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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

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In 1998 Hawaii became the first state to pass a so-called “ban-the-box” law, prohibiting both private- and public-sector employers from inquiring about an applicant’s conviction history until after the employer makes a conditional offer of employment. Massachusetts followed suit in 2010 by enacting a law barring private- and public-sector employers from asking applicants about their criminal history on an employment application. Since that time, more states, counties, and cities have passed laws that require covered private-sector employers to remove from employment applications questions about an applicant’s criminal record and wait until later in the hiring process to present the inquiry to the applicant. Some of these laws also prohibit employers from ordering a criminal background check on a job applicant until after a conditional offer of employment has been made. In 2014 and 2015 alone, ban-the-box laws were passed in Oregon, New York City, San Francisco, the District of Columbia, New Jersey, Illinois, and one city and two counties in Maryland.¹

Private-sector employers, particularly those operating nationally, have scrambled to revise employment applications and modify hiring processes to stay ahead of this movement. This can be somewhat challenging 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 that the employer 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.² Finally, some of these laws require employers to provide certain notices above and beyond what the federal Fair Credit Reporting Act (FCRA) requires.

1 See Jennifer Mora, Jennifer Warberg and Philip Gordon, *Oregon to Become the Latest State to Ban the Box*, Littler ASAP (June 22, 2015); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (June 12, 2015).

2 See Rod Fliegel, Barry Hartstein and Jennifer Mora, *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, Littler Insight (June 12, 2013).

Additionally, certain ban-the-box or “fair chance” laws and ordinances that some mistakenly believe apply only to public sector employers, actually apply to *private sector employers* that do business or contract with state or city governments. At least 14 cities have enacted such laws, including: Boston (MA); Cambridge (MA); New Haven (CT); Hartford (CT); Worcester (MA); Detroit (MI); Richmond (CA); Atlantic City (NJ); Buffalo (NY); Indianapolis (IN); Louisville (KY); Rochester (NY); Syracuse (NY); and Pittsburgh (PA).

Like the most popular ban-the-box laws that apply to all private-sector employers in the state, county or city at issue, the laws that apply to private-sector employers acting as vendors or having contracts with state or city governments are inconsistent as to *when* the employer can inquire about a job applicant’s criminal history, if at all, or *what* types of criminal information the employer can consider. For instance, in Louisville, Kentucky, city and county contractors cannot ask about prior convictions on job applications or in first-round interviews, unless the applicant offers the information voluntarily. In Hartford, Connecticut, the ordinance simply bars the city’s vendors from inquiring about, and presumably considering, “any arrest or criminal accusation made against such person which is not then pending against that person and which did not result in a conviction.”

On the other hand, since September, 2013, private-sector employers doing business with the City of Richmond, California are subject to onerous restrictions regarding inquiries about a job applicant’s criminal history. Any private business with 10 or more employees, regardless of location, that receives financial assistance from the City or is a contractor or subcontractor with the City is prohibited from inquiring about an applicant’s criminal history *at any time*, even post-hire, unless federal or state law requires a background investigation and only then, after a conditional offer has been made. Further, the City of Richmond limits consideration of criminal records into those that are “substantially job-related” and, for certain positions, may require the employer to submit its determination that the conviction is “substantially job-related” to the City Manager for consideration and approval.

In sum, *private-sector* employers, especially multi-state employers, should not assume they are subject only to the more popular ban-the-box laws, like the recent versions enacted in Oregon and New York City. Private-sector employers that do business or contract with local governments should further determine whether they are subject to separate restrictions on inquiries on and consideration of criminal history for employment purposes. If applicable, such employer 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.

All private-sector employers should also continue to monitor new “ban-the-box” laws at the state, local, and now, the federal level. Indeed, on May 21, 2015, 70 members of the United States House of Representatives sent a letter to President Barack Obama urging him to “require that *federal contractors* and agencies refrain from asking job applicants to report their criminal history at the initial stages of the hiring process.” (emphasis added) In 2015, ban-the-box laws have also been introduced in Georgia, Missouri, New Mexico, Ohio, Pennsylvania and Texas, in addition to legislation introduced in other jurisdictions that restricts the types of criminal records employers can consider for hiring and other employment decisions.

Finally, employers throughout the United States should continue to be mindful of developments in related areas of the law, including laws restricting the use of credit history information³ and the fair credit reporting laws.⁴

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, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).