



COUNTY ADVISORY BULLETIN

CAB

Published by: County Commissioners Association of Ohio

209 East State Street • Columbus, Ohio 43215-4309

Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

Bulletin 2016-01

March, 2016

“BAN THE BOX” ON PUBLIC EMPLOYER EMPLOYMENT APPLICATIONS

APPLICABLE LEGISLATION: HB 56 (131st General Assembly)

REVISED CODE SECTIONS EFFECTED: Amends sections 124.11, 124.34, 329.021, 2953.36, 4121.121, 5120.38, 5120.381, 5120.382, 5123.08, and 5139.02 and enacts sections 9.73 and 5164.44

LEAD SPONSORS: Representatives Schuring and Slesnick

HOUSE COSPONSORS: Amstutz, Antonio, Ashford, Becker, Blessing, Bishoff, Boyce, Brenner, Boyd, Buchy, Craig, Derickson, Dever, Driehaus, DeVitis, Fedor, Ginter, Green, Grossman, Hackett, Hood, Howse, Johnson, T., Kuhns, Leland, Lepore-Hagan, Maag, McClain, O'Brien, S., Patmon, Patterson, Pelanda, Perales, Ramos, Reece, Retherford, Ruhl, Rogers, Ryan, Sears, Sheehy, Smith, R., Stinziano, Sweeney, Sykes, Thompson, Young, Speaker Rosenberger

SENATE COSPONSORS: Brown, Burke, Eklund, Hottinger, Seitz, Yuko

EFFECTIVE DATE: March 23, 2016

BULLETIN SUMMARY

- The bill prevents all public employers, including counties, from asking about previous criminal convictions on their job applications.
- The bill does not prohibit a public employer from including in a job application a statement notifying applicants about potential disqualification if they have a particular criminal history.
- The bill also does not prohibit public employers from inquiring about felony convictions later in the hiring process. The inquiry is only “banned” from the job application itself

RECOMMENDED COUNTY ACTION

- All county offices/human resource departments should review and revise all applications for any position within the county government in order to be in compliance with the provisions of HB 56 by March 23, 2016.
- An audit should also be conducted of all hiring processes to ensure that any inquiry about convictions occurs at an appropriate time during the hiring process and that that inquiry is sufficiently documented.
- It is also recommended that training be provided to all managers involved in the hiring process to ensure compliance with HB 56.

TEXT OF THE NEW “BAN THE BOX” PROVISION - SECTION 9.73

Sec. 9.73

(A) As used in this section:

- (1) "Public employer" means a state agency or a political subdivision of the state.
- (2) "State agency" means any organized body, office, agency, institution, or other entity established by the laws of the state for the exercise of any function of government.
- (3) "Political subdivision" means a county, township, municipal corporation, or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.

(B) No public employer shall include on any form for application for employment with the public employer any question concerning the criminal background of the applicant.

(C) Nothing in this section prohibits a public employer from including on any form for application for employment with the public employer a statement notifying an applicant of any provision of the Revised Code or federal law that disqualifies an individual with a particular criminal history from employment in a particular position.”

BACKGROUND

The Act prohibits public employers from asking for information about an applicant’s felony convictions at the time the application is submitted to the public employer. There is an exception to this restriction that covers applications for positions which include statutory restrictions in terms of an applicant's criminal history. These exceptions include positions in schools or those that work with elderly individuals or children. In addition, the bill makes a small change to ORC Section 124.34. This change is actually a clarification that states an individual who is convicted of a felony while in the classified civil service will become an unclassified employee, however, that conviction must occur while the employee is employed and not prior to his or her employment date.

INQUIRY REGARDING CRIMINAL CONVICTIONS

The inquiry is only “banned” from the job application itself. The bill does not prohibit public employers from inquiring about felony convictions later in the hiring process. Employers should develop a procedure regarding how, and when, the inquiry will be made. The developed procedure should be followed for each position without deviation. Deviation from a standard practice may inadvertently expose employers to a claim of disparate treatment.

WHEN TO SEEK INFORMATION ABOUT CRIMINAL CONVICTIONS FROM APPLICANTS

The inquiry depends upon the employer and the position. Some employers may find that asking about criminal convictions earlier in the process, such as during a phone interview or first in-person interview, may be prudent. This would be particularly important for those positions where Ohio or Federal law disqualifies a person with certain convictions from holding the position. Positions that may fall into this category include, but are not limited to, teachers, nurses, direct care workers, police officers, and sheriff’s deputies. For other positions, however, employers may find it is more cost-effective to save the inquiry for the final candidates or to simply make a conditional job offer to the desired applicant that is contingent upon successfully passing a criminal background check.

USE OF CRIMINAL BACKGROUND CHECKS PRIOR TO EMPLOYMENT

The bill does not discourage, or encourage, criminal background checks in the public sector. Conducting a criminal background check, at least on the final candidate(s) considered, remains recommended as a best practice for all county employers. Public employers must still obtain the written consent of applicants before running background checks and should also ensure that the background check procedure is in compliance with the EEOC’s 2012 Enforcement Guidelines on Criminal Background Checks.

The EEOC guidelines anticipate that, in most cases, an employer will not reject a candidate solely based on a prior felony conviction. Employers are expected to evaluate the applicant’s entire record, including the type of felony and when it occurred. The EEOC has taken the position that employers cannot refuse to hire applicants simply because they have a felony conviction. Instead, the EEOC requires employers to demonstrate that the refusal to hire based upon a conviction is “job related and consistent with business necessity.” This will typically require the employer to weigh various factors including the nature of the job, the type of conviction, and the amount of time that has passed since the conviction occurred. Further the EEOC requires a form of “pre-deprivation” meeting with an applicant who has a criminal conviction in order for them to provide any mitigating factors that the employer must weigh before rendering a decision.

APPLICATIONS FOR POSITIONS WHICH HAVE SPECIFIC CRIMINAL HISTORY PROHIBITIONS

The Act specifically authorizes the employer to include a statement on an employment application where specific statutory directive prohibits an individual from holding the position if convicted of certain crimes. HB 56 expressly states that it does not prohibit a public employer from including in the job application a statement notifying applicants if a provision of the Ohio Revised Code or Federal law disqualifies an individual with a particular criminal history from employment in a particular position (ORC Section 9.73(C)).

TERMINATION FOR CONVICTION OF A FELONY WHILE A COUNTY EMPLOYEE

The Act also modifies Ohio's civil service law in several areas to clarify that it is a permitted practice to state that classified employees who are convicted of a felony "while employed in the civil service" may be removed under R.C. 124.34(A). Further, an unclassified employee loses their position because they are convicted of a felony "while employed in the civil service," the employee forfeits their right to resume a position in the classified service under R.C. 124.11(D)(3)(a). Consequently, if an employee is convicted of a felony after they have been hired and are currently employed by the county that employee may be fired.

TERMINATION FOR CONVICTION OF A FELONY WHICH OCCURRED PRIOR TO BECOMING EMPLOYED

As stated above, criminal background checks prior to an offer of employment continue to be a recommended best practice for employers to make informed employment decisions. In situations where a criminal background check is not done and the employer later learns of a felony that occurred prior to employment, it is clear that grounds for termination exist in certain situations.

The first situation is where the employee failed to disclose a felony conviction that would render them legally disqualified for the job under Ohio or Federal law.

The second situation is when the employee was asked about prior felony convictions as part of the selection process and lied. As a part of a properly documented selection process, employers should have a record of the employee's response if they were asked about any convictions during an interview or in a later part of the selection process. If documentation verifies that the employee did not disclose the conviction during these later processes, "dishonesty" will continue to be a viable basis for removal.

Questions or comments should be directed to [John Leutz](#), CCAO Legislative Counsel, who was primarily responsible for the preparation of this County Advisory Bulletin (CAB).