

One Minute Memo®



A Ban on Ban-the-Box Laws? Texas and Indiana Introduce Legislation That Would Prohibit Municipal and County Ban-the-Box Laws Within Their States

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Seyfarth Synopsis: In recent years, numerous cities and counties have enacted ordinances restricting the ability of public and private employers to inquire into the criminal histories of applicants during various stages of the job application process—the so-called “ban-the-box” laws. Recently, however, two state legislatures have gone against the grain. State legislatures in Indiana and Texas recently introduced new state-wide legislation meant to create conformity within their borders by prohibiting municipalities and counties from micro-managing the particular steps involved in private employers’ hiring with regard to the prohibition, limitation, or regulation of background screening.

Indiana Senate Bill 312

As of July 1, 2017, local governments can no longer issue ban-the-box ordinances in Indiana. [Senate Bill 312](#) prohibits political subdivisions (including counties, municipalities, and townships) from enacting ordinances that interfere with an employer’s ability to obtain or use criminal history information during the hiring process (to the extent allowed by state or federal law). Accordingly, the [Indianapolis Ban the Box Ordinance](#), previously applicable to both the public sector and private employers holding vendor contracts with Indianapolis and Marion County, Indiana since February 2014, has been preempted.

Austin’s Fair Chance Hiring Ordinance

In March of 2016, the Austin City Council passed a Fair Chance Hiring Ordinance prohibiting the use of criminal history check boxes on job applications. (See prior post [here](#).) The Fair Chance Hiring Ordinance recently dodged a bullet; the Legislature of the State of Texas had introduced similar legislature to Indiana’s and the original wording of House Bill 91 in committee had included a ban on such ordinances. Over time, the caption of the bill was no longer accurate, since it also included “occupational licensing requirements and an applicant’s criminal history.” The Texas Senate deleted the portion of the bill that would prohibit ban-the-box ordinances so the bill once again matched its caption and the Senate went on to pass House Bill 91 on May 23, 2017.

Employer Outlook

As counties and municipalities have passed individual, and at times conflicting, ban-the-box ordinances, a patchwork of legal obligations, requirements, and prohibitions has resulted for certain regional and national employers. This patchwork can impose significant compliance issues. Indiana and Texas appear to have recognized this issue, and have made efforts to create consistency within their states. Based on the success of the recent Indiana legislation, other states seeking to create consistency and reduce burdens on employers may bring similar legislation (rather than be deterred by the Texas legislature's defeated attempt).

Additionally, similar themes can be seen: The Pennsylvania Senate passed a [Bill](#) in February that would amend the Commonwealth's Equal Pay Act and which would allow employers to inquire into prospective employee's wage histories. Significantly, the Bill contains a preemption clause which provides that "[t]he provisions of this act shall preempt and supersede any local ordinance or rule concerning the subject matter of this Act." If enacted, this preemption language will sound the death knell to Philadelphia's Salary History Ban Ordinance, originally scheduled to take effective May 23, 2017 (but currently stayed pending legal [challenge](#)).

Overall, the goal of legislative and regulatory consistency is positive for employers who, at times, can be subject to various levels of regulation in the various jurisdictions in which they operate. Clarity and consistency pave the way for compliance, and create a welcoming atmosphere for current and new employers.

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