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The Hiring Process Tightrope — Tips for Employers in the Senior Care Space to Navigate the EEOC's Guidance on Criminal Background Checks and "Ban the Box" Laws

By Esteban Shardonofsky

For employers in the senior living and long-term care industry, criminal history information is a crucial tool in the hiring process. Various state and federal laws prohibit retirement communities from employing individuals who have been convicted of certain crimes involving abuse, neglect, or mistreatment. Despite this, federal agencies and state governments are increasingly limiting an employer's use of criminal history information through constraints on background checks and new "Ban the Box" laws. These laws generally prohibit employers from inquiring into an applicant's criminal history until after a first interview or conditional offer of employment is made.

Navigating these legal hurdles while maintaining employee and resident safety can baffle even the best-intentioned administrators, executives, and attorneys. To break through the clutter, below we summarize the Equal Employment Opportunity Commission's (EEOC) guidance on the use of criminal history information, explain why "Ban the Box" initiatives matter, and outline strategies for compliance.

EEOC's Guidance On The Use Of Criminal Background Checks:

In April 2012, the EEOC issued updated enforcement guidance on the use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964 ("the Guidance" or "the Enforcement Guidance"). The Guidance explains that an employer's use of an individual's criminal history may violate the prohibition against employment discrimination under Title VII. The Guidance suggests that these inquiries disproportionately exclude minority candidates from hire, which could create an adverse impact unless the employer can demonstrate that the practice is job related and consistent with business necessity.

While the Guidance does not make it illegal for employers to conduct or use the results of criminal background checks during the hiring process, the EEOC reiterates that an across-the-board hiring ban on all individuals with conviction or arrest records is unlawful. Instead, the Guidance recommends using a two-step process to ensure that a particular screening policy/practice does not violate Title VII's prohibition on disparate impact discrimination. First, employers should conduct a targeted screening of criminal records to exclude only specific criminal conduct that would make the applicant unfit to perform the job. To do so, employers must consider at least the nature and gravity of the crime, the time elapsed since the crime or conviction, and the nature of the job sought. Because an arrest is not evidence of criminal conduct, the Guidance prohibits employers from relying on arrest

records to screen out applicants. However, employers may still consider the conduct underlying an arrest if the conduct would make the individual unfit for a position.

Second, the Guidance encourages employers to conduct individualized assessments of those applicants who are screened out during the first step to ensure that they are not relying on incorrect, incomplete, or irrelevant information, to allow for consideration of mitigating factors, and to give applicants an opportunity correct errors in their records (which do occur sometimes). The EEOC suggests evaluating various factors including, for example, the facts or circumstances surrounding the arrest or conviction, evidence that the individual performed the same type of work, post-conviction, with no known incidents of criminal conduct, the length and consistency of employment before and after the offense or conduct, and any rehabilitation efforts.

Because of the highly-regulated nature of their workforce, nursing homes and assisted living facilities face a difficult task in complying the EEOC's Guidance. According to the EEOC, federal laws and regulations that prohibit long-term care employers from employing individuals with certain criminal histories are not preempted by Title VII. Thus, complying with a federally-imposed restriction is a defense to a Title VII claim. The EEOC takes the position that similar state and local laws or regulations are preempted by Title VII. Therefore, according to the Guidance, "if an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability."

"Ban the Box" Sweeping the Country:

"Ban the Box" laws limit when an employer may ask applicants to disclose criminal history information during the application process. Most of these laws prohibit employers from asking about criminal history on employment applications (whether written or on-line). While most of these laws permit employers to ask this question during the interview process, some prohibit employers from inquiring about an applicant's criminal history until after a conditional offer of employment is made. Although not common, some of these statutes also impose "job relatedness" requirements (similar to the EEOC's Guidance) before an employer can exclude an applicant based on criminal history.

Advocates of this legislation argue that inquiring about criminal history at the start of the application process allows employers to make stereotypical judgments about candidates, has a disparate impact on minority applicants who are excluded from hire, and also discourages minority applicants from applying in the first place.

Currently, 18 states (California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Ohio, Oregon, Rhode Island, Vermont, and Virginia) and the District of Columbia have enacted "Ban the Box" legislation. While most of these laws apply only to state and local governments, the laws in seven of these states (Hawaii, Illinois, Massachusetts, Minnesota, New Mexico, Oregon, and Rhode Island) apply to private employers as well.

Many cities and counties have also enacted some form of "Ban the Box" legislation for private employers. These include Philadelphia, San Francisco, and Seattle.

If you operate in a state or jurisdiction with "Ban the Box" laws, consider removing the criminal history question from your application. Employers who violate these laws may face significant fines and penalties, which are often counted per violation and accumulate over time. While some of these laws include exceptions for certain healthcare occupations or for employers who are required by law to consider an applicant's criminal history, it is probably easier for employers to remove the question from the application rather than have multiple different application depending on the job, state, or jurisdiction involved.

If you would like further information on this topic, please contact Esteban (Steve) Shardonofsky at *sshardonofsky@seyfarth.com*, your Seyfarth attorney, or any member of the Senior Living & Long-Term Care Team.

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