

Background check changes that impact your security operations

Legal trends around credit and criminal histories that are impacting background checks

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It's safe to say that many Americans kicked off the New Year with the same resolution -- get a job. If the US Bureau of Labor Statistics December 2010 data is right, then approximately fifteen million Americans were unemployed at the end of 2010. And as job seekers hit the streets, many of them are asked to complete the obligatory job application, possibly consent to a credit check, and answer this question: "Have you ever been convicted of a crime?"

It's a hard time to be out of work, and a criminal conviction on a record is only going to make it harder. As a result, some of the long-established hiring practices that employers have come to rely upon -- practices that evolved in order to provide a safer workplace in a world of theft, violence and data security breaches -- are under scrutiny. One of those practices under fire is the checkbox on job applications asking about criminal history. A so-called "ban the box" movement is gaining momentum across the nation, as legislators are responding to proponent's claims that the little checkbox on job applications is having a big impact, keeping qualified people out of work.

Ban the box is not new. In 1998, Hawaii was the first state to ban the box, prohibiting both public and private employers from asking about an applicant's criminal past until after a conditional offer of employment is made. In 2009, Minnesota eliminated the "box" at the state level. Other variations have since been enacted by 24 separate city, state and county governments, in some instances applying only to public employees and in other cases both private and public.

In the perfect storm of The Great Recession, followed by a very slow recovery that is disappointingly short on new jobs, the "ban the box" movement has hit its stride. Groups and fan sites have popped up even on Facebook: Detroiters Banning Together to "Ban the Box" already had over 186 "likes" at the beginning of 2011.

Helping former convicts find work is a laudable goal, especially if it keeps them from returning to crime. But for those responsible for reducing the risk of crime and violence in the workplace, the "ban the box" trend has resulted in a patchwork of laws that create inconsistencies and make it increasingly difficult to perform what most would consider even the most basic due diligence in the screening process. Workplace violence, identity theft and data security issues are not going away. Negligent hiring and retention lawsuits continue to be on the rise, where million dollar verdicts are routine. For many companies, just knowing what they can and cannot ask applicants, what forms need to be completed, and where to go for answers is increasingly murky.

For companies doing business in multiple jurisdictions, applying the new laws can be anyone's best guess. The CORI legislation in Massachusetts was recently interpreted by the Massachusetts Commission Against Discrimination (MCAD) as covering all applications received by candidates in Massachusetts, even when the position is located somewhere else. Moreover, the MCAD interpretation expands the prohibition against criminal



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inquiry beyond the initial application stage, expanding it to any written communication prior to an interview, an extension that goes beyond the plain language of the law.

Creating additional pressure on employers is the aggressive agenda of the EEOC under the leadership of recently confirmed Chairwoman Jacqueline Berrien. Under the Obama administration's leadership, the agency hired 383 employees in 2010, including 41 lawyers and a new General Counsel. The Cato Institute's Walter Olsen was quoted as saying the new team makes "the Carter (administration) EEOC look like a Chamber of Commerce operation." Berrien, a savvy litigator, is pursuing the use of both credit reports and criminal checks as a screening tool, citing claims of blanket discrimination and disparate treatment. A few weeks after holding public hearings on the use of credit reports by employers, Berrien announced a lawsuit against education giant Kaplan, claiming the company systematically discriminated against employees with a screening policy that included credit checks for some employees. The argument is that communities of color have more credit problems than whites, and by checking some applicants' credit, companies are systematically excluding whole classes of applicants. Another closely watched case is against event planner The Freeman Companies, which asserts similar claims protesting the use of both criminal and credit histories.



So-called "ban the box" legislation can make it more difficult for security companies like yours to properly conduct background checks on employees.

For those charged with implementing a security program, engaged in risk management and loss prevention, and for HR departments struggling with how, what and when is it legal to ask candidates about their past, the fog is not lifting -- it's getting thicker. So what is an employer to do?

For starters, employers need to document their background screening processes and become familiar with which state and local restrictions are applicable in their jurisdiction. A background screening policy should be job-specific so the employer can demonstrate job relatedness. The risk posed by the ex-offender is going to be evaluated in the context of a specific job, and whether disqualification was based on a business necessity. The EEOC guidelines may be incorporated into the written policy, and consider auditing pools of applicants and new hires for disparate impact.

The 383 employees at the EEOC in 2010 were likely hired subject to a background check and were probably asked about their criminal past -- and rightly so. But as 2011 progresses, more restrictions and enforcement actions are likely in store for private employers. More states will consider restrictions on the use of credit, and other jurisdictions will enact rules to help ex-offenders -- regulations that could have an unintended chilling effect on an employer's ability to protect its workforce. Until the courts rule in some of the pending systemic cases, the risk management, security and HR communities need to audit their policies and practices, get the best advice they can afford, and stay tuned for what comes next.

About the author: Angela Bosworth, Esq., is the executive vice president for OPENonline, a national provider of background checks. Bosworth brings 20 years as a licensed attorney and over 10 years of experience in the background screening industry to her position at OPENonline. Her extensive experience in the background screening industry includes governmental affairs, compliance best practices, and policy initiatives. She is a frequent speaker on the legal compliance issues associated with background screening, privacy and security, and hiring. She is a co-author of the "Pre-employment Background Screening Guideline" published by ASIS International, is actively involved in the National Association of Professional Background Screeners (NAPBS) and the Society for Human Resource Management (SHRM), ASIS International, and is a member of the Ohio State and Columbus Bar Associations.