

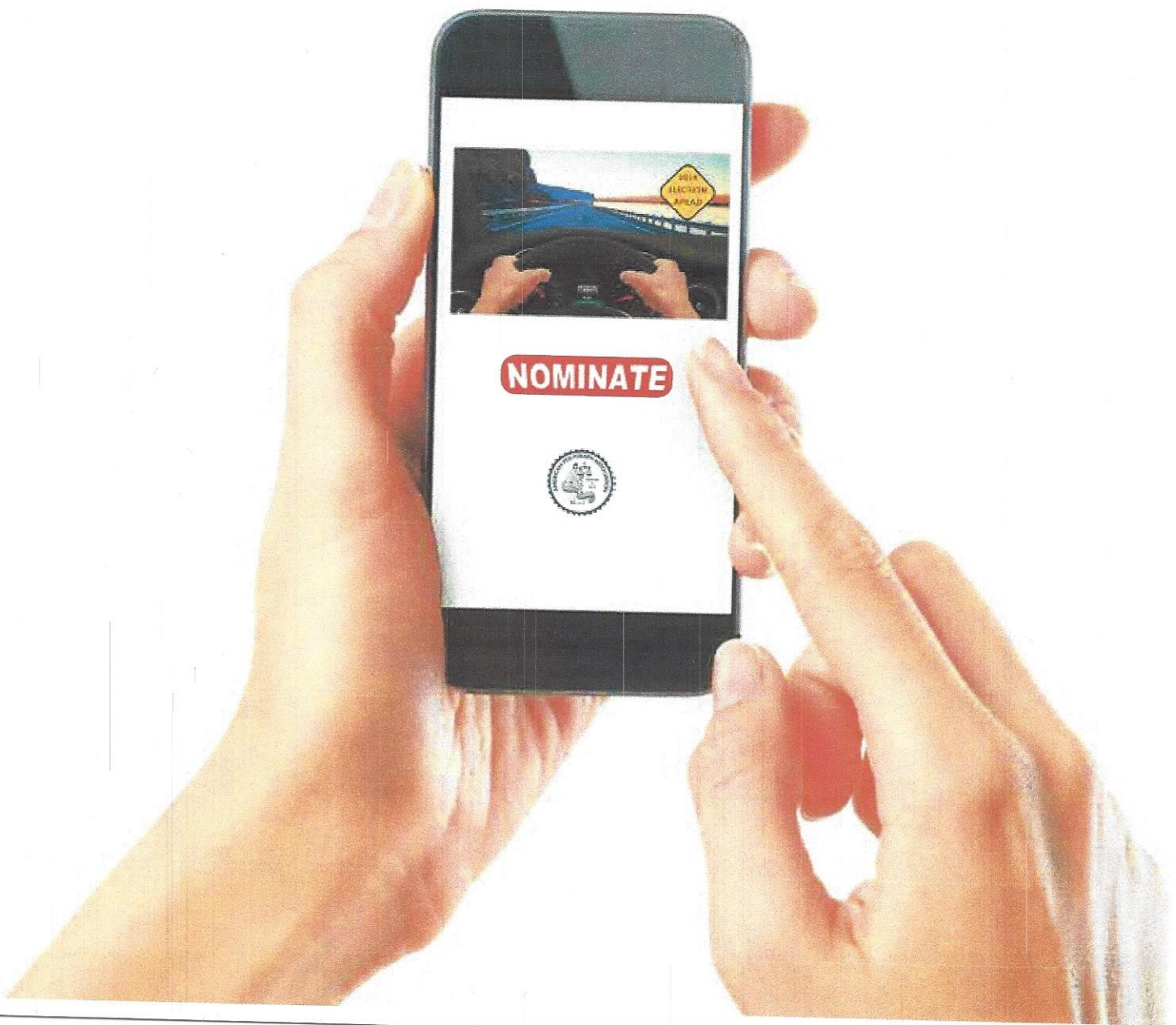
# APA MAGAZINE

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## Ban-The-Box Update



by **Stanley M. Slowik**

**Advisement:** It is not the intention of the author to render legal advice. Any and all concerns regarding legal matters should be reviewed by the reader's legal counsel. The content of this article does not necessarily reflect the opinions of the American Polygraph Association, its members or representatives.

Ban-The-Box refers to government mandates that prohibit employers, including most federal agencies, from seeking work related information about job applicants' criminal and financial histories until the latter stages of the selection process. The "box" refers to actual or virtual questions that

might appear on a job application or pre-polygraph questionnaire.

In a directive that effectively reverses and eliminates restrictions on criminal and credit background investigations, the Office of Personnel Management (OPM) issued a new directive, Guidance on Requests for Exceptions to Timing of Suitability Inquiries Rule (Guidance, [chcoc.gov](http://chcoc.gov)). Previously, using the Obama Administration's 2014 Presidential Memorandum, Enhancing Safeguards to Prevent Undue Denial of Federal Employment Opportunities to the Unemployed or Those Facing Financial Difficulty Through No Fault of Their Own as its mandate, the



OPM began requiring all federal employers, including those typically using polygraph as part of the background process, to defer evaluations of criminal activity and financial responsibility until after the applicant had been given a Conditional Offer of Employment (COE). The stated intent of the regulation was to get federal employers to first invest selection time, staff and money then perhaps overlook subsequent information regarding criminal and financial problems that would have disqualified the applicant (New Federal Mandate, Slowik).

Under the new Guidance procedures, federal employers can now evaluate these two critical information targets early in the process by simply requesting a waiver from OPM providing they can qualify for an exception (OPM Exceptions Waiver template). In words that virtually repeat recommendations made earlier by this author in this publication (ibid, Slowik), two exceptions are specifically cited:

1. Positions where "the ability to testify as a witness is a requirement of the position and thus a clean criminal history record would be essential to the ability to perform the duties of the position effectively";
2. Positions where "the expense

of completing the examination makes it appropriate to adjudicate suitability at the outset of the process".

Federal employers that cannot qualify for one of these two exceptions either have no meaningful conduct standards or are using evaluation methodologies that are as ineffective as they are cheap, e.g. asking questions easily lied to on a form.

As is the case in all 50 states, there are numerous jobs in addition to law enforcement that require applicants to have clean criminal and financial histories before, by statute – not mandate, they can be certified. While waivers to the certification standards can be granted this would typically take place after certification was denied. When employers postpone evaluations of criminal activity and financial responsibility until after COE only to have the applicant disqualified because they can't meet objective, work related standards or essential functions (being a credible witness in court), the employers not only lose their upfront investments of recruitment and selection time and costs but the evaluation pipeline becomes clogged with unqualified candidates, greatly delaying the time to COE and significantly reducing the pool of





qualified candidates picked off by employers using more efficient and effective background systems. Worst of all, Ban-the-Box winds up conning some applicants into thinking they might get a job when by statute this is extremely unlikely.

Perhaps in anticipation of the foregoing, on September 29, 2016, the National Background Investigations Bureau (NBIB) was created as a new semi-autonomous entity within OPM. Charles S. Phalen, Jr., its first Director, is a former VP of Corporate Security at Northrop Grumman and former Director of Security for the Central Intelligence Agency. The NBIB absorbs the mission and function of the OPM's Federal Investigative Service and is charged with reforming and improving the federal background process. Amongst other stated goals, the NBIB plans to coordinate with IT security at the Department of Defense to build "a foundation of government wide standards that promote security, interoperability and information sharing" including the "creation of a law enforcement liaison unit to improve criminal history records access".

Although not specifically referenced in the OPM's Guidance, most Ban-the-Box initiatives are politically constructed to benefit constituencies that

cannot meet merit based job requirements involving criminal and financial histories. Virtually every criminal activity data source clearly shows both a significant gender and racial statistical disparity with regard to measures of criminal conduct (commission, arrest, conviction, probation, incarceration, etc.). Although most Ban-the-Box mandates appear to refer to criminal records, this limitation is not always clear in the hundreds of state, county and municipal examples currently in effect. Difficulties for polygraph examiners arise when those statutes and ordinances that fail to specify the methodology (records vs. criminal history) or examiners who ask about prohibited criminal activities (pre-test questionnaires or interviews), assuming the polygraph examination is taking place before the COE as the federal Buchanan and Leonel cases appear to recommend (ADAAA, Slowik). The best predictor of future criminal activity is recent, past criminal activity. Since criminal records are limited to those who got caught and, after charge/plea bargaining, what they pled to, record checking is a poor substitute to admissions of actual criminal activity obtained in pre-employment interviews and polygraph pre-tests. To maintain that these disparities are the result of racism and sexism is false





and scientifically inaccurate, a conclusion supported by several federal Appellate findings (ibid, Slowik). It is an affront and offensive to law enforcement, prosecutors, judges and juries to infer that they are all in racist collusion to produce such an outcome. Worse, as evidenced by the recent revelations about sexual harassment outcries, there would have to be an incredible number of lying victims, particularly of felony crime, since most victims are the same race as the accused.

While the OPM's Guidance on how to streamline selection by eliminating Ban-the-Box applies only to federal employers, examiners working for state and local government agencies that don't already exempt their agencies from Ban-the-Box should consider presenting the OPM Exceptions Waiver template as a form of consensus support since many Human Resource Departments pattern their practices on the federal procedures.

In June, I will begin my 50th year as a continuously practicing examiner conducting at least 200 exams per year. When I started at John E. Reid and Associates, we conducted most of the more sensational Internal Affairs polygraphs of the Chicago Police including the recently passed Dick Gregory who was represented by F.

Lee Bailly and alleged to have inflicted bite wounds to Chicago Police officers during the 1968 Democratic Convention riots (he did) and suffered alleged excessive force at their hands (they did too). At the time the staff at Reid's argued over what the hiring standards for becoming a Chicago Police Officer were only to discover there was only one. Not education, criminal record, job discipline, drug/alcohol abuse or any other performance based criteria. Those had all been removed following the 1964 Civil Rights Act that created Title VII: no standards, no discrimination. No, the only meaningful criterion for becoming a police officer back then was "Who's your Alderman?" Sadly, just as the Department of Justice report Advancing Diversity in Law Enforcement recommends lowering educational and criminal activity standards to achieve racial equality, this was already tried before and didn't work out so well. I know. I was there. Besides, my birth certificate is signed by the then Clerk of Cook County....  
Richard J. Daly.



## References

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- Americans with Disabilities Act Amendments Act and Polygraph Compliance Issues, Slowik, Stanley, Polygraph, V38, N3, 2009
- Guidance on Requests for Exceptions to Timing of Suitability Inquiries Rule, <https://www.chcoc.gov>
- National Background Investigations Bureau, <https://www.opm.gov/blogs/Director/2016/9/29/Factsheet-National-Background-Investigations-Bureau/>
- New Federal Ban-The-Box Mandate, Slowik, Stanley, APA Magazine V49N3, 2016
- OPM Exceptions Waiver (template) available from [Michael.Gilmore@opm.gov](mailto:Michael.Gilmore@opm.gov) or 202-606-2429

