban-the-box laws which apply to private employers of more than 10, 15, or 20 employees. However, the Seattle law has two important carve-outs: it does not apply to individuals who, in the course of their employment, may have unsupervised access to developmentally disabled persons and vulnerable adults; and it does not apply when state or federal law otherwise permit or require criminal background checks prior to employment.

This carve-out will likely encompass most senior housing providers, both licensed and unlicensed. However, where Washington state law does not otherwise require background checks or exclude employees with certain criminal histories from working in sensitive positions, and in positions where an employee will not be expected to have unsupervised access to vulnerable or developmentally disabled individuals, Seattle's ban-the-box ordinance may apply.

¹⁵ Seattle Mun. Code §14.17.

V. Conclusion

Federal anti-discrimination and credit reporting laws have remained relatively stable, with no significant changes in recent years. The recent EEOC issued guidance is not a “game changer,” so much as it is a reference guide to best practices collected over the years. Nonetheless, senior care providers are not automatically exempt from complying with the federal standards. In the context of Title VII and EEOC’s anti-discrimination regulations, senior care providers may conduct background checks of job applicants and current employees when background checks are either required by state law or licensing agencies, or where the action is deemed to be a business necessity. Courts will apply such a standard objectively, not subjectively, so providers are advised to evaluate their current hiring and background checking policies in light of the questions posed in this Brief.

At the state and local level, ban-the-box legislation has been on the increase in recent years, and has enjoyed wide popular support due to the efforts of civil rights, prisoners’ rights, and privacy rights groups. Generally, the majority of ban-the-box laws in the country apply to public employers only. A small but growing minority of jurisdictions have extended ban-the-box protections to private employers as well. In these jurisdictions, a senior care provider may find that some or all of its employee workforce is subject to these laws. Senior living providers are well served to consult with legal counsel to assure that they are in full compliance with state law and local ordinances as it relates to their hiring, retention, and background check practices. Seemingly administrative missteps at the application stage can become costly class action lawsuits.



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