A Timely Analysis of Legal Developments

ASAP®

July 21, 2014

Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks

By Adam Wit, Darren Mungerson and Jennifer Mora

On July 19, 2014, Illinois Governor Pat Quinn signed into law the Job Opportunities for Qualified Applicants Act, which will go into effect on January 1, 2015. The new law will restrict the timing of pre-employment inquiries by Illinois employers about a job applicant's criminal past. The Act reflects the ongoing trend, at both the state and local level, toward so-called "Ban-the-Box" laws that have been enacted across the nation.[1] The Equal Employment Opportunity Commission (EEOC) also has endorsed this limitation in its updated guidance regarding consideration of arrest and conviction records under Title VII of the Civil Rights Act of 1964.[2]

Employers Covered by the New Law

The new law restricts how and when employers can request and use criminal conviction information in the hiring process. The Act, introduced as House Bill 5701, applies to private employers who have 15 or more employees in the current or preceding calendar year, and employment agencies. Notably, the Act defines "employer" to include agents of covered employers. The Act does not apply to public employers.

What the New Law Requires

An employer (or employment agency) covered by the new law "may not inquire about or into, consider or require disclosure" of the criminal record or criminal history of an applicant until *after* the applicant has been determined to be qualified for the position *and* notified that the applicant has been selected for an interview. For those covered employers or employment agencies who do not conduct interviews, the inquiry into an applicant's criminal background or history cannot take place until *after* a conditional offer of employment has been made to the applicant.

1 *See* Rod Fliegel and Jennifer Mora, *"Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records*, Littler ASAP (Feb. 14, 2014); Rod Fliegel, Pam Salgado, Dan Thieme and Jennifer Mora, *Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes*, Littler ASAP (Jun. 20, 2013); Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers*, Littler ASAP (May 17, 2013); Jennifer Mora, Rod Fliegel and Sherry Travers, *The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York*, Littler ASAP (Jun. 7, 2013).

2 *See* Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012).

The new law also exempts certain positions from coverage, such as where:

- a federal or state law excludes applicants with certain criminal convictions from working in the position sought;
- the position requires a standard fidelity bond or an equivalent bond and a conviction of one or more specified criminal offenses would preclude the applicant from obtaining the bond; or
- the employer would employ individuals licensed under the Emergency Medical Services (EMS) Systems Act.

Previously, under the Illinois Human Rights Act, an employer could not inquire into arrest records or criminal history information that was ordered expunged, sealed or impounded nor could an employer use that information as a basis to refuse to hire, to segregate or to act with respect to certain other terms and conditions of employment. However, the Human Rights Act allowed employers to inquire into criminal convictions that were not expunged, sealed or impounded at any stage of the application process. This new law now puts significant limitations on *when* such inquiries can be made.

Even though a covered employer cannot, at the initial stage of the application process, make direct inquiries into an applicant's criminal background or history (except when covered by one of the limited exceptions), the Act provides that an employer or employment agency may still notify applicants in writing of any specific offenses that would disqualify an applicant from employment "due to federal or State law or the employer's policy." Furthermore, the Act itself does not prevent an employer from denying employment to applicants who have been convicted of certain offenses so long as the process for such inquires has been followed, though employers should be careful that such determinations do not give rise to potential claims under other federal or State laws, such as the federal Fair Credit Reporting Act (FCRA) and Title VII.

The Act gives the Illinois Department of Labor (IDOL) the authority to investigate alleged violations and authorizes the imposition of a warning for the first offense, followed by civil penalties recoverable by the IDOL if the employer engages in subsequent offenses or does not remedy the initial violation. The Act does not provide aggrieved applicants with a private right of action for any alleged violation of the new law.

Action Steps for Employers

Illinois and multi-state employers should ensure that their current job application complies with applicable law, including Illinois' new law. Given the recent attention paid to background checks by the EEOC, state and local fair employment agencies, and plaintiffs' lawyers, this is an excellent opportunity for employers to review their application and hiring processes. More specifically, employers should consider:

- restrictions on the inquiry into and use of criminal information under EEOC guidance and certain state laws;
- the use of credit information under other state laws; and
- compliance with federal and state fair credit reporting laws, including the FCRA.

Adam Wit is Office Managing Shareholder of Littler's Chicago office, Darren Mungerson is a Shareholder in the Chicago office and Jennifer Mora is a Shareholder in the Los Angeles (Century City) office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Wit at awit@littler.com, Mr. Mungerson at dmungerson@littler.com, or Ms. Mora at jmora@littler.com.