



# Ban the Box – Live Examples

Fair Chance Hiring Ordinances and Employment Screening

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## Montserrat Miller

Montserrat Miller is a partner in the Privacy and Consumer Regulatory; Immigration; and Government Affairs Practice Groups of Arnall Golden Gregory LLP based in Washington, D.C.

Ms. Miller has developed a national practice advising both consumer reporting agencies (aka background screening companies) and employers regarding their compliance with consumer reporting laws, including the Fair Credit Reporting Act (FCRA). This includes the use of criminal and credit history information, motor vehicle records, as well as Fair Chance Hiring Laws (aka Ban the Box ordinances), all tied to employment background checks. In addition, Ms. Miller represents organizations that have experienced a personal data security incident or data breach and compliance with state breach notification laws. Finally, Ms. Miller advises organizations on the collection, use and disclosure individuals' personal data and whether it is permissible under federal, state or international law.

Ms. Miller co-chairs the firm's [Background Screening Industry Group](#).

Ms. Miller has extensive experience representing clients before the Federal Trade Commission, Consumer Financial Protection Bureau, Department of Homeland Security, Equal Employment Opportunity Commission and the U.S. Congress.



# About Arnall Golden Gregory LLP

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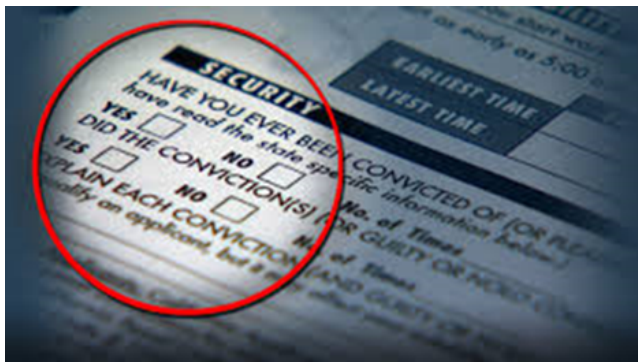
# About Arnall Golden Gregory LLP

- Specific industry team dedicated to the Background Screening industry
- Served as national legislative counsel to the National Association of Professional Background Screeners (NAPBS) and represent the Consumer Data Industry Association (CDIA)
- Team members regularly provide:
  - Day to day advice to employers on hiring programs and background screening practices
  - Day to day advice to background screeners on compliance with the Fair Credit Reporting Act and other consumer protection statutes
  - Day to day advice on EEO compliance
  - Development of litigation avoidance programs
  - Defense of individual and class action lawsuits



# What is Ban the Box?

- Fair Chance Hiring Ordinances
- Employment Screening
- Public and Private Employers
- Intersection of the FCRA, EEOC Guidance and State/Local Laws and Ordinances



Bus. or Trade School	
Professional School	

HAVE YOU EVER BEEN CONVICTED OF A CRIME?  
If yes, explain number of conviction(s), nature of offense(s) committed, sentence(s) imposed, and type(s) of rehabilitation.

# Ban the Box

- Employers cannot ask a job applicant about their arrest and/or conviction history on the job application and until a conditional offer of employment has been made.
- Goal is to ease hiring barriers and create a fair chance to compete for jobs – judge applicants on qualifications first.
- Delaying arrest and conviction-history inquiries in hiring = ban the box and according to NELP is “intended to mitigate the blanket exclusion that job-seekers with criminal records face when seeking work.”

# EEOC

“As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.” (2012 Enforcement Guidance)

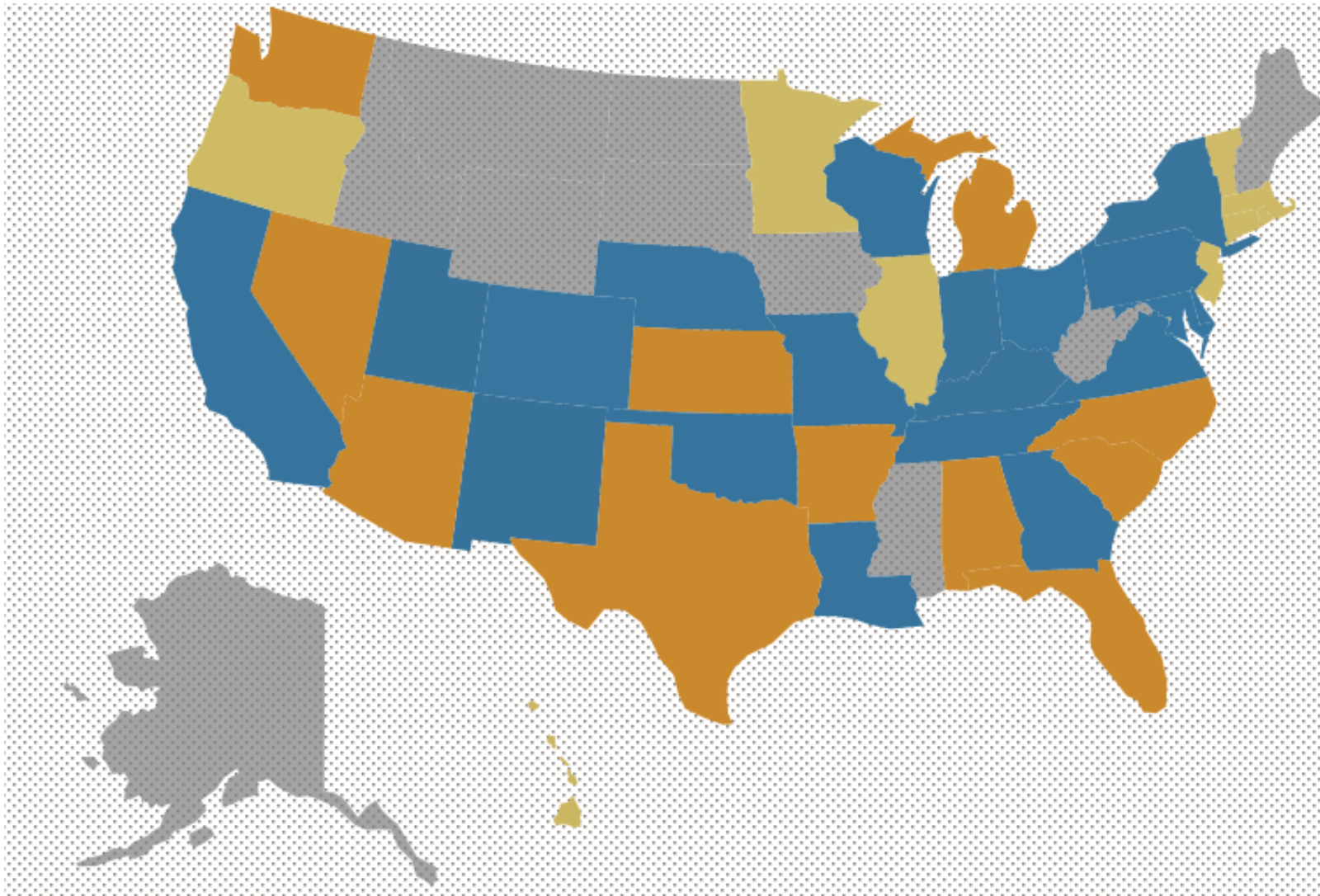
## Individualized Assessment:

- Incorrectly identified or inaccurate report
- Facts or circumstances surrounding conviction
- Number of offenses
- Age
- Same type of work, post conviction, with no incidents
- Length and consistency of employment history post conviction
- Rehabilitation
- References
- Bonding



# Landscape for Private Employers

- Nine states and the District of Columbia have Fair Chance Hiring Laws – Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont
- Major localities – Austin, Baltimore, Buffalo, Chicago, Columbia (MO), the District of Columbia, Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George’s County (MD), Rochester, San Francisco and Seattle



- State covers public employers
- State covers private employers
- Other local policies, no state law or policy
- No state or local policy

# State Level – Private Employers

- Connecticut
- Hawaii
- Illinois
- Massachusetts
- Minnesota
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington, D.C.
- Number of employees
- Timing of inquiry (e.g., after conditional offer of employment)
- Individualized assessment
- Waiting period before taking adverse action
- Notices
- Basis for potential adverse action
- Exceptions include law enforcement, federal/state requirement

# Minnesota

- *M.S.A. § 364.01 et seq.*
- 2014
- Employers cannot inquire into or consider or require disclosure of the criminal record or criminal history until the job applicant has been selected for an interview or, if no interview, a conditional offer of employment is made.
- Exception for Department of Corrections and when law requires consideration of criminal history.

# New Jersey

- The Opportunity to Compete Act (2014) – effective March 1, 2015
- *N.J.S.A. 34:6B-11 et seq.*
- The Opportunity to Compete Act Rules issued by the New Jersey Department of Labor and Workforce Development
- *N.J.A.C. 12:68 The Opportunity to Compete Act Rules*
- 15 or more employees.
- Cannot inquire about criminal record during initial employment application process – oral, written inquiry, employment application.
- Exceptions for law enforcement, when required by law, participation in WOTC.
- Job advertisements cannot state that employer will not consider any applicant who has been arrested or convicted of a crime.
- No private right of action but penalties may be up to \$1,000 (1<sup>st</sup>), up to \$5,000 (2<sup>nd</sup>) and up to \$10,000 (3<sup>rd</sup>).

# Chicago

- City Ban the Box ordinance works in tandem with state law, the Job Opportunities for Qualified Applicant Act (820 ILCS 75/1 *et seq.*)
- Effective 2015
- *Municipal Code of Chicago, Chapter 2-160*
- Applies to any private employer with less than 14 employees.
- Cannot inquire about or into, consider, or require disclosure of an applicant's criminal record or criminal history until after the applicant has been determined qualified for the relevant position and notified that he/she has been selected for an interview, *or*, if no interview, until after a conditional offer of employment is extended.
- Exceptions for federal/state law exclusions, bonding is required, license required under the Emergency Medical Services Systems Act.
- Must inform applicants of decision not to hire based entirely or partially on the applicant's criminal record or history and the basis for same.
- Job opportunity advertisements restricted
- \$100 to \$1,000 for each offense and/or possible business license suspension or revocation.

# San Francisco

- Fair Chance Ordinance (2014)
- *Article 49 of the San Francisco Police Code*
- Covers employees who perform work in the City and County of San Francisco and have 20 or more employees (total worldwide)
- Employers cannot require applicants to disclose, inquire about or discuss criminal history until either after the first live interview or after a conditional offer of employment.
- Must state in all job solicitations/ads that qualified applicants with arrest and conviction records will be considered for the position in accordance with this ordinance.
- Conspicuously post the FCO notice.
- Individualized Assessment – before taking adverse action such as failing/refusing to hire, discharging, or not promoting an individual based on a conviction history or unresolved arrest, give the individual an opportunity to present evidence that the information is inaccurate, the individual has been rehabilitated, or other mitigating factors.
- Prior to taking adverse action must provide job applicant with copy of the report and explain the basis for the potential adverse action and then provide job applicant with 7 days.
- Maintain and retain accurate records of employment, application forms, and other pertinent data for 3 years.
- Provide yearly compliance reports to the OLSE.

# Hiring Process

- Employment Screening – FCRA, Ban the Box, State Restrictions on CRAs (criminal history) and Employers (credit history)
- Incorporation of individualized assessment and notice of potentially adverse items with the pre-adverse action letter



# Employer Considerations to Address Ban the Box Ordinances

- Determine if you are in a covered state or locality.
- Review employment application materials – advertisements, job descriptions and job applications for impermissible inquiries regarding criminal history (arrests and convictions).
- Provide training and FAQs to employees who conduct job interviews and involved in hiring process to explain permissible/impermissible inquiries into, and uses of, criminal history information.
- Review the hiring process to ensure compliance including the timing of criminal background checks, distribution of mandatory notices, application of mandatory waiting periods and adherence to the FCRA and state law if considering credit history.

# Best Practices

- Employers should not ask about criminal records on job applications and, if and when such inquiries are made, limit them to records for which the exclusion would be job related for the position in question and consistent with business necessity or where required by law.
- Don't have blanket exclusions unless required by law.
- Consider individualized assessments.
- Update offer letters to clearly state the conditions for employment in addition to whether employment is conditioned upon completion of a successful background check and/or inquiry.
- Understand your obligations under the FCRA in order to incorporate notices, letters and individualized assessments into the background screening process.

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Thank you!

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