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Portland, Oregon Bans the Box

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On November 25, 2015, Portland's City Council unanimously passed new rules that will significantly affect an employer's ability to obtain and use criminal history information in the hiring process. With these new rules, Portland joins the growing number of other cities, counties and states across the country, including Oregon,¹ that have enacted similar "ban-the-box" legislation in recent years.²

Employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of credit history information³ and the fair credit reporting laws,⁴ and to assess the impact of those laws on their pre-employment screening process. Most immediately, Portland employers should assess whether they are covered by the law, and if so, whether they need to revise their employment application, or otherwise modify their pre-employment screening procedures.

Coverage and Exemptions

Portland's ban-the-box law applies to any employer with six or more employees, at least one of whom is in a "position being performed a majority of the time within the City of Portland." The law's definition of "employee," which is limited to persons for whom "the Employer reserves the right to control the means by which . . . service is performed," appears to exclude independent contractors from the coverage of these rules.

The new law prohibits covered employers from considering a job applicant's criminal history prior to a *conditional offer of employment*. This will delay the point in the hiring process when such information may be considered by covered employers and subject any decision to rescind an offer based upon criminal history to special scrutiny.

- 1 See Jennifer Mora, Jennifer Warberg, and Philip Gordon, *Oregon to Become the Latest State to Ban the Box*, Littler ASAP (June 22, 2015).
- 2 See Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (Jun. 12, 2015); Philip Gordon and Zoe Argento, *Ring in the Year with Four Ban-the-Box Laws*, Littler ASAP (Jan. 26, 2015); Rod Fliegel, Jennifer Mora, Joseph Harkins and Melanie Augustin, *Private Sector Employers in the District of Columbia Will Soon Be Required to Comply with a New Law Restricting Their Ability to Rely on Criminal Records for Employment Purposes*, Littler Insight (Aug. 22, 2014); Jennifer Mora and Philip Gordon, *Columbia, Missouri Joins the Ranks of Ban-the-Box Jurisdictions*, Littler ASAP (Dec. 15, 2014).
- 3 See Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions*, Littler Insight (Apr. 21, 2015).
- 4 See Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014).

Significantly, the City's ban-the-box law sets a stricter standard than the state's recently enacted ban-the-box law, which becomes effective on January 1, 2016. Under the state law, employers are permitted to inquire into criminal history after the initial interview. Because the state law does not expressly preempt local laws, employers covered under Portland's ban-the-box law should apply the stricter standard — at least until an appellate court determines that the state law preempts the City's law or the state law is amended to expressly preempt local law.

Under Portland's law, covered employers may rescind a conditional offer of employment only after the employer conducts an "individualized assessment" of the applicant's criminal history. That assessment must address the nature of the applicant's offense, the time elapsed since the offense, and the nature of the position sought in order to determine whether the offense is job-related and rescission of a job offer is consistent with business necessity. This individualized assessment is similar to the "targeted screen" recommended by the EEOC in its April 2012 Enforcement Guidance on the use of arrest and conviction records for employment purposes.⁵

Portland's law bars covered employers from considering certain categories of criminal history. These categories include the following:

- Arrests not leading to conviction (unless charges are pending);
- Convictions that have been voided or expunged; or
- Charges that have been resolved through completion of a diversion or deferral of judgment program for offenses not involving physical harm or attempted physical harm to a person.

In line with Oregon's new law, the following categories of employers are exempt from coverage by Portland's law:

- Employers that are required by law to consider an applicant's criminal history;
- Law enforcement agencies and employers in the criminal justice system; and
- Employers seeking nonemployee volunteers.

Special provisions apply to positions involving direct access to or the provision of services to children, the elderly, and people with disabilities, mental illness or substance abuse disorders.

Enforcement

The City of Portland anticipates contracting with the state's Bureau of Labor and Industries (BOLI) to enforce its new law beginning July 1, 2016. Aggrieved applicants will have the ability to file a complaint with BOLI to recover civil penalties, but not a private right of action. The City Attorney is tasked with drafting administrative rules that will govern the implementation and enforcement of the new law.

Recommendations

Employers should first evaluate whether they are covered by the new law and, if covered, consider the following:

- Revise job applications, interviewing guidelines and policies and procedures for background checks and consideration of criminal history;
- Change the sequence and timing of events in the hiring process; and
- Implement guidelines and documentation that comply with the new law.

⁵ See Barry Hartstein, Rod Fliegel, Marcy McGovern, and Jennifer Mora, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012).