

“Ban the Box” Legislation Expands Across the Country

Employers Need to Update Employment Applications and Policies

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There is a growing national movement to “Ban the Box” – i.e., to prohibit questions about a job applicant’s criminal history on employment applications. Currently, “Ban the Box” laws are primarily targeted at public employers; however, there are increasing efforts to impose these same restrictions on private employers. New Jersey, Washington, D.C., and San Francisco have become the latest jurisdictions to pass such legislation. Laws prohibiting private employers from seeking certain information regarding criminal convictions are already in place in Hawaii, Illinois, Massachusetts, Minnesota, and Rhode Island, as well as various cities and municipalities, including Baltimore, Philadelphia, and Seattle. Employers would be well-advised to review and update their employment applications and policies based on these increasingly common restrictions.

The New Jersey Opportunity to Compete Act

On August 11, 2014, Governor Christie signed the New Jersey Opportunity to Compete Act, which will take effect on March 1, 2015. The New Jersey law will apply to any employer that has 15 or more employees over 20 calendar weeks and that does business, employs persons, or takes applications for employment within New Jersey.

During the initial employment application process, which ends when an employer has conducted a first interview, covered employers are prohibited from making any inquiry, whether written or oral, regarding an applicant’s criminal record. If an applicant voluntarily discloses information regarding his or her criminal record, however, the employer may make inquiries regarding that record. Employers are also prohibited

from publishing any advertisement stating that the employer will not consider applicants who have been arrested or convicted of crimes or offenses.

While the New Jersey law prohibits inquiries during this initial application process, nothing in the New Jersey law prohibits an employer from making inquiries regarding an applicant's criminal record after the initial application process has concluded. Employers are not prohibited from refusing to hire an applicant based on the applicant's criminal record, unless the record has been expunged or erased, provided the refusal is consistent with any other applicable laws. The restrictions on criminal history inquiries do not apply to positions in law enforcement or related fields or to positions for which criminal background checks are required by law, rule, or regulation.

The New Jersey law preempts and prohibits any county or municipal "Ban the Box" law, except for laws regulating the county or municipality's own operations. This will impact existing laws in both Atlantic City and Newark. While the Opportunity to Compete Act does not provide a private cause of action, an employer can face significant penalties for violations. Any employer who violates the act will be liable for a civil penalty of up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation.

The D.C. Fair Criminal Record Screening Act

On August 8, 2014, the Council of the District of Columbia transmitted the unanimously approved Fair Criminal Record Screening Act to Mayor Gray. The Mayor has until August 22 to sign or veto the bill, or to allow the bill to become law without his signature. Unless vetoed, the Act will become law following a required 30-day period of Congressional review and publication in the D.C. Register. The law will apply to any employer with more than 10 employees in D.C.

Covered employers are prohibited from making any inquiry regarding an arrest or criminal accusation made against the applicant, which is not then pending against the applicant and which did not result in a conviction. Covered employers are also prohibited from making an inquiry regarding any criminal conviction until a conditional offer of employment is made. Any prohibited inquiry into these matters, direct or indirect, including application forms, interviews, and criminal history checks, is considered to be an unlawful discriminatory practice.

After a conditional offer of employment is made, an employer may only withdraw the offer because of a criminal conviction for a "legitimate business reason" in light of seven factors. The first two factors consider whether the offense will have any impact on the applicant's ability to perform the duties related to the employment sought. The next four factors consider the details of the offense itself, including the time elapsed, the applicant's age at the time, the seriousness of the offense, and evidence of rehabilitation and good conduct. The final factor requires consideration of "[t]he public policy that it is beneficial generally for ex-offenders to obtain employment." An arrest may never serve as the basis for the withdrawal of an offer.

If an offer of employment is withdrawn, the applicant may request that the employer provide a copy of all records obtained by the employer in consideration of the applicant and a written statement of denial within 30 days. The statement of denial must articulate a legitimate business reason, demonstrate consideration of the seven factors, and advise the applicant of his or her ability to file a complaint with the Commission of Human Rights.

While the Fair Criminal Record Screening Act does not provide a private cause of action, an employer can face significant penalties for violations. Depending on the size of the employer, the Commission of Human

Rights may impose a fine of up to \$5,000 for each violation after January 1, 2015. In addition, if the Commission determines that an employer has retaliated against an individual for exercising rights under the law, the Commission may award back pay, compensatory damages, and reasonable attorney's fees, and it may order reinstatement.

The San Francisco Fair Chance Ordinance

Starting August 13, 2014, the San Francisco Fair Chance Ordinance requires employers with 20 or more employees to review an individual's qualifications before inquiring about that person's arrest and conviction record(s) and related information. The ordinance also limits the use of criminal history information by covered employers, city contractors, and housing providers.

Under the ordinance, inquiry into an applicant's criminal history is permissible only after the first live interview, or after a conditional offer of employment. In order to be considered, the conviction must directly relate to the position, meaning the underlying criminal conduct has a direct and specific negative bearing on the person's ability to do the job in question. Before taking an adverse action based on criminal history, the employer must provide the applicant with an opportunity to offer evidence on the accuracy of the conviction, evidence of rehabilitation, and other mitigating factors. Employers are barred from considering at any time arrests that did not lead to a conviction (but may consider "unresolved arrests," i.e., an arrest undergoing an active pending criminal investigation or trial, to the same extent it can consider a conviction), convictions more than seven years old, convictions that were judicially dismissed, convictions made in the juvenile justice system, and participation in diversion programs.

EEOC Guidance

Employers should also keep in mind that the U.S. Equal Employment Opportunity Commission ("EEOC") has been focused on the use of criminal history in the application process, issuing guidance in 2012 on employers' use of arrest and conviction records under Title VII of the Civil Rights Act of 1964 (the "EEOC Guidance").

The EEOC Guidance notes that, according to one study, 92 percent of employers use criminal background checks in at least some aspect of their hiring procedures. The recent trend of "Ban the Box" laws and the EEOC Guidance, however, serve as important reminders that this information can only be used in a narrowly tailored fashion. Employers should review their hiring policies and procedures to ensure compliance with the legal requirements in the applicable jurisdictions and the standards set by the EEOC Guidance.

Best Practices

Employers are well-advised to follow these best practices in their hiring:

1. Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
2. If an employment application includes a question regarding criminal history consider:
 - a. Whether such a question is permissible in the applicable jurisdiction;

- b. Whether the question is justified by a legitimate business reason;
 - c. Whether any law requires the question due to the nature of the position;
 - d. Whether, if using a national or multi-state application, the application must include clear disclaimers directing individuals in certain jurisdictions not to answer the question.
3. Advise employees who may conduct interviews of job applicants that they generally should not ask any questions regarding an applicant's criminal history.
4. If inadvertently made aware of prohibited information, document the manner in which the information was obtained and, where prohibited, avoid reliance on that information in making an employment determination.
5. Before taking an adverse action, such as rescinding an offer of employment, ensure compliance with applicable law and clearly document the business reasons supporting that decision.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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