

Labor and Employment and Policy Alerts

Akin Gump
STRAUSS HAUER & FELD LLP

Congress Passes Federal “Ban-the-Box” Law for Federal Agencies and Government Contractors

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Key Points

- Congress has passed the Fair Chance to Compete for Jobs Act of 2019 (“Fair Chance Act”) as an amendment to the National Defense Authorization Act, which was enacted on December 17, 2019. This federal “ban-the-box” law prohibits federal agencies and federal contractors from asking about a job applicant’s criminal history until after a conditional offer of employment has been made.
- The Fair Chance Act, which received bipartisan support, will go into effect two years from the date of enactment. The measure provides exceptions for three types of positions, including: (1) positions related to law enforcement and national security duties; (2) positions requiring access to classified information; and (3) positions for which it is required by law to access criminal history information before the conditional offer stage.
- The Fair Chance Act directs the Office of Personnel Management (OPM) and General Services Administration (GSA) to issue implementing regulations.
- Violations by contractors are subject to an array of penalties ranging from warning, to suspension of payment.

The Fair Chance to Compete for Jobs Act of 2019

Mirroring the trends in state and local jurisdictions that have passed legislation to limit the use of criminal arrest and conviction history in employment decisions, a bipartisan group, in both houses of Congress first introduced federal fair chance legislation in 2017. Reintroduced in 2019, the Fair Chance Act (S. 387 and H.R. 1076) was co-sponsored by Sens. Cory Booker (D-NJ) and Ron Johnson (R-WI) in the Senate and Reps. Elijah Cummings (D-MD) and Doug Collins (R-GA) in the House. Numerous cities and thirty-five states have already implemented “ban-the-box” laws to prohibit employers from asking job applicants about their criminal history prior to making a conditional offer of employment. The Fair Chance Act similarly prohibits employers from asking criminal record-related questions prior to giving the applicant a conditional offer of employment.

Contact Information

If you have any questions regarding this alert, please contact the Akin Gump lawyer with whom you usually work or

Scott M. Heimberg

Partner
sheimberg@akingump.com
Washington, D.C.
+1 202.887.4085

Robert G. Lian, Jr.

Partner
blian@akingump.com
Washington, D.C.
+1 202.887.4358

Jamie R. Tucker Jr.

Partner
jtucker@akingump.com
Washington, D.C.
+1 202.887.4279

Passed as part of the National Defense Authorization Act that President Donald Trump signed into law on December 20, 2019, the new law will apply to employees in all branches of the federal government and employees of private-sector companies working on federal contracts. Specifically, the statute will prohibit federal agencies and federal contractors from requesting criminal history information from applicants until they reach the conditional offer stage. For contractors, the prohibition would extend only to those positions related to a federal contract. The legislation defines “conditional offer” as “an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.”

There are exceptions in the law for three types of positions, including: (1) positions related to law enforcement and national security duties; (2) positions requiring access to classified information; and (3) positions for which it is required by law to access criminal history information before the conditional offer stage. The details associated with these exceptions and other aspects of the legislation will need to be further developed through regulations.

In terms of penalties, a first violation would result in a written warning after a 30-day notice and appeal period. For subsequent violations, the Fair Chance Act directs the executive branch agency to take action against the contractor while considering the severity of the infraction and the contractor’s history of violations. Possible action includes: (1) written notice that eligibility for contracts requires compliance; (2) requiring the federal contractor to respond within 30 days, affirming that it is taking steps to comply with the Act; and (3) suspension of payment under the contract until the federal contractor demonstrates its compliance.

The new law effects two years from the date of enactment and delegates authority to implement regulations to the OPM in the case of federal employees and to GSA (in consultation with the Secretary of Defense) in the case of federal contractors. OPM and GSA have 18 months and 16 months, respectively, from the date of enactment to issue these regulations. Violators will be subject to a sliding scale of sanctions.

Because many details of the new law are left unresolved, contractors should monitor the development of final regulations as they manage employment related aspects of their federal contracts.

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