

# One Minute Memo®



## Another Change to Massachusetts' Ban-the-Box Law

By Jennifer Mora, Jean Wilson, and Barry Miller

**Seyfarth Synopsis:** Effective October 13, 2018, Massachusetts employers will no longer be permitted to inquire about certain misdemeanor convictions and sealed or expunged records for employment purposes.

Almost ten years ago, Massachusetts became the second state, following Hawaii, to enact a “ban-the-box” law, so-called because they require employers to remove from job applications any question that asks a job applicant to self-disclose their criminal history. Instead, employers must wait until later in the hiring process to do so, unless the employer is prohibited by law from employing criminal offenders in the position at issue. Since that time, the ban-the-box wave has spread across the nation, with laws most recently enacted in Washington ([discussed here](#)) and California ([discussed here](#)).

In addition to the ban-the-box law, Massachusetts’ anti-discrimination law also contained provisions that restricted “what” employers may inquire about, including:

- Any arrest, detention or disposition that did not result in a conviction;
- A first offense for the following misdemeanors: disturbance of the peace; drunkenness; simple assault; affray; minor traffic violations; and speeding; and
- Any misdemeanor conviction where the date of the conviction, or the completion of any period of incarceration resulting from the conviction, occurred more than five years prior to the date of the employment application, unless the person was convicted of any crime during that same five-year period.

On April 13, 2018, Governor Charlie Baker signed a criminal justice reform bill, which changed existing law in several respects. Importantly, the amendment reduced the five-year period for inquiring about misdemeanors to three years, which means that employers now may not ask about (whether orally or in writing) any misdemeanor conviction where the date of the conviction, or the completion of any period of incarceration resulting from the conviction, occurred more than three years prior to the date of the employment application, unless the person was convicted of another crime within the three years preceding the inquiry. Moreover, in addition to being prohibited from asking about sealed records, employers may not ask about a criminal record that has been expunged.

In addition, any form used by an employer that seeks information about an applicant's criminal history must include the following statement about expunged records, in addition to the statement already required concerning sealed records:

"An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer 'no record' to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications or convictions."

In addition, the criminal justice reform bill lowers the number of years before an individual can seek to have a criminal record sealed or expunged. Ultimately, this means that employers will have less access to criminal history information in making employment decisions. In response to employers' concerns about being held liable for negligent hiring or retention based on criminal history to which they no longer had access, the legislature included a provision in the bill that incorporates presumptions based on employers' more limited access to such information. Employers will be presumed not to have notice (or the ability to know) about (i) records that have been sealed or expunged, (ii) records about which employers may not inquire under the anti-discrimination law, or (iii) crimes that the Massachusetts Department of Criminal Justice Information Services cannot lawfully disclose to an employer.

Massachusetts employers, and nationwide employers that hire in the state, should immediately review their job applications to ensure they are not inquiring about criminal history information too early in the process. They also should consider reviewing and modifying any pre-hire policies and forms to ensure they are not inquiring about off-limits information and that any written question to applicants that inquires about criminal history contain the required language. Employers in all jurisdictions should stay abreast of ongoing developments in this evolving area of the law.

If you would like additional information, contact [Jennifer Mora](mailto:jmora@seyfarth.com) at [jmora@seyfarth.com](mailto:jmora@seyfarth.com), [Jean Wilson](mailto:jwilson@seyfarth.com) at [jwilson@seyfarth.com](mailto:jwilson@seyfarth.com), or [Barry Miller](mailto:bmiller@seyfarth.com) at [bmiller@seyfarth.com](mailto:bmiller@seyfarth.com).

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**Seyfarth Shaw LLP One Minute Memo® | April 30, 2018**

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