

# EMPLOYEE PRIVACY AND BACKGROUND CHECKS

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# AGENDA

## BACKGROUND CHECKS

- “Ban the Box” laws
- Salary history ban laws

## EMPLOYEE PRIVACY

- Texas Identity Theft Enforcement and Protection Act



# BACKGROUND CHECKS: APPLICABLE LAWS

## Federal Laws

- Fair Credit Reporting Act

## State Laws

## Local Ordinances



# Ban the Box: Overview

Generally, “ban the box” laws prohibit employers from inquiring about criminal convictions during the initial phase of the hiring process.



# Ban the Box: State Laws and Local Ordinances

- 31 states have adopted statewide laws or policies governing “ban the box”
- 11 states have mandated the removal of conviction history questions from job applications (California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington)
- Over 150 cities and counties have enacted “ban the box” laws



# Ban the Box: Austin, Texas

- Fair Chance Hiring Ordinance, passed March 24, 2016
- Applicable to private employers with fifteen (15) or more employees whose primary work location is in the city of Austin
- Prohibits criminal history questions and criminal background checks until a conditional job offer has been made
- Prohibits employers from taking adverse action against an applicant based on the applicant's criminal history unless the employer has a good faith belief that the individual is unsuitable for the job based on an individualized assessment
- Enforcement



# Ban the Box: Notice and Posting Requirements

- Some jurisdictions have special notice and posting requirements
  - Special Notice of Rights (in addition to FCRA notice and other notices)
  - Website Postings
  - Job Postings
    - Criminal history as an automatic disqualifier
    - Specific offenses that will disqualify an applicant
    - Qualified applicants with criminal history considered



# Ban the Box: Individualized Assessment

Factors that must be considered before taking an adverse action due to criminal conviction history (varies by jurisdiction):

- Nature and gravity of criminal offense
- Length of time since criminal offense
- Nature and duties of the job for which the applicant applied
- Applicant's employment history before and after the criminal offense
- Character references
- Evidence of rehabilitation
- Number of offenses
- Age of applicant when criminal offense occurred





# Ban the Box: Pre-Adverse Action Procedures

- Some jurisdictions have special pre-adverse action procedures
  - Individualized Assessment Forms
  - Employers required to identify specific criminal records that concern the employer
  - Waiting periods



# Ban the Box: Key Takeaways

- Ensure notices and postings meet federal, state, and local requirements (check with your consumer reporting agency)
- Document “individualized assessment” before taking adverse action
- Track state and local law developments



# Salary History Bans: Overview

Generally, salary history bans prohibit employers from inquiring about an applicant's salary history during the pre-employment process and/or considering an applicant's salary history when making hiring and compensation decision.



# Salary History Bans: State Laws and Local Ordinances

- New trend – 5 new state laws and 3 new local ordinances
- 7 states have enacted salary history bans
  - California, Connecticut, Delaware, Hawaii, Massachusetts, Oregon, Vermont
- 5 cities or counties have enacted salary history bans
  - San Francisco, Albany County (NY), New York City, Westchester County (NY), Philadelphia



# Salary History Bans: What is a “salary”?

Definition of “salary” varies by jurisdiction, but may include:

- Monetary wages
- Commissions
- Benefits (including fringe benefits)
- Stock Options
- Bonuses
- Equity based compensation



# Salary History Bans: Exemptions

- Voluntary disclosure by applicants
  - Consider documenting voluntary disclosures
- Salary expectations
- Written authorization from applicant



# Salary History Bans: Key Takeaways

- Review/update employment applications
- Provide training for hiring managers
- Review/update job postings
- Ensure background check notices meet state and local requirements (check with your consumer reporting agency)



# Employee Privacy: Texas Identity Theft Enforcement and Protection Act

- Applies to private employers
- Requires employers to use reasonable procedures to protect sensitive personal information from unlawful use or disclosure
  - “Reasonable Procedures”
  - “Sensitive Personal Information” → An employee’s name coupled with a social security number, driver’s license number, government issued identification number, account number or credit or debit card number in combination with any required account security code, access code, or password
- Enforcement





# Employee Privacy: Texas Identity Theft Enforcement and Protection Act

## KEY TAKEAWAYS

- Limit disclosure of sensitive personal information
- Review and update policies regarding protection of sensitive personal information
- Review and update document retention procedures



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