

Ban the Box and Sex Offenses: To Hire or Not to Hire

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Ban the Box legislation arose from admirable motivations – beginning as an international campaign by civil rights groups and advocates for individuals with criminal history. Given that some sources cite nearly one in three adults has a criminal record, and given further that African-American men are more likely to have records and be disproportionately affected by convictions when seeking employment, Ban the Box and similar legislation (such as “fair chance ordinances”) give individuals with criminal history more meaningful chances to obtain employment.

Under Ban the Box legislation, employers typically cannot inquire into an applicant’s criminal history until the applicant has completed an initial interview or received a conditional offer of employment. Thereafter, if the employer learns of a conviction, it generally may not disqualify an applicant unless the criminal conviction is related to job duties. The “related job duties” analysis requires an individual assessment of the ex-offender, the criminal conviction, and the nature of the job applied for, one that is often beset with complications, unclear conclusions, and pitfalls. It exposes employers to at least two significant risks: (1) liability for negligent hiring and negligent retention where an ex-offender employee is hired but later engages in conduct that harms a third-party; and (2) liability for disqualifying an ex-offender from employment if the employer does not have a sound basis for disqualification.

The standard for a negligent hiring and retention finding is relatively low. Employers have been held liable to victims where an employer either knew or should have known that its employee might render harm to another, which can be established by the employee having a criminal record and a correlation between a job duty and the criminal offense. For example, a correlation could be found where a prospective employee has a criminal history of embezzlement and job duties include having access to company funds, or where a candidate has a child molestation conviction and the job duties include interactions with children.

Each situation differs and the analysis can be challenging. Consider an applicant convicted of viewing child pornography on his computer – does s/he pose a foreseeable risk in a work environment that does not employ anyone under the age of 18? If the company holds an annual “bring your child to work” day or decides to hire a high school-aged summer intern, does that change the analysis?

Further, some crimes labeled “sex offenses” do not always pose the same risks. An applicant convicted of indecent exposure for urinating in public is arguably different from an applicant convicted of exposing himself in public for other, sexual purposes. Employers should tread carefully in this area because some courts have held that it is not necessary that the employer foresee that the victim would be harmed in the exact way or to the

same extent as actually occurred.¹ All that matters for liability may be that the employer *could* have foreseen that *some* injury would likely result in *some* manner as a consequence of the employee's acts. In a Massachusetts case, a negligent hiring claim involved a bartender who had previous convictions for assault with intent to commit rape and kidnapping but had engaged in a different type of violence, assaulting a bar patron. The court concluded that the matter should be decided by the jury because the jury could infer that the prior conviction indicated a high potential for violence.² Similarly in a New York case, an employee with a conviction for first degree sexual abuse subsequently physically assaulted a coworker. Though the assault on the coworker was not a sexual assault, the employer was found liable because the harm was similar enough to have been foreseeable.³

These cases present situations in which even a thorough, individualized analysis of the offense, the offender, and the job tasks may result in liability. And those assessments are made even more difficult in states like New York, which creates a rebuttable presumption that the revocation of a job offer was motivated by the applicant's criminal history.

The consequences of negligent hiring can manifest themselves in both private lawsuits and governmental actions. For example, a private putative class action was recently filed against a transportation network company for negligent hiring, alleging that criminal background checks should have been undertaken to disqualify persons convicted of assault and harassment.⁴ And a Colorado agency imposed an \$8.9 million fine on a transportation network company for retaining workers with backgrounds ranging from major moving violations to drunk driving.⁵

Given the delicate interplay between an employer's duty to provide a safe workplace for employees and other third parties and the obligation to refrain from considering an employee's criminal history, some employers may be tempted to sidestep Ban the Box legislation by investigating an applicant's history by other means. For example, with respect to sex-related offenses, an employer may simply informally conduct an internet search on sites such as Megan's Law, the common term for the collection of state laws that require law enforcement authorities to identify sex offenders to the public. However, some state and local statutes prohibit such inquiries. For example, California imposes penalties on employers for using information from such sites for employment purposes.⁶ And in many states, employers are barred from considering non-convictions in their employment decision.

There are exceptions, however, for certain employers. California permits governmental agencies, adoption agencies, child care centers, and other similar businesses to inquire into sex offender history, while denying such permission to other employers. Other ordinances put time limits on consideration of convictions. San Francisco County's Fair Chance Ordinance bars an employer from considering a conviction that is more than seven years old, unless hiring for positions involving the supervision or care of minors, dependent adults or seniors. But this may have unintended consequences because the seven year "look back" period commences on the day of sentencing. Thus, a person with a sexual offense conviction whose date of sentencing was over seven years old could—as early as the day he/she was released from prison—apply to work at jobs that might otherwise be able to bar

¹ *Tallahassee Furniture Co. v. Harrison*, 583 So. 2d 744, 757 (Fla. Dist. Ct. App. 1991).

² *Foster v. Loft, Inc.*, 526 N.E.2d 1309, 1311 (Mass. App. Ct. 1988)

³ *Glover v. Augustine*, 832 N.Y.S.2d 184 (App. Div. 2007).

⁴ <https://www.usatoday.com/story/tech/2017/11/14/uber-sued-female-passengers-alleging-driver-rape-violence/863166001/>

⁵ <http://www.xperthr.com/news/uber-hit-with-massive-fine-in-colorado-background-check-case/29882/>

⁶ See Penal Code 290.46 (expressly prohibits employers from using Registry information to refuse to hire, fire, or demote and employ or potential employee, except as otherwise provided by statute or to "protect a person at risk.")

him/her.⁷ Thus, even with a criminal background check, an employer may not know of or be able to use an older conviction which could be relevant.

Finally, given the lack of data on how a sex offense may correlate to job functions, the employee hiring process may pose a daunting task for employers given the risks. However, there are methods of screening applicants that reduce the risks, including the following:

- comply with Ban the Box and similar legislation, but run background checks as soon as permitted;
- conduct an independent reference check on job candidates to elicit additional information about the applicant's job history and performance in the workplace;
- consider how much time has passed since the conviction;
- inquire into whether the applicant has a certificate of rehabilitation;⁸
- closely analyze the conviction's relationship to the essential functions and nature of the job;
- consider the overall job environment and nature of other employees; and
- consider the level of supervision of the position applied for.⁹

Employers should also consider the wisdom of performing a background check when promoting, transferring, or reassigning employees to positions with different or additional job responsibilities. This is particularly important if a background check or reference check was not performed at the time of initial hire, but it can also be useful to uncover information about offenses which have occurred since the employee was initially hired. Any new information must be correlated to the new job, but this is an important step in maintaining a safe work environment.

Also, it is important to keep apprised of legal changes such as California's proposed Senate Bill 421, which restructures the California sex-offender registry into a three-tiered system under which the offender remains on the registry for a period correlating with the gravity of the offense.¹⁰

By following best practices and remaining informed of state and local rule updates, employers can lower their risk of penalties for disqualifying applicants with criminal histories for unsound reasons. They can also help minimize exposure to negligent hiring/retention claims by undertaking an individualized assessment of each applicant to

⁷ <http://www.esrcheck.com/wordpress/2015/08/13/san-francisco-ban-the-box-ordinance-may-hurt-ex-offenders-the-law-was-meant-to-help/> .

⁸ Only six states offer certificates of rehabilitation or other similar means of removing occupational bars: Arizona, California, Nevada, New Jersey, New York, and Illinois. These laws differ in how extensively they restore the individual's civil rights, eligibility criteria, and procedures.

⁹ <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Best-Practices-Models.pdf>
<http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>
Hire Network, Best Practice Standards: The Proper Use of Criminal Records in Hiring,
<http://hirenetwork.org/sites/default/files/Best-Practices-Standards-The-Proper-Use-of-Criminal-Records-in-Hiring.pdf>
FTC and EEOC Joint Guidance, Background Checks: What Employers Need to Know,
<https://www.eeoc.gov/eeoc/newsroom/release/3-10-14.cfm>

¹⁰ https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB421

determine whether a correlation exists between the applicant's prior conviction, their prospective work duties, and the threat of potential harm to third parties.