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Bans on Criminal Background Checks Grow

Whether you think it will end unjustly punishing criminal offenders who have served their time, or is political pandering to ex-offenders, "Ban the Box" laws are proliferating throughout the United States.

The box that is being banned is the one that appears on employment applications next to the question asking if you have ever been arrested or convicted of a crime.

One factor motivating ban supporters is the war on drugs, which over the years has added substantially to the prison population. One study claims that 65 million Americans, or one in four adults, have a criminal record.

Democratic Party strategists also have targeted ex-offenders with Ban the Box efforts along with securing voting rights for felons to cement support in minority communities. During the recent Democratic primary in Washington, DC, all of the mayoral candidates appeared at an event aimed exclusively at addressing needs of ex-offenders and their families.

The Ban the Box movement has its origins in states and cities, but in the last few years it has gained strength at the federal agency level, although some employers and state attorneys general who don't favor the change are pushing back.

States jumping on the "banned" wagon include California, New York, Hawaii, Delaware, Massachusetts, Minnesota and Rhode Island. They have been joined by cities like Baltimore, Philadelphia, San Francisco, Seattle, Cleveland, Louisville, KY, Newark, NJ, Oakland, CA, and Rochester and Buffalo, NY.

Making matters even more confusing for multi-state employers are the differences in the scope of these laws. States like Illinois, Iowa, Colorado, Pennsylvania and others prohibit inquiries into arrest records. Others like Michigan limit arrest inquiries to pending felony charges. California and Ohio prohibit inquiries into certain petty marijuana-related offenses and Hawaii and Washington prohibit inquiries into criminal convictions more than 10 years old

Still others, such as North Carolina, Ohio, Georgia and Maryland, prohibit employers from inquiring into criminal records that have been sealed or expunged.

Some states have a combination of these along with additional prohibitions, such as how far back an employer can inquire.

What is interesting is that most states also legally require employers conduct criminal background checks on employees who work in certain industries, such as health care and education.

Federal Inititative Creates Controversy

Although there is no national ban-the-box law, in 2013 the federal government recommended that its contractors as a general rule refrain from inquiring about convictions on job applications.

The Equal Employment Opportunity Commission has sued employers arguing that these application queries violate federal anti-discrimination law because they disproportionately harm minorities.

(Continued on next page)

Among the companies that have been targeted by major EEOC lawsuits are J.B. Hunt Transport, Uti Logistics and BMW Manufacturing (*ACWI Advance*, 7-31-14, Page 4).

Last year the state attorneys general of Alabama, Colorado, Georgia, Kansas, Montana, Nebraska, South Carolina, Utah and West Virginia wrote a strongly-worded letter to the EEOC commissioners objecting to these actions.

“We believe that these lawsuits and your application of the law, as articulated through your enforcement guidance, are misguided and a quintessential example of gross federal overreach,” they said.

Texas used even stronger language when it sued the EEOC to stop its actions against employers in that state: “The State of Texas and its constituent agencies have the sovereign right to impose categorical bans on the hiring of criminals, and the EEOC has no authority to say otherwise.”

Texas and others also observed that if employers obey the EEOC directive, it would put them in the crosshairs of tort suits when an employee with a criminal record does harm to the public.

Also, last year a federal judge tossed out an EEOC lawsuit brought against a logistics firm for using criminal and credit checks, noting the commission itself conducts criminal background investigations on all of that agency’s job applicants. (*ACWI Advance*, 9-15-14, Page 5).

But in the face of the wave of local and state laws being adopted, attorney Philip L. Gordon of the law firm of Littler Mendelson urges employers to seriously consider removing the question from applications before it becomes an issue.

You can still learn about applicants’ criminal histories by conducting interviews and lawful pre-employment background checks, he said.

However, the state attorneys general letter to EEOC pointed out that forcing employers to undertake individualized assessments adds significant costs.

“Employers will have to spend more time and money evaluating applicants that they would not have previously considered due to their criminal history and, in many cases, are unlikely to hire even after a more thorough vetting,” they wrote.

NLRB Wants to Expand Joint-Employer Doctrine

The National Labor Relations Board wants to turn the clock back 30 years t requiring companies to engage in collective bargaining that covers workers employed by subcontractors.

Since 1984 NLRB and courts have held that two entities constitute a "joint-employer" only if they share the ability to directly and immediately control or "co-determine" essential terms and conditions of employment, such as, hiring, firing, discipline, supervision and direction.

The board asked for friend-of-the-court briefs in a case where the Teamsters seek to represent lower-paid workers at a waste recycling plant who worked for a subcontractor of the plant's operator, which itself directly employed higher-paid workers in more highly skilled jobs.

The union says the current standard allows the plant operator to engage in a "calculated restructuring" of employment and "insert" a contractor to "insulate" itself from its "basic legal obligation" to recognize and bargain with the union.

NLRB member Wilma Liebman wants to turn back the clock, holding that the current standard allows "the real party in interest – the entity that provides the capital that employees, in turn, make productive – to avoid the bargaining table."

Liebman wants to return to the board’s pre-1984 standard “to find joint employer status in cases where the putative joint-employer exercised indirect control over the contractor's wages and discipline,” she said, “and in cases where industrial realities made one company a necessary party to meaningful collective bargaining even though it played no role in hiring, firing, or directing employees."

The law firm of Holland & Knight observes, “The NLRB will likely broadly expand the joint-employer doctrine in ways that would impair existing relationships among separate businesses that economically cooperate to achieve a mutually desired objective.”

STB Reconsiders Rail Fuel Surcharge Safe Harbor Rule

On May 22 the Surface Transportation Board issued a notice seeking comments on whether the safe harbor provision of the current rail fuel surcharge rules should be modified or removed.

When the STB adopted fuel surcharge rules in 2007, it concluded that the Highway Diesel Fuel Index accurately reflected changes in fuel costs in the rail industry.

Based on this conclusion, the STB declared a "safe harbor" for any railroad that uses the HDF Index in its fuel surcharge program, In other words, a railroad fuel surcharge program based on the HDF Index is immune from a challenge that it over-recovers actual changes in the railroad's fuel costs.

The safe harbor rule became an issue in a recent case filed by Cargill against BNSF Railway. According to the STB's own decision, BNSF's fuel surcharge revenues exceeded its incremental fuel costs by $181 million.

But, because BNSF used the HDF Index to determine its fuel surcharge, the STB dismissed Cargill's complaint under the safe harbor rule. That result has prompted the STB to revisit the safe harbor rule in this new rulemaking proceeding.

STB requested public comment on:

- Should the safe harbor rule be modified or ended by the board?
- Was the growing spread between a rail internal fuel costs and the HDF Index observed in the Cargill case was likely an aberration?
- Are there problems associated with use of the HDF Index as a safe harbor in judging the reasonableness of fuel surcharge programs?
- Can any problems with the safe harbor be addressed through modifications
- Are any problems with the safe harbor outweighed by its benefits?

Opening round comments are due by July 14 and Reply comments are due by August 12.

Chemical Industry Urges More Focused Enforcement

In a letter to the President, 16 chemical and other industry groups said that in place of imposing new safety regulations, the government should focus on enforcement and improving emergency response.

The letter was written in reaction to an initiative mounted by several agencies to overhaul chemical safety oversight following last year's massive ammonium nitrate explosion in West, Texas.

The groups said, "The chemical industry is one of the most regulated industries in the world, and data show that the industry also is one of the safest."

Among those who signed the letter were the American Chemistry Council, National Association of Chemical Distributors, National Association of Manufacturers and U.S. Chamber of Commerce.

They said the President should work with the industry and others to ensure that emergency responders have the information they need to protect communities where chemicals are stored.

"Increased recognition and leveraging of industry performance improvement programs should be an essential component of enhancing and updating the current federal approach, and we are eager to discuss how this might be accomplished," they said.

Instead of increasing regulatory burdens, agencies should focus on outreach and education, and target enforcement to firms known for noncompliance.

"It is counterproductive to create new laws or regulations if the implementing agencies do not have the resources or expertise to enforce them," the industry groups told President Obama.

"Creating additional requirements will only further diminish such entities' overall capacity to ensure compliance and will not improve safety for companies who are meeting the current standards and consistently do so."

E-Commerce Boom Triggers Industrial Real Estate Change

"It appears that the future of retail is not more store or shopping centers but more warehouses and trucks," declares the industrial real estate company of Cushman & Wakefield.

"E-tailing is the wave of the future," it asserts. "Sales from online purchases make up a higher percentage of the total sales for traditional retailers than ever before. E-tailing will continue to outpace the growth of physical retail stores."

C&W said online sellers have become the fastest-growing segment of warehouse occupiers. Warehouse vacancy has declined for 15 consecutive quarters, and demand for newly built, large distribution centers that cater to e-commerce has been particularly robust, the company pointed out.

"It is clear that industrial development is being driven by changes in the supply chain," C&W said. "Developments in logistics and technology have driven the demand for newer and bigger warehouse and distribution centers. Supply chains must be more flexible and responsive, with distribution centers equipped with the latest technology."

To keep larger stocks of inventory and to package and send out items in-house has created a need for bigger fulfillment centers, the company noted.

Not only has the square footage of new buildings increased substantially, but the average clear heights have risen and the total number of loading docks and doors has multiplied, the company reported.

Clearance height in the new facilities is often 36 to 40 feet to accommodate two mezzanine levels for picking and packing. Industrial projects with clear heights greater than 30-feet clear account for 78.3% of the total under construction.

C&W also said that new fulfillment centers also are differentiated from traditional ones by specialized features including greater building depth, with wider column spacing to accommodate a new generation of warehouse management systems.

They also include specialized material handling equipment and racking, and frequently are laid out with a cross-dock configuration.

Court Gives DOL Black Eye Independent Contractor Case

A U.S. District Court ordered the Department of Labor to pay $566,000 in attorneys' fees and costs to a Texas employer.

The court held that DOL's position that the employer misclassified gate attendants as independent contractors was not "substantially justified"—nor was the DOL's demand that the employer pay over $6 million in back wages and unpaid overtime.

DOL began investigating Gate Guard Services in 2010 after a DOL investigator received complaints from two friends the investigator said he had met through "parties" and "the bars and stuff like that" who worked at the company along with about 400 other gate attendants.

GGS locates gate attendants for operators to keep track of vehicles entering and leaving oilfield sites.

Without warning, the DOL investigator showed up at GGS's office to speak to the manager. The investigator returned 10 days later for an "opening conference." Based on these meetings, his friends' reports, and an interview with a third GGS worker, the investigator initially concluded that GGS most likely owed more than $6 million in back wages.

The investigator then interviewed fewer than 17 of the gate attendants over the next few months. Based on having interviewed less than 5% of the gate attendants, the investigator informed GGS that these workers were actually employees, and told the company to pay $6.2 million in back wages and unpaid overtime.

The court ruled that the Labor Department had failed to act in a reasonable manner both before and during the course of this litigation.

The judge openly criticized the investigation, pointing out that if the DOL had "interviewed more than just a handful of GGS's roughly 400 gate attendants before presenting GGS with a $6 million demand, it would have known the gate attendants were not employees."

The federal judge also declared that, once discovery revealed the underlying facts of the case, "DOL should have abandoned this litigation."

Finding Incentive Alternatives for Family Businesses

If you own a family business, it is a given that you're not going to issue equity outside of the family. As a result, stock options may not seem to be of any value to non-family member employees. In addition, family employees' knowledge that they will eventually inherit the business is usually seen as their incentive to perform.

However, attorney Andrew W. Steen of the law firm of Davis Wright Tremaine says there are other equity incentives that you can usefully deploy.

"Equity incentive does not have to come just in the form of traditional stock options," he pointed out. "There are countless permutations of ways to align an employee's interests with the growth of the business."

If you wish to avoid giving true equity to non-family members, Steen says that phantom stock or stock appreciation rights can provide the economic equivalent of equity without actually issuing stock.

Both alternatives are seen as contract rights intended to give the employee value that is commensurate with the value of the company stock.

The Ghost in the Machine

These "phantom stocks" and stock appreciation rights can provide employees with the economic equivalent of equity without actually issuing stock, Steen stresses.

Stock appreciation rights grant an employee the contractual right to receive cash or stock equal in amount to the increase in the price of the stock.

He describes phantom stock as a contractual right of the employee that mirrors a restricted stock grant. The employee receives an account credited with a certain number of hypothetical shares and, at some point in the future, the company pays the employee an amount equal to what the employee would have received from selling the same number of real shares.

In both scenarios, the company can subject these rights to a vesting schedule that can be based on time, performance, operation benchmarks, etc.

This schedule can help create specific incentives, he says. "And in neither situation does the employee ever get true equity in the company or any voting or other rights that would go along with equity"

When it comes to family members, he says the value of equity incentives may lie in the ability to fashion a vesting schedule.

"The patriarch or matriarch may not want to hand over the company to the next generation until after they have proven themselves," Steen notes. "But the next generation does not want to make the commitment and put in the labor with the family business without the assurance of a smooth ownership transition."

With an equity incentive vesting schedule based on time, the family member will incrementally own more and more of the company over time.

"For some family members this may be a much better incentive because their commitment and labor are being rewarded continually over time, rather than in anticipation of a future hand off of ownership and control," Steen observes.

This may require something of a shift in viewpoint, he admits. "In other words, we should not be so quick to dismiss the notion of equity incentive just because yours is not the typical corporate situation."

Steen believes there is a lot of flexibility and there are a number of different ways to align employees' interests to the growth and success of a family-owned business.

"Of course, in evaluating alternatives, be sure to first consult with your tax advisors closely, for issues such as when the rights are taxable to the employees and whether there are any issues under Section 409A of the tax code," he urges.