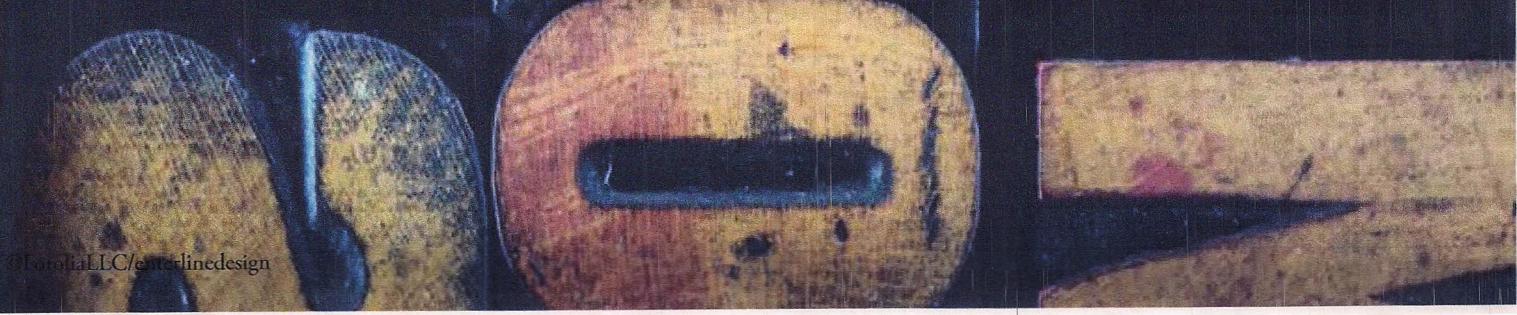


# APA MAGAZINE

The Magazine for the Polygraph Professional

May/June 2016  
Volume 49,3

# VOTE



## New Federal Ban-The-Box Mandate

Stanley M. Slowik



Fotolia/LC/Siro46

On May 2, 2016, the Office of Personnel Management (OPM), the federal agency charged with the implementation and administration of employment practices used by federal employers, has published in the Federal Register a new ban-the-box regulation. The OPM says the mandate would "prevent agencies" from soliciting information or discussing criminal activity and adverse credit issues for applicants seeking employment with federal agencies until after a Conditional Offer of Employment (COE) has been made (Federal Register, 2016). Unlike the eleven states that have already passed this type of legislation, there are no statutory exemptions for law

enforcement or intelligence agencies, though the OPM says it will consider such exemptions on a "case-by-case" basis. Previously, federal employers, including those using polygraph as part of the background process, had been allowed to determine applicant suitability at any time during the hiring process and often used Optional Form 306 (OF-306), Special Form 86 (SP-86) and various pre-polygraph questionnaires all of which ask about criminal arrests and convictions, various criminal activities and problems with personal finances. The OPM cites as its authority the somewhat cynically titled January 1, 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 (Whitehouse Office of the Press Secretary, 2014), as if one's felony convictions are typically false and therefore not one's own fault.

The new regulation, 3206-AN25, follows earlier defeat of both legislative (HR 370) and judicial (EEOC v. Kaplan; EEOC v. Freeman) attempts to restrict the evaluation of criminal and financial activity of job applicants in the private sector. These were attempts to attribute the long standing gender and racial statistical disparities in criminal convictions and negative credit events to sexism and racism. Both the federal trial and Appellate Courts have found such claims to be "laughable, distorted, cherry-picked, worthless and an egregious example of scientific dishonesty" (APA Magazine, 2015). It is important, therefore, to note that the new requirements only apply to federal employers and do not effect the hiring practices of state and local government or private employers, only federal agencies. Also, this mandate will still be in the comment phase until July 1, 2016 after which the language of the mandate becomes fixed.

Though clearly a political wedge issue,

the new requirements are based upon assumptions well known to be false. Specifically, 3206-AN25 concludes that applicants have only actually done the number and types of crimes appearing on their criminal records. Polygraph examiners who conduct pre-employment interviews and examinations are acutely aware that the minimized admissions made during interviews far exceed what appears on records. It is also well established that while not perfect, a person's recent, work-related past is the most valid and reliable predictor of what they will do in the recent, work-related future. Since over 90% of all criminal cases are plea and charge bargained and some criminal conviction records are sealed, expunged, pardoned or otherwise made inaccessible, admissions of commissions – not convictions appearing in a manipulated record – have always been a far more accurate method for making future behavioral predictions. OPM Director Beth Cobert, in announcing the new federal requirements, justifies delaying criminal and credit activity evaluations on the basis that "Early inquiries could lead to the premature disqualification of otherwise, eligible candidates, regardless of whether an arrest actually resulted in a conviction...." Unfortunately, there does not appear

to be any basis as to how the OPM came to conclude that polygraph examiners and others involved in the background process are incapable to differentiating between arrests and convictions or why decision outcomes will be any different when objective, work-related disqualifying criteria are applied before or after the COE. Sadly, one certain outcome of the new requirement will be applicants being given false expectations about employment possibilities that can never be realized.

In the early days of pre-employment drug testing, employers would clearly indicate the test requirement in the job announcement and some applicants, believing they would be unable to defeat the drug screen, judiciously applied elsewhere. Today, of course, any self-respecting substance abuser can easily beat the drug test therein explaining why less than 1% of law enforcement job applicants come up positive on the drug test but over 20% make recent, workrelated admissions of substance abuse during the polygraph examination. The misleading inference that federal employers are somehow going to ignore objective criminal and credit activity standards if the applicant performs well during the highly subjective procedures OPM is recommending, might be

reduced by clearly indicating in the job announcement some of the most common criminal and credit activity disqualifiers. For example, none of the 50 states will certify felons as police officers without a waiver, a condition of employment made clear from the onset that historically has worked legally and efficiently for thousands of government employers. Federal employers, traditionally, have lost some of the most desirable candidates because their size and bureaucratic practices tend to draw out the time needed to evaluate. If you clog up the background pipeline with candidates that will be disqualified anyway, neither the applicant nor the employer is best served. Deferring evaluation of criminal and credit activity to the latter stages of the hiring process most certainly will have this effect.

At the very least, federal employers should insist upon some clarification of what federal Ban-the-Box actually covers. While the states have pretty uniformly limited the "ban" to criminal record checking, 3206-AN25 prohibits "making inquiries into an applicant's background of the sort asked on the OF-306 or other forms used to conduct suitability investigations for federal employment". This seems to include not just written applications, Personal History Statements, forms and records

but all types of interviews and polygraph examinations in which criminal and credit activity are discussed, prior to COE. Further complicating matters, while "crime" and "credit" are usually treated as standalone interview target and polygraph questions, most of the remaining interview and polygraph topics can also be viewed as criminal activities, e.g. substance abuse, violence, etc. Therefore, simply removing the crime and credit targets from pre-offer interviews and polygraph examinations would probably not satisfy OPM. If this interpretation is correct, not only will the process take a lot longer but the sheer number of people needing interviews and polygraphs will increase significantly along with the attendant increases in costs and staff. Ironically, the OPM's new rule is appearing at exactly the same time that other federal agencies are expanding social media backgrounds to obtain security clearances (Wall Street Journal, 2016). While not a certainty, it is highly likely that problems with criminal and credit activities will be revealed during social media scans long before COE's. This, of course, raises the possibility that OPM will have to further "prevent agencies" from conducting the social media background until after the COE.

One critical point the Administration

and OPM appear to have ignored are the federal Appellate Court decisions previously reported in Polygraph: when there are too many Conditions to the Conditional Offer it is not real. These Federal Court decisions essentially indicate that everything except the psychological and medical evaluations should take place before the COE. If not only criminal and credit record checking but written forms and assessment, interviews and polygraphs and perhaps social media backgrounds in which these topics are discovered and discussed must also be deferred post-offer, it creates a nearly identical situation that the Courts have found against.

For those of us who have provided services for large government agencies, Civil Service Commissions and the OPM itself, 32-6-AN25 appears to have many of the undesirable qualities of the long discredited Rule of Three. Under this misguided system, applicants were pre-selected by an entity separate from the Department by which they would be employed using criteria that failed to reflect the unique or independent characteristics of said Department. While this approach sometimes achieves political goals unrelated to competency, it almost always guarantees a decline in work performance. The very idea

that OPM is better situated to assess or create hiring standards and control exceptions to such standards for Departments than the Departments themselves simply defies credibility.

Since there is little to lose, federal law enforcement and intelligence agencies should at least go through the motions of asking OPM for an exemption allowing pre-offer evaluation of criminal and credit activity, including those activities typically included in pre-employment forms, interviews and polygraphs. These same federal agencies should also request to be excluded from subjective interference by outside agencies with regard to setting Qualification and Disqualification standards. Further, each federal employer should request to be the only agency with the authority to grant waivers to their own standards depending upon mitigating circumstances the agency determines to be appropriate. If these requests to the OPM prove unsuccessful, the agency will have at least produced a record should they have to challenge the Administration in Court. In the meantime, federal employers and applicants should expect serious delays in the background process and an unfortunate return to previously discredited practices where Conditional Offers of Employment are

neither real or credible.

## References

Disparate Impact and EEOC v. Freeman, APA Magazine, V48 N3 pp.103-108, May/June, 2015

<https://www.federalregister.gov/articles/2016/05/02/2016-10063/recruitment-selection-and-placement-general-and-suitability>

Interrogation, Slowik, S. (C.R. Berger and M.E. Rolof, Eds.), International Encyclopedia of Interpersonal Communication, Wiley-Blackwell, Boston, MA, 2016.

Security Clearance To Probe Social Media, Wall Street Journal, May 15-16, 2016

The Americans With Disabilities Act Amendment Act and Polygraph Compliance Issues, Polygraph, V38 N3 pp.198-203, 2009

[www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-enhancing-safeguards-prevent-undue-denial-federal](http://www.whitehouse.gov/the-press-office/2014/01/31/presidential-memorandum-enhancing-safeguards-prevent-undue-denial-federal)