

# Welcome!

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## **“Ban-the-Box” and Other Laws Limiting an Employer’s Use of Criminal History**

*Presented by Rosemary G. Kenyon and Kayla J. Marshall*



# “Ban-the-Box” and Other Laws Limiting an Employer’s Use of Criminal History

## Rosemary G. Kenyon



Rose Kenyon is a partner in Smith Anderson’s Employment and Labor Law Practice Group. She has significant experience as a counselor and litigator, both in private practice and as in-house counsel, on all aspects of employment and labor law. Rose has been recognized as a Fellow in the *College of Labor and Employment Lawyers*, and in *Chambers USA: America’s Leading Lawyers for Business*, Labor & Employment, among others. She is a frequent speaker on emerging employment and labor law trends.

## Kayla J. Marshall



Kayla Marshall is an associate in Smith Anderson’s Employment and Labor Law Practice Group. She has experience representing employers in cases involving claims of discrimination, retaliation, harassment, wrongful termination, and trade secret and non-complete issues. Through her employment practice, she also assists clients in developing effective employment practices and policies and advises employers regarding issues arising in the employment context.

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# Introduction

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- Ban-the-Box Laws
- Prohibited Inquiries
- Use of Criminal Background in Hiring Decisions
- Procedural Requirements

# Ban-the-Box Laws

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- Limit when an employer may permissibly ask about an individual's criminal background
- Growing trend among states
  - A significant minority of states have some form of a ban-the-box law for *private* employers (e.g., HI, IL, OR, RI, MA, MN, NJ)
  - Number of major municipalities have also enacted ban-the-box laws

# Ban-the-Box Laws

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- Variability of *when* employer can ask
  - After conditional offer, completion of first interview, selection for interview, written application
- Examples, cannot ask before:
  - employer determines the applicant is qualified for the position and has notified the applicant of interview (e.g., IL)
  - Same as above, but may ask after completion of the first interview (e.g., NJ)
  - conditional offer of employment issued (e.g., HI)

# Ban-the-Box Laws

## Employer Application Forms

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- Dilemma for multi-state employers
- Best practices – 2-step application process
  - Identify relevant states
  - General application with no criminal history questions
    - Alternative is to ask, with multiple state qualifiers
  - Develop 2nd application used later in the process that complies

# Prohibited Inquiries

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- There are some questions about criminal history that employers should not ask at *any* stage of the hiring process
  - Arrest Records
  - Expungements
  - Misdemeanors
  - Marijuana convictions more than two years old (CA)
- State and federal law/regulation



# Prohibited Inquiries

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- **Limitations on use of older information**
  - **Fair Credit Reporting Act (FCRA):** for jobs that pay less than \$75,000 annually, 7 year limit on *arrest* records (but not *convictions*) and on most other financial information
  - **State Laws:** State FCRA's and other state laws limit consideration of conviction records after certain period of time (e.g., Washington, Hawaii (10 yrs))
  - **EEOC Guidance:** Employer should consider amount of time that has passed since the offense or completion of offender's sentence

# Ban-the-Box/Prohibited Inquiries Application Process

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## ■ Best Practices

- Develop 2 applications forms
  - Initial Application
  - 2<sup>nd</sup> Application – includes questions about criminal history that comply with state law
- Multi-state employers:
  - Draft for most aggressive state law (not the best)
  - State exceptions: If you are a California resident, do not report on . . .
- Ensure that 3<sup>rd</sup> party background firm provides only allowed information

# Use of Criminal Background in Hiring Decisions

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- **Use of background information**
  - If you cannot ask about it, do not use it
- Specific limitations in federal and state law/regulation

# Use of Criminal Background in Hiring Decisions

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## Federal Restrictions:

- EEOC Enforcement Guidance
  - Avoid adverse impact
  - Individualized assessments considering
    - Type of conviction as it relates to specific job
    - amount of time that has passed since the offense or completion of offender's sentence
    - Other factors
- FCRA
  - Time limits on arrests and certain financial information

# Use of Criminal Background in Hiring Decisions

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## State Laws:

- Growing trend to legislate
- Specific limitations preventing use of:
  - Convictions for which offender completes a first offender program (Georgia)
  - Certain marijuana convictions (California)

# Use of Criminal Background in Hiring Decisions

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- **Impose limitations similar to EEOC that require:**
  - individualized assessment
  - consider the applicant's criminal history based on the nature of the job, the nature and gravity of the conviction, and the amount of time that has elapsed since the conviction

# Use of Criminal History in Hiring Decisions

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- **District of Columbia**

- Employer can only withdraw offer or take adverse action based on conviction if based on legitimate business reason, considering:
  - The duties and responsibilities of the employment sought
  - The bearing the criminal offense will have on the applicant's ability or fitness to perform the responsibilities or duties of the job
  - Time elapsed since criminal offense
  - Seriousness of criminal offense

# Use of Criminal History in Hiring Decisions

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## ■ Pennsylvania

- Employers may only consider felony and misdemeanor convictions if the convictions relate to the applicant's suitability for the position for which he applied

## ■ New York State

- Employers may deny employment or remove employee only if:
  - there is a direct relationship between one or more of the prior criminal offenses and the specific employment sought
  - the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public



# Use of Criminal History in Hiring Decisions

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## ■ Best Practices

- Use proper application forms and background screening process (earlier slides)
- Know the state law limitations that apply to your company's application process

# Use of Criminal History in Hiring Decisions

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## ■ Best Practices (cont'd)

- Develop written company guidelines to evaluate criminal convictions in the hiring process that consider:
  - Type and gravity of convictions as they relate to specific positions and threat to safety and property
  - Consistency for similar jobs
  - Individual *case-by-case* assessment
  - One-size may not fit all jobs

# Use of Criminal History in Hiring Decisions

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## ■ Best Practices (cont'd)

- Develop a chart
- When an individualized assessment is necessary, use a disciplined process to consider gravity of offense, job needs, elapsed time, and other relevant factors
- Document the process, since there will be more scrutiny of these decisions

# Background Checks and Procedural Requirements

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## ■ FCRA

- Applies when employer uses third party to conduct background check of applicant
- Under the FCRA, an employer must:
  - Provide a clear and conspicuous written disclosure *and* obtain authorization to perform background check (separate form)
  - Give notice *before* any adverse action is taken based on information in report
  - Wait a reasonable period of time after giving notice and before taking adverse action (i.e., 5 days)
  - Provide notice of adverse action

# Background Checks and Procedural Requirements

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- **State Law – Growing Trend (examples):**
  - **Pennsylvania:** An employer must provide written notice to applicants when a decision not to hire the applicant is based in whole or in part on criminal history record information
  - **Massachusetts:** If an employer makes an adverse employment decision based on criminal history, the employer must give the applicant whatever criminal history records that the employer possesses
  - **Georgia:** If an adverse employment decision is made based on the applicant's criminal record, the employer must disclose all information in the record to the employee or applicant and state how it affected the decision

# Background Checks and Procedural Requirements

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## ■ Best Practices – Background Check Process

- Develop written protocol for process for background check to include disclosures, authorizations, notifications
- If outsourced, critically review each step since many background firms are not strictly complying, and it is the *employer's legal obligation*

# “Ban-the-Box” and Other Laws

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## ■ Best Practices - Overall

- Know what state laws that apply
- Review and revise application forms to comply with changing state laws
- Develop a process for integrating background checks into the hiring process that allows enough time to evaluate
- Develop a disciplined process for vetting which convictions are relevant for which jobs, and a process for an individualized assessment of situations when needed
- Develop a process for obtaining background checks that complies with FCRA and applicable state laws

# Thank you!

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