What Must Public Employers Do to Comply with Ohio’s “Ban The Box” Law?

As of December 9, 2015, House Bill 56, better known as the “ban the box” bill, passed through the Ohio Legislature. The bill prevents all public employers, including counties, townships, and municipal corporations, from asking about criminal convictions on their job applications. The bill effectively “bans the box” on applications that ask applicants to disclose if they have been convicted of a felony. Some of the top questions Zashin & Rich attorneys have been receiving regarding the implications of H.B. 56 are below:

1. What actions do I have to take immediately?

By the time the bill becomes effective (ninety days after Governor Kasich’s signature), Public Employers should remove all inquiries regarding criminal convictions from their job application. Public Employers should also conduct an audit of their hiring process to ensure that their inquiry about convictions occurs at an appropriate time during the hiring process and that they have sufficiently documented the matter. Management training may also be required to ensure the process is known and followed.

2. Does this mean I am now prohibited, as a Public Employer, from running criminal background checks on job applicants?

No. The bill does not discourage, or encourage, criminal background checks in the public sector. From a legal perspective, it is still highly recommended that employers conduct a criminal background check, at least on the final candidate(s) considered. Public Employers must still obtain the written consent of applicants before running background checks and should also ensure that the background check procedure is in compliance with the Fair Credit Reporting Act (FCRA) and with the EEOC’s 2012 Enforcement Guidelines on Criminal Background Checks.

3. Are Public Employers prohibited from asking about criminal convictions of all job applicants?

No. The bill does not prohibit public employers from inquiring about felony convictions later in the hiring process. The inquiry is only “banned” from the job application itself. Employers should develop a procedure regarding how, and when, the inquiry will be made. The developed procedure should be followed for each position without deviation. Deviation from a standard practice may inadvertently expose employers to a claim of disparate treatment.

4. When should I seek information about criminal convictions from applicants?

This depends upon the employer and the position. Some employers may find that asking about criminal convictions earlier in the process, such as during a phone
interview or first in-person interview, may be prudent. This would be particularly important for those positions where Ohio or Federal law disqualifies a person with certain convictions from holding the position. Positions that may fall into this category include, but are not limited to, teachers, nurses, direct care workers, police officers, and sheriff’s deputies.

For other positions, however, employers may find it is more cost-effective to save the inquiry for the final candidates or to simply make a conditional job offer to the desired Applicant that is contingent upon successfully passing a criminal background check.

5. Can my job application inform applicants if State or Federal Law disqualifies persons with certain convictions from employment?

Yes. H.B. 56 expressly states that it does not prohibit a Public Employer from including in the job application a statement notifying applicants if a provision of the Ohio Revised Code or Federal law disqualifies an individual with a particular criminal history from employment in a particular position.

6. Can Public Employers refuse to hire all applicants who later disclose that they have a felony conviction or whose background check reveals a conviction?

Not necessarily. If the conviction is one that disqualifies an applicant under Ohio or federal law, then the applicant can be denied the position. However, for other applicants, Public Employers should comply with the EEOC’s 2012 Enforcement Guidelines. The EEOC takes the position that employers cannot have a blanket policy of refusing to hire applicants simply because they have a felony conviction. Instead, the EEOC requires employers to show that the refusal to hire an applicant based upon a criminal conviction is “job related and consistent with business necessity.” This will typically require the employer to show that it weighed various factors including the nature of the job, the type of conviction, and the amount of time that has passed since the conviction occurred. Further the EEOC requires a form of “pre-deprivation” meeting with an applicant who has a criminal conviction in order for them to provide any mitigating factors that the employer must weigh before rendering a decision. The EEOC’s Enforcement Guideline is available online and offers useful examples.

7. Can I still run criminal background checks on current (non-applicant) employees?

Yes. The bill clarifies that this is a permitted practice by modifying Ohio’s civil service law in several areas to state that classified employees who are convicted of a felony “while employed in the civil service” may be removed under R.C. 124.34(A). Further, if
an unclassified employee loses their position because they are convicted of a felony “while employed in the civil service,” the employee forfeits their right to resume a position in the classified service under R.C. 124.11(D)(3)(a).

8. What if I hire an employee without running a criminal background check and subsequently learn that the employee had a conviction pre-hire that a pre-employment criminal background check would have uncovered? Can I fire them?

It depends. Previously, in such a situation, a Public Employer could check to see if the employee disclosed the criminal conviction on the job application by “checking the box.” If the employee did not disclose the conviction on the job application, then one basis for removing the employee was “dishonesty.” With the box now banned, this rationale can no longer be applied for future applicants.

Another avenue available to Public Employers facing such a situation was civil service law which stated that a felony conviction was grounds for removal. Therefore, a Public Employer could argue that whether the felony occurred pre-employment or post-employment, it was equally a removable offense. However, H.B. 56 modified civil service law to state that the conviction had to occur “while employed.” As a result, pre-employment convictions (which do not occur “while employed”) arguably may no longer qualify under this provision of civil service law.

So what is an employer to do in such a situation? First, if the non-disclosed pre-hire conviction makes the employee disqualified under Ohio or Federal law, the removal is certainly defensible on that basis. Alternatively, employers who properly document their selection process should have a record of the employee’s response if they were asked about any convictions during an interview or in a later part of the selection process. If the documentation verifies that the employee did not disclose the conviction during these later processes, “dishonesty” will continue to be a viable basis for removal. The safest approach, however, is to conduct a pre-employment criminal background check so that this issue can be addressed as part of the selection process.

Should you have any questions regarding the impact of H.B. 56 or need assistance revising your job applications or your selection process to ensure compliance with H.B.56, the FCRA, and the EEOC’s Enforcement Guidelines, please contact Brad Bennett or Jonathan Downes at Zashin & Rich’s Columbus office.

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