



# Compliance TODAY

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by Andrew Amari, JD, CHC and Cornelia M. Dorfschmid, PhD, MSIS, PMP, CHC

# Ban the Box: A brief overview of criminal background checks

- » Ban-the-Box (BTB) laws exist at the state, city, and county levels with jurisdictional differences.
- » Compliance officers need to understand BTB laws' significance for sanction screening.
- » Working with HR to assess BTB laws' potential impact is crucial.
- » Careful attention to exceptions for healthcare positions is advised.
- » Hiring processes must be compliant with BTB.

*Andrew Amari (andrewamari2@gmail.com) is Hospital Policy and Regulatory Specialist at the Association of American Medical Colleges in Washington, DC and Cornelia M. Dorfschmid (cdorfschmid@strategicm.com) is Executive Vice President at Strategic Management Services, LLC in Alexandria, VA.*

Compliance offices do not function alone; they must work closely and frequently with other departments to be effective. Look no further than policies and procedures such as an organization's legal or human resources (HR) working protocol; these common policies are a testament to the amount of interactive work compliance officers encounter. Unsurprisingly, laws, regulations, and rules in non-healthcare areas may demand attention from the Compliance office. Compliance commonly works with HR for issues concerning discipline, hiring, background checks, and sanction screening. For that reason, compliance officers should be aware of a growing type of legislation known as "Ban-the-Box" (BTB) laws.

BTB, a civil rights campaign, has successfully passed its name-sake legislation (also known in certain jurisdictions as "Fair

Chance" laws) in at least 29 states and 150 cities and counties throughout the United States.<sup>1</sup> California passed a statewide BTB law as recently as October 2017.<sup>2</sup> These BTB laws prohibit employers from running criminal background checks or asking certain questions about criminal convictions during the employment application and hiring process, an area traditionally within HR's purview. However, issues relating to hiring and background checks, which are typically rigorous for those who provide care, require the compliance officer's attention as well. Although BTB laws do not all share the same exact elements, this article details the commonalities among them and the primary varieties within the shared elements.

## Jurisdictional BTB distinctions

There are commonalities among most BTB laws. First, each jurisdiction sets a threshold of which organizations the law applies to and which groups of employees are protected by the law. Second, each law prohibits employers from inquiring about criminal history, but at what point the protections kick in during the hiring process depends on the jurisdiction. Finally, each jurisdiction chooses which practices are prohibited and



Amari



Dorfschmid

what information employers are restricted from asking about. Understanding the differences of BTB laws across jurisdictions is crucial to healthcare compliance professionals, especially those who operate in multiple jurisdictions.

### **Who is subject and who must comply?**

BTB prohibitions ordinarily do not apply to an organization unless it employs a number of people specified by the law. Certain jurisdictions require only one employee, whereas others require 25 or more employees before the law's protections begin. Once an organization meets the employee requirement, the BTB's protections apply, and the organization must comply with the BTB law.

The protections also have limitations on who is covered. Although many laws protect applicants to public or private jobs, exemptions are extremely common among BTB laws. Thus, a jurisdiction may define its protected group in several ways. It may provide specific exemptions or enumerate which groups of individuals are covered, therefore implying that unlisted groups are not protected. For instance, certain jurisdictions exempt public employees from the prohibition.<sup>3</sup> Additionally, and most relevant to healthcare organizations, some jurisdictions exempt certain licensed or trade positions or positions that provide care to the young, elderly, or sick.<sup>4,5</sup> Although these exemptions exist, they are uncommon, and healthcare organizations should take care to find out whether the exemption is permitted in their jurisdiction. Other possible exemptions include public contractors, private employers, public safety, fiduciary positions, or when federal or state law says otherwise.

### **When are practices prohibited?**

Timing is one of BTB laws' most distinctive elements across jurisdictions. These requirements dictate when, if at all, an organization is

prohibited from making the sorts of inquiries that BTB laws prohibit. This means that certain BTB laws only restrict inquiries about criminal backgrounds until a certain point in the application/hiring process.

The events that trigger protections include, but are not limited to:

- ▶ filling out the application (i.e., there cannot be a question regarding criminal activity),
- ▶ any time before the interview,
- ▶ a criminal background check without an interview (i.e., the interview must occur before the background check is administered),
- ▶ any time before offering the applicant a position, and
- ▶ before making a decision on whether or not to hire the applicant.<sup>6</sup>

### **What practices and information are protected?**

Each jurisdiction differs in the types of practices that BTB laws prohibit. Generally, BTB laws restrict questions or inquiries regarding an applicant's criminal background. However, each jurisdiction controls exactly which practices it prohibits and to what extent. For instance, BTB laws may prohibit checking for smaller offenses, such as misdemeanors, but not felony convictions.<sup>7</sup> In fact, BTB laws cover a number of different types of criminal history, including convictions, arrests, sealed records, dismissed cases, juvenile records, or diversion programs. Each jurisdiction elects which information its BTB law protects.

The three most common practices that are prohibited under BTB laws are:

- ▶ inquiries to an applicant about their criminal background,
- ▶ obtaining background checks, and
- ▶ using criminal background information in the hiring decision.

All of these items must be considered with the prior information. For instance, although

you cannot run a background check according to some BTB laws, you may be able to do so upon extending a conditional offer of employment to the protected applicant.<sup>8</sup> In that case, the offer may still be revoked after the background check.

Also, where asking about criminal information is prohibited in the hiring process, the practice may not be entirely prohibited. Instead, the law may include exception-based language that allows limited use of the prohibited questioning, such as when “the conviction directly relates to employment.” This is true for certain jurisdictions that have addressed their BTB law’s relationship to professions with licensure requirements. For instance, New Mexico’s BTB law (the Criminal Offender Employment Act) allows any “board or other agency having jurisdiction over employment” to refuse or revoke licensure where the conviction “directly relates” to the particular trade.<sup>9</sup> This means, in certain jurisdictions, the law prevents an organization from disqualifying a candidate from an occupation that requires licensure solely because of a prior conviction, unless the crime bears a specified level (e.g., “direct relationship,” “rational relationship,” “sufficient nexus”) of relation to the job.

Additionally, compliance professionals should familiarize themselves with any laws related to the hiring of caregivers that either create exceptions for the BTB law or lend guidance on how to apply the BTB law to healthcare professionals. New Mexico provides another example with its Caregivers Criminal History Screening Act, which makes clear the limitations of criminal screening for those providing specific types of care. The Act

specifies that the criminal history can only be used to see if the applicant has a statutorily defined “disqualifying” conviction.<sup>10</sup>

### Exclusion screening

Healthcare providers might also be concerned with exclusion screening as it relates to BTB laws. Exclusion screening through the OIG’s List of Excluded Individuals/Entities (LEIE) or state Medicaid Exclusion Lists do not, *per se*, present any issues under the BTB laws.

BTB laws are concerned with *criminal* backgrounds, not federal designations. The LEIE serves the purpose of providing a list of individuals who are not allowed to participate in Medicare/Medicaid, and for that reason, it is

not necessarily indicative of an individual’s criminal history, even if the underlying reason for exclusion is based on criminal action.

However, organizations should ensure that their sanction screening question does not implicate criminal history if the state BTB law prohib-

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its it. Instead, organizations should separate questions about exclusions from any language suggesting criminal history will be implicated. Furthermore, certain exceptions discussed above may permit sanction screening in participating jurisdictions. Specifically, exceptions for government licensure bodies, certain healthcare providers, or specific relationships to the job function imply that sanction screening is permitted in these specific instances.

### Conclusion

BTB prohibitions vary greatly across jurisdictions, whether at the state, city, or county level. Compliance officers should be aware of differences in the scope,

timing, and subject of each law’s prohibitive elements. Each organization must ensure that it is familiar with its jurisdictional differences, especially if it operates over many states, cities, and counties. Healthcare organizations must remain cognizant of their obligations under any BTB laws when creating application forms or designing a hiring process, and should coordinate their efforts with HR to comply with applicable BTB laws. Failure to understand when the law applies, at what point in the hiring process it applies, whom it covers, and what information is protected can be detrimental to a healthcare

organization’s fair hiring process and compliance with the law. ©

1. National Employment Law Project: “Ban the Box’ is a Fair Chance for Workers with Records” Fact Sheet. August 2017. Available at <http://bit.ly/2ErfzKd>
2. The National Law Review: “Governor Brown Has Signed ‘Ban the Box’ Legislation into Law for California” October 17, 2017. Available at <http://bit.ly/2EnvfCh>
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4. The City of Lancaster: Employment Application Procedures Memorandum. September 22, 2014. Available at <http://bit.ly/2ChZHYG>
5. 2017 Minnesota Statutes § 364 (Criminal Offenders; Rehabilitation). Available at <http://bit.ly/2Gbias6>
6. Ibid, Ref #3
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9. 2006 New Mexico - Statutes § 28-2-4—Power to refuse, renew, suspend or revoke public employment or license. Available at <http://bit.ly/2EDXXYj>
10. New Mexico Statute § 29-17-5 (Caregivers Criminal History Screening Act). Available at <http://bit.ly/2Hbrj5r>

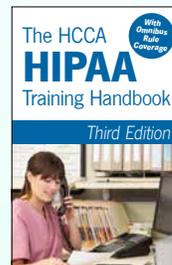
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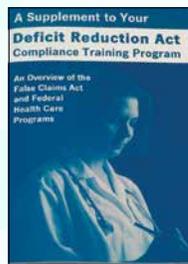
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