

Insight

IN-DEPTH DISCUSSION

May 10, 2016

Vermont Joins the Ranks of Cities and States that "Ban the Box"

BY Jennifer L. Mora

On May 3, 2016, Vermont Governor Peter Shumlin signed a bill into law that prohibits most employers from requesting criminal history information on an employment application. The law adds a new section to the state statutory provisions on "unlawful employment practices." Vermont's new law continues the nationwide "ban-the-box" trend and follows closely on the heels of similar legislation enacted in other jurisdictions, including Austin, Texas, Portland, Oregon, and New York City.¹

Vermont's ban-the-box law goes into effect on July 1, 2017. Despite this delay, covered employers should become familiar with the terms of the new law and consider the action items set out below. Due to the proliferation of such laws – and related class action litigation – employers also may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local laws, including the federal Fair Credit Reporting Act.²

Coverage and Exemptions

The law applies to any "any individual, organization, or governmental body, including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee or

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).

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

successor thereof, and any common carrier by mail, motor, water, air or express company doing business in or operating within this state, and any agent of such employer, which has one or more individuals performing services for it within this state.”

The law defines “employee” as “every person who may be permitted, required or directed by an employer, in consideration of direct or indirect gain or profit, to perform services.” Arguably, this provision is broad enough to cover independent contractor relationships.

Unlawful Practices

The law prohibits any covered employer from requesting criminal record information on an initial employee application form. Instead, employers must wait to inquire about criminal record information until “an interview” or “once the prospective employee has been deemed otherwise qualified for the position.”

Unfortunately, unlike other ban-the-box statutes, Vermont’s new law does not address whether it is limited to questions presented to applicants about their criminal history or whether it more broadly prevents employers from ordering an applicant’s criminal history as part of a background check before an interview or before the applicant has been deemed qualified for the position sought. This ambiguity likely means that employers should take the more conservative position and not seek background checks on an applicant until after an interview occurs or the employee is deemed qualified for the position.

Vermont employers, however, may ask about criminal convictions on an initial employment application if the following conditions are met:

1. The prospective employee is applying for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for one or more types of criminal offenses; **or**
2. The employer or an affiliate of the employer is subject to an obligation imposed by any federal or state law or regulation not to employ an individual, in either one or more positions, who has been convicted of one or more types of criminal offenses; **and**
3. The questions on the application form are limited to the types of criminal offenses creating the disqualification or obligation.

These are limited exceptions that will only apply to a limited number of employers. Questions about these exceptions should be directed to counsel to determine if one of the exceptions applies.

Some federal or state laws that prohibit an employer from employing an individual with a certain type of criminal record allow the employer to request from the federal or state government a waiver allowing the individual to work despite the criminal record. Even in these situations, the new law still allows a Vermont employer to inquire about criminal convictions on an employee application form.

Review Process

If an employer inquires about a prospective employee's criminal record information, the prospective employee, if still eligible for the position under applicable federal or state law, must be afforded an opportunity to explain the information and circumstances regarding any convictions, including post-conviction rehabilitation.

Enforcement

The law does not provide an aggrieved individual with a private right of action against a covered employer. Instead, the law imposes a \$100.00 penalty for each violation.

Recommendations

Employers in Vermont may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local employment laws that regulate use of an individual's criminal history. Suggested action items for nationwide employers are as follows:

- Review job advertisements for impermissible language regarding criminal record, particularly employers operating in New York City and San Francisco.
- Review job application and related forms for impermissible inquiries regarding criminal records.
- Provide training and FAQs to employees 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 best practices for storing such records and documenting related hiring and personnel decisions.
- 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.