

Is there room for redemption in the workplace?

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Employers face huge liability risks for hiring the wrong people. Suppose you hire a salesperson to go into customers' homes to provide free estimates in hopes of selling more replacement windows. If your salesperson has a criminal history and commits a violent crime against the prospective customer, any competent plaintiffs' lawyer could make a pretty good case against your company for negligent hiring. That's true whether you conducted a criminal background check and hired the salesperson anyway or failed to do a criminal background check.

The liability risks have caused many employers to ask on their employment applications whether applicants have ever been convicted of crimes. However, a growing national movement is challenging this common risk-management practice.

The central premise of the movement, which goes by the name "ban the box," is to delay when an applicant is asked about any criminal history. The delay arguably allows ex-convicts to be judged on their qualifications and gives them a better chance at finding employment after they have paid their debt to society.

Tucson's in—Phoenix next?

Tucson became the first Arizona city to ban the box on its job application for city employment in March 2015. The Tucson City Council unanimously adopted a resolution removing any inquiry about criminal history from the city's standard job application form. Tucson now will conduct background checks only after making a contingent offer of employment, and only certain positions will require background checks.

If a position requires a background check that reveals the applicant's criminal history, the city will make hiring decisions based on the age of the criminal record, the seriousness of the offense, its relationship to the job responsibilities, and other mitigating factors. Tucson has also committed to giving applicants an opportunity to refute the background check findings before being disqualified for the job. Tucson's policies closely track the guidance issued by the Equal Employment Opportunity Commission (EEOC) back in 2012.

The Phoenix Human Relations Commission is spearheading an effort to ban the box on that city's job application. According to published reports, Phoenix is taking a slightly different approach than Tucson. Phoenix now is deciding which of approximately 900 jobs are eligible for an application with no criminal history inquiry. Sworn public safety positions and jobs that require employees to work closely with children and money are not eligible. Officials estimate that about 300 jobs will qualify for no criminal history inquiry on the job application.

Some ban-the-box laws apply to employers in the private sector. In Arizona, Senator Martin Quezada (D-Avondale) has introduced a private-sector ban-the-box bill in each of the past three legislative sessions, but the bill has not advanced out of committee.

Risk vs. opportunity

The ban-the-box movement presents difficult challenges for Arizona employers. Each employer is in the best position to assess its own hiring needs. The law is clear that businesses across the board have an obligation to their employees and customers to create and maintain a safe workplace. If a criminal background is disqualifying for a

particular job, postponing the inquiry to the end of the hiring process is a waste of time for both the employer and the applicant.

On the other hand, there is broad consensus that we have a serious problem as a nation with over-criminalization. Interest groups from opposite ends of the political spectrum—the Heritage Foundation and the American Civil Liberties Union (ACLU) are two examples—have introduced initiatives to combat over-criminalization.

A criminal conviction is not a disqualifier for every job. Having two job application forms—one with the criminal history inquiry when it's an absolute disqualifier and one without—could be an effective solution. For many employers, however, the most sensible step may be to take the criminal history question off the job application and instead develop another screening technique to weed out applicants with a disqualifying criminal history early enough in the process so you don't waste both your time and the applicant's.

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