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President Obama's Order "Banning the Box" for Federal Employees is an Important Reminder to Review Hiring Policies

BY JENNIFER MORA

Last month, President Obama announced a new mandate to the federal government's human resources department to "delay inquiries into criminal history until later in the hiring process." Specifically:

The President has called on Congress to follow a growing number of states, cities, and private companies that have decided to "ban the box" on job applications. We are encouraged that Congress is considering bipartisan legislation that would "ban the box" for federal hiring and hiring by federal contractors. In the meantime, the President is directing the Office of Personnel Management (OPM) to take action where it can by modifying its rules to delay inquiries into criminal history until later in the hiring process. While most agencies already have taken this step, this action will better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal employment.¹

The directive applies only to federal employees – it does not apply to contractors.

Whether this is a first step towards more comprehensive ban-the-box legislation at the federal level is unclear. A few days before President Obama's announcement, presidential hopeful Hillary Clinton (D) endorsed ban-the-box legislation, and earlier this year, Senators Rand Paul (R-KY) and Cory Booker (D-NJ) re-introduced federal legislation that would allow non-violent offenders to have their criminal records sealed.

Regardless, private-sector employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this evolving area of the law. In the last two years, ban-the-box laws applicable to private-sector employers were passed in Illinois, New

¹ White House Office of the Press Secretary, *FACT SHEET: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated* (Nov. 2, 2015).

Jersey, Oregon, New York City (NY),² San Francisco (CA),³ City of Columbia (MO),⁴ the District of Columbia, Baltimore (MD) and two counties in Maryland (Prince George's County and Montgomery County). All of these laws require covered private-sector employers to remove from employment applications questions about an applicant's criminal record and to wait until later in the hiring process to present the inquiry to the applicant. Some of these laws also prohibit employers from even ordering a criminal background check on a job applicant until after a conditional offer of employment has been made.

Staying ahead of this movement can be somewhat challenging for private-sector employers, particularly those operating nationally, because the various laws are not consistent as to when an employer can legally ask the question or order a background check. Some jurisdictions allow an employer to inquire about criminal history after an interview, while other jurisdictions require the employer to wait until after making a conditional offer of employment. Some of these laws also require employers to conduct an "individualized review" before rejecting an applicant with a conviction record, which is similar to the review the Equal Employment Opportunity Commission (EEOC) recommends as a best practice. Portland, Oregon's latest ordinance is the most recent example of a ban-the-box law requiring an individualized review. Finally, some of these laws require employers to provide certain notices above and beyond what the federal Fair Credit Reporting Act (FCRA) requires. As an example, New York City employers are now subject to far more onerous notice requirements than those required by the FCRA.

Private-sector employers that do business with local governments may be subject to even more ban-the-box laws and other laws restricting employer use of criminal history.⁵ At least 14 cities have enacted such laws, including: Richmond (CA); Hartford (CT); New Haven (CT); Indianapolis (IN); Louisville (KY); Cambridge (MA); Boston (MA); Worcester (MA); Detroit (MI); Atlantic City (NJ); Buffalo (NY); Rochester (NY); Syracuse (NY); and Pittsburgh (PA).

In sum, all private-sector employers, including those that do business or contract with local governments, should determine whether they operate in a jurisdiction with a ban-the-box law or other law restricting consideration of criminal history for employment purposes. Specifically, employers should consider:

- Revising job applications, interviewing guidelines and policies and procedures for background checks;
- Revamping the sequencing and timing of events in the hiring process; and
- Implementing guidelines and documentation that comply with these laws.

Because the ban-the-box trend is expected to continue, employers should also continue to monitor new ban-the-box laws at the state, local, and now, the federal level. In 2015, ban-the-box laws were introduced in a number of states including Ohio and Texas, in addition to legislation introduced in other jurisdictions restricting the types of criminal records employers can consider for hiring and other employment decisions. Of course, employers should continue to monitor developments in related areas of the law, including laws restricting the use of credit history information and the fair credit reporting laws.⁶

2 See Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (June 12, 2015).

3 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 Insight (Feb. 14, 2014).

4 Jennifer Mora and Philip Gordon, *Columbia, Missouri Joins the Ranks of Ban-the-Box Jurisdictions*, Littler ASAP (Dec. 15, 2014).

5 Jennifer L. Mora, *Private-Sector Employers Doing Business with Local Governments may be Subject to Even More Ban-the-Box and Other Laws Restricting Consideration of Criminal Records*, Littler Insight (July 13, 2015).

6 Jennifer L. Mora, David S. Warner and Rod M. Fliegel, *NYC Commission Issues Guidance on the Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions*, Littler Insight (Sept. 22, 2015).