

# *Just-The-Facts* on ‘Ban the Box’

## Reactions to EEOC’s ‘Ban the Box’ Suggestions Differ

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An Equal Employment Opportunity Commission (EEOC) recommendation in its recent guidance on criminal background checks to not ask about convictions in employment applications as a best practice is bad advice, according to Don Livingston, an attorney with Akin Gump in Washington, D.C., and a former EEOC general counsel.

“A few jurisdictions ban the box,” he noted. “In those jurisdictions, employers are barred from asking about criminal convictions at the application stage of the hiring process.”

But he added that “in other jurisdictions, it is sound business practice to seek information at the outset of the application process that is important in screening applicants. This includes information about criminal convictions that are manifestly job related, such as a history of theft for someone seeking a bank teller position or a history of sexual crimes for a job in a high school. So, I do disagree with the EEOC ‘best practice.’ ”

Livingston remarked that “the later in the hiring process the employer delays asking job-related questions of the applicant, the greater the cost to the employer of making hiring decisions.”

### **Alternatives**

One alternative to not asking about convictions on all applications is to have different applications and different questions relating to criminal history for different positions or job classes, Pamela Devata of Seyfarth Shaw in Chicago told *SHRM Online*. “The EEOC’s guidance seems to indicate that what criminal history question employers should ask should be tailored to the specific job in question,” she remarked.

Devata added that “Since the guidance is not binding, employers are not required to remove questions about criminal history from their employment applications. However, given that the EEOC is the administrative agency charged with enforcing Title VII, employers should evaluate what information they ask in relation to the position in question and when they should ask it. We are advising employers to consider asking about targeted criminal history convictions based on position or job class later in the hiring process to address the EEOC’s concerns.”

Devata noted, “Employers could ask an applicant about his or her criminal history later in the hiring process—for example, during the interview.” She added that “employers should be mindful that there are state laws that have restrictions about what they can ask, even if they are asking about criminal history later in the hiring process. For example, Massachusetts, California, Connecticut and [some] other states have restrictions on what information an employer can ask about, and we recommend that employers never ask about sealed or expunged records to comply with the number of state laws that also have that prohibition.”

Yet Devata remarked, “Because the EEOC has said that removing criminal history from the application is a best-practice recommendation, but not a mandate, and has provided some guidance to limit criminal history questions, it likely would be able to argue that it has not overstepped its statutory authority. However, there are many who have expressed that they think the EEOC has overstepped its authority.”

### **No Rush to Remove Box**

Katharine Parker, an attorney with Proskauer in New York, said that “assuming they are not in a jurisdiction that prohibits questions on applications about convictions, employers need not rush to remove a box inquiring about prior criminal convictions on their application forms.”

But she added that “employers should review their application question and determine whether it is appropriately tailored for their business and the positions for which it is being used and to ensure it is compliant with current state

and local law. For example, an employer can consider whether it is appropriate to limit the question to particular types of crimes or crimes that occurred within a specific period of time.”

Parker stated, “A question about conviction history on an application form does not preclude individualized assessment. Indeed, an employer may expressly state on its application that a conviction is not an automatic bar to employment precisely because it intends to engage in an individualized assessment after the applicant reports that he or she has previously been convicted of a crime.”

### **Relevancy of Criminal History**

“The \$1 million question” according to Barry Hartstein, an attorney with Littler in Chicago, is how employers can determine if criminal history is relevant and what kinds of questions would or would not have a nexus to job duties. “The EEOC does not provide any real guidance for employers. There may be some jobs in which it is obvious, such as the conviction of theft within a period of years, and hiring a housekeeper.”

But Hartstein added that “what may be relevant or have a close nexus may vary depending on the work environment.” He noted that he “recently had a discussion with one client that operates business hotels and resorts that cater to families. Certain disqualifying criminal offenses for the same position may vary, whether it is a typical business environment as compared to a resort in which children may be running around.”

“The key,” Hartstein said, “is for the employer to be thoughtful in its approach and consider documentation justifying the rationale for specific exclusions.”

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