

Blog Post

Federal Contractors To Be Limited On Criminal Background Checks

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Private employers with federal contracts will soon be prohibited from requesting criminal history information from candidates at the onset of the hiring process; instead, they will have to wait until after an offer is made.

The Fair Chance to Compete for Jobs Act of 2019 (Act) was discreetly tucked into the Defense Spending Bill approved on December 20, 2019. The Act is part of a growing national trend of “Ban the Box” laws, referring to the question on job applications asking whether a candidate has been convicted of a crime. Ban the Box laws largely have bipartisan support and, according to the National Employment Law Project, have been approved in 35 states and more than 150 cities across the United States.

As of March 31, 2017, the U.S. Office of Personnel Management already required most federal agencies to wait until the conditional offer stage of the hiring process to request criminal history information from a job candidate. The Act supersedes this regulation and applies the prohibition to both the federal government and now certain private employers.

Specifically, the Act prohibits private employers that contract with the federal government from requesting criminal history information, including arrests and convictions, from candidates *for*

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positions within the scope of the federal contracts until after the conditional offer stage.

A “conditional offer” means an offer that is conditioned upon the results of a criminal history inquiry. The Act does not entirely prevent federal contractors from seeking criminal history information, nor does it impose specific standards or requirements on how the employer uses that information. It only delays the inquiry timing until after a conditional offer has been made.

The Act is crafted so that it only applies to prime contractors and to those employees performing work for the federal government on a federal contract. The language is specifically limited to those who “*submit[] a bid for a contract*” and those “*receiving a Federal Contract and receiving payments*” from the federal government on those contracts.

The Act is intended to be consistent with and not supersede or restrict the application of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion, sex and national origin, or other relevant federal civil rights laws. Penalties for violating the Act range from a written warning for the first violation up to suspending payment under the federal contract for subsequent violations.

Critical to the Act, and to most of the state and local Ban the Box laws, is that it includes exceptions to the law. This particular Act does not apply to positions involving access to classified information, law enforcement, or national security positions. Within 16 months of the enactment of the Act, the Administrator of General Services, in consultation with the Secretary of Defense, must issue regulations identifying additional positions to which the prohibitions do not apply, giving consideration to positions involving interactions with minors, access to sensitive information, or managing financial transactions.

The decision to prohibit inquiries into criminal histories at any early stage of the hiring process is intended to help qualified workers with arrest or conviction records compete fairly for employment in federal agencies and with federal contractors. A study in 2019 conducted by Daniel Shoag of Case Western University and Stan Veuger of the American Enterprise Institute found the policy of banning criminal history questions increased employment by 4% in the nation's most criminalized neighborhoods (i.e., neighborhoods with the highest concentrations of people with records).[1]

The Defense Spending Bill included two other laws which affect the federal government and its employees. The Defense Spending Bill included a 3.1% average federal pay raise increase for federal employees and a paid parental leave program for all federal workers. The program allows federal employees up to 12 weeks of paid time off for the birth, adoption, or foster care of a new child. The paid parental program will begin in October 2020.

The federal government joins several states including California, New Jersey, and New York, which already offer paid parental or sick leave. The Family and Medical Leave Act requires employers with 50 or more employees to offer employees up to 12 weeks of unpaid leave to attend to their own or close family member's serious health condition or for the birth or adoption of a child, among other things. The Defense Spending Bill's paid parental leave program only covers leave for the care of a new baby after birth, adoption, or the start of foster care; it does not cover care for a sick relative or oneself.

The Act does not take effect until December 2021, two years from the date of enactment. Nonetheless, employers that contract with the federal government should consider revising their employment applications now to remove questions regarding a candidate's criminal history. Federal contractors should also begin training management to not ask

this question prior to a conditional offer of employment being made. For all other employers, check your state and/or local laws to see whether a Ban the Box law has been passed.

For assistance with policies, training, procedures, or issues that arise with criminal history inquiries or the applicability of a Ban the Box law, contact your Akerman attorney.

[1] Daniel Shoag, Stan Veuger, "‘Ban the Box’ Measures Help High Crime Neighborhoods" (American Enterprise Institute Economics Working Paper 2016-08, updated March 2019).

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