Proposed 'Ban the Box' Legislation Would Limit Criminal History Inquiries by Federal Contractors

By Richard I. Greenberg and Susan M. Corcoran

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Bills pending in both houses of Congress would make it unlawful for most federal contractors to request a job applicant, whether orally or in writing, to disclose criminal history record information before the applicant has received a conditional offer of employment.

The bills, introduced on September 10, 2015, exempt from its prohibition positions in which consideration of criminal history record information prior to a conditional offer is required by law. The bills also exempt federal contracts that require an individual hired under the contract to have access to classified information or to have law enforcement or national security duties.

The bills, S. 2021 and H.R. 3470, enjoy bipartisan support and may move quickly in both the Senate and House.

That this legislation is receiving strong support from Republican legislators is unusual. According to the National Employment Law Project, seven states, Washington, D.C., and 26 cities and counties, primarily in "Blue" or Democratic-leaning jurisdictions, now have some form of "ban the box" laws for government contractors or private employers. Business and industry groups typically have resisted such laws as posing an unnecessary hurdle to obtaining relevant information from applicants for many positions early in the hiring process. For example, some argue that an employer-contractor seeking to hire a Chief Financial Officer should not have to make an offer of employment before asking whether the applicant has been convicted of embezzlement. Many large contractors hire thousands of employees yearly, and may find such obstacles overly burdensome.

"Ban the box" laws generally expand on the Equal Employment Opportunity Commission's controversial 2012 "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964." The Enforcement Guidance requires employers to conduct an individualized assessment of the job-relatedness of a criminal conviction to the job to which the candidate applied and encourages employers not to ask about criminal background information before making a job offer.

If you have any questions, please contact the Jackson Lewis attorney with whom you regularly work.

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