Insight

IN-DEPTH DISCUSSION

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City of Los Angeles Mayor to Sign Long-Awaited and Onerous "Ban the Box" Law

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In the next week, Los Angeles Mayor Eric Garcetti is expected to sign the Fair Chance Initiative for Hiring (Initiative), which will prohibit most private sector employers from inquiring into a job applicant's criminal history until after making a conditional offer of employment. Los Angeles' new "ban-the-box" law follows on the heels of similar legislation enacted in New York City and Austin, Texas, and continues the nationwide ban-the-box trend.[1] The Initiative will go into effect in less than one month, on January 1, 2017.

The Los Angeles law does more than just limit an employer's ability to inquire about criminal history on the employment application. It also mandates affirmative procedures for employer compliance, including a requirement that employers conduct the same eight-factor individualized assessment that the Equal Employment Opportunity Commission (EEOC) recommends employers consider before making adverse employment decisions based on an individual's arrest or conviction history.

Most immediately, companies with Los Angeles-based employees or contractors, including sharing economy companies, should assess whether they are covered by the law, and if so, whether to revise their applications, offer letters, background check forms and notices, and guidelines and documentation for the hiring process.

Coverage

The Initiative applies to any "***employer***" that is located or doing business in the City of Los Angeles and employs 10 or more ***employees***, which means any person who performs at least two hours of work on average

1 See Philip Gordon and Jennifer Mora, *Austin Becomes the First City in Texas to "Ban the Box"*, Littler Insight (Mar. 25, 2016); Jennifer Mora and Stephen Fuchs, *Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law*, Littler Insight (Feb. 25, 2016); Jennifer Warberg and Philip Gordon, *Portland, Oregon Bans the Box*, Littler Insight (Dec. 3, 2015); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (June 12, 2015) (among others which can be found in these Insights).

each week in the City of Los Angeles and who qualifies as an employee entitled to minimum wage under California's minimum wage law. The new law also applies to job placement and referral agencies. It does not apply to the City of Los Angeles or to any other local governmental unit acting as an employer. Notably, both California and the City of Los Angeles already have in place separate laws that "ban the box" for state and city job applicants.

Importantly, the Initiative is broad enough to cover virtually any type of "***employment***," which is defined to include, but is not limited to, temporary or seasonal work, part-time work, ***contracted work***, contingent work, work on commission, and work through the services of a temporary or other employment agency, as well as participation in a vocational or educational training program with or without pay.

The new law covers both applicants and incumbent employees (each referred to throughout this article as "candidate").

Unlawful Practices

The Initiative prohibits employers from doing the following:

- Including on any application for employment any question that seeks disclosure of a candidate's criminal history. It is unclear from the Initiative whether nationwide employers can still include the question with an instruction advising Los Angeles candidates not to answer it. At present, New York City, Philadelphia and the District of Columbia all prohibit applications from including the question at all, even with such an instruction.
- Inquiring about or requiring disclosure of a candidate's criminal history unless and until an offer conditioned only on an assessment of the candidate's criminal history has been made to the candidate. This broadly includes asking the candidate to self-disclose their criminal history during an interview, searching the internet for information about the candidate's criminal record, or ordering a criminal background report from a third-party consumer reporting agency, the FBI, the California Department of Justice, any law enforcement agency or any other source.

Considering Criminal History and Taking Adverse Action

An employer's assessment of a candidate's criminal history is permissible only once the employer has made a conditional offer of employment. After that time, the employer cannot take any adverse action, including withdrawal or cancellation of the employment offer, unless the employer "performs a ***written*** assessment that effectively links the specific aspects of the Applicant's Criminal History with risks inherent in the duties of the Employment position sought by the Applicant." ***At a minimum***, the employer must consider factors identified by the EEOC and any other factors as may be required by any rules or guidelines promulgated by the City's Department of Public Works, Bureau of Contract Administration (Department), which will have responsibility for administering the Initiative. It is unclear whether the Department will provide a form for an employer to use to document this evaluation, similar to the form the New York City Commission on Human Rights requires employers to use when conducting a similar analysis under the New York City Fair Chance Act.

The EEOC's individualized review factors can be found in its April 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII.[2] The EEOC's

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

guidance enumerates the following specific factors for an employer to consider, which according to the Initiative, Los Angeles employers are now ***required*** to consider:

- the facts or circumstances surrounding the offense or conduct;
- the number of offenses for which the individual was convicted;
- age at the time of conviction or release from prison;
- evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- the length and consistency of employment history before and after the offense or conduct;
- rehabilitation efforts, e.g., education and training;
- employment or character references and any other information regarding fitness for the particular position; and
- whether the individual is bonded under a federal, state, or local bonding program.

Other ban-the-box laws, including those in New York City, San Francisco and the District of Columbia, also require an employer to consider certain (although different) factors before making an adverse employment decision against a candidate based on a criminal record.

The employer must then provide the applicant a "Fair Chance Process," which means allowing the candidate an opportunity to provide information or documentation to the employer regarding the accuracy of the criminal record or other information that he or she would like the employer to consider, including evidence of rehabilitation or other mitigating factors. As part of this process, the employer must provide to the candidate written notification of the proposed adverse action, ***a copy of the performed written assessment***, and any other information supporting the employer's proposed adverse action.

The employer may not take adverse action or fill the employment position for at least five business days after the candidate has received this notification. If the candidate provides the employer with additional information or documentation, the employer must consider the new information and perform a written ***reassessment***. If after performing the reassessment, the employer nevertheless decides to take adverse action against the candidate, the employer must notify the candidate and provide him or her with a copy of the reassessment.

Exemptions

The above prohibitions and requirements do not apply in four defined situations:

- when an employer is obligated by law to obtain information regarding a candidate's conviction history;
- when the candidate will be required to possess a firearm in course of the employment;
- when a candidate who has been convicted of a crime is prohibited by law from holding the position sought, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation; and
- when the employer is prohibited by law from hiring an individual convicted of a crime.

The Initiative also states that it is not to be interpreted or applied so as to create any requirement, power or duty that is in conflict with federal or state law.

Notice and Posting Requirements for Employers

The law imposes two separate notice requirements. First, all solicitations and advertisements for Los Angeles jobs or other types of work must state that the employer will consider qualified candidates with criminal histories in a manner consistent with the new law.

Second, all employers must post a notice that informs candidates of the new law, which must be posted in a conspicuous place at every workplace or job site in Los Angeles that is under the employer's control and is visited by applicants. Copies of the notice must be sent to each labor union or representative of workers that has a collective bargaining agreement or other agreement applicable to employees in Los Angeles.

Retaliation

As is often the case with ban-the-box laws, the Los Angeles Initiative makes it unlawful for an employer to retaliate or otherwise take adverse action against an individual who has complained to the City about the employer's non-compliance or anticipated non-compliance with the new law, or who has opposed any practice made unlawful by the Initiative, participated in any proceedings related to enforcement of the new law, or otherwise sought to enforce or assert their rights under the Initiative.

Record Retention

The Initiative requires employers to retain all records and documents related to a candidate's employment application and any written assessment or reassessment performed under the Fair Chance Process for no less than three years after receipt of the employment application.

Enforcement and Exhaustion

Los Angeles' ban-the-box law provides an aggrieved individual a private right of action against a covered employer and the ability to obtain the penalties set forth in the Initiative as well as any other legal or equitable relief appropriate to remedy the violation. An aggrieved individual may not file a private lawsuit against an employer unless and until he or she has reported the alleged violation to the Department, which must be filed within one year of the alleged violation, and a determination before a hearing officer has been reached, including conclusion of any hearing. If an aggrieved individual elects to proceed with litigation against the employer, he or she must file a civil action within one year of the completion of the Department's enforcement process or the issuance of any decision by a hearing officer, whichever is later.

Penalties and administrative fines range from $500 to $2,000, depending on the provision alleged to have been violated and the number of violations. The Department will not impose any penalties or administrative fines until July 1, 2017. Before that date, the Department will only issue written warnings.

Recommendations

Employers in Los Angeles, at a minimum, should evaluate whether they need to revise their existing employment application. They should also consider whether to undertake a broader (and privileged) assessment to strengthen their compliance with federal, state, and local employment laws that regulate use of a candidate's criminal history. Suggested action items for employers with employees in Los Angeles and other jurisdictions having ban-the-box laws are as follows:

- Review job applications and related forms for impermissible inquiries regarding criminal records;
- Provide training and FAQs to managers and supervisors who conduct job interviews and make or influence hiring and personnel decisions to explain permissible and impermissible inquiries into, and

uses of, criminal records, and convey the company's policies and procedures for storing such records and documenting related hiring and personnel decisions; and

- Review the hiring process to ensure compliance, including the timing of criminal background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.

Moreover, all employers, including nationwide employers, may want to conduct an assessment of their pre-employment screening practices to strengthen their compliance with the Fair Credit Reporting Act and state fair credit reporting laws.[3]

3 See Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016).