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The Flurry of New Employment Laws Regulating the Use of Criminal Records Continues with Expanded Restrictions in Indiana, North Carolina, Texas, and Buffalo, New York

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The public policy interests supporting employment-related protections for ex-offenders, including encouraging ex-offenders to reenter the workforce, are detailed in the updated EEOC Enforcement Guidance, titled "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964,"¹ released in April 2012. And, while states like California, Massachusetts, New York and Wisconsin already extend such protections to ex-offenders, employers need to be mindful of additional new state and local laws that seek to promote these same public policy interests by restricting inquiries into and the use of criminal records for employment purposes. For example, late last year the **City of Newark, New Jersey**, enacted a so-called "Ban the Box" ordinance that, with very limited exceptions, prohibits employers from inquiring about an applicant's criminal history on an employment application, and **Minnesota** followed suit just last month by enacting the state's own version of a "Ban the Box" law. The trend continues across the country, and thus now, perhaps more than ever before, employers must stay abreast of these ex-offender protection laws and should closely monitor pending legislation at both the federal, state and local level.

On the reverse side of this issue, recognizing that employers have potential tort exposure for hiring ex-offenders, some state legislatures have taken steps to protect employers from tort claims like negligent hiring and/or retention. One example is a new law pending in **Texas**. This legislation is intended to further the same public policy interests, but takes a different and more sensible approach: curbing lawsuits against employers rather than denying employers access to potentially salient information about a candidate's criminal past.

Soon, Buffalo, New York, Will Ban the Box

On May 28, 2013, the City of Buffalo Common Council voted to pass a new ordinance that will restrict private sector employers operating in Buffalo from inquiring about criminal history on an employment application. The seven-to-two vote is sufficient to override any veto by the City's Mayor, Byron Brown. The new ordinance will take effect immediately upon being ratified, pursuant to the City Charter.

¹ See Rod Fliegel, Barry Hartstein, and Jennifer Mora, [EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers](#), Littler ASAP (Apr. 30, 2012).

According to the ordinance, employers with 15 or more employees located in the Buffalo city limits engage in unlawful discrimination if they “make any inquiry regarding” or if they “require any person to disclose or reveal, any criminal conviction during the application process.” The application process begins when the applicant inquires about the employment sought and ends when an employer has accepted an employment application.

The new law also makes it unlawful for an employer to make any inquiry regarding, or to require any person to disclose or reveal, any criminal conviction against the person before a “first interview,” which means “any direct contact by the employer with the applicant whether in person or by telephone,” to discuss the employment being sought or the applicant’s qualifications. If the employer does not conduct an interview, the employer must inform the applicant whether a criminal background check will be conducted before employment begins.

Employers that hire for licensed trades or professions, including interns and apprentices for those positions, still may ask the same questions the licensing body asks, in accordance with New York law. Moreover, if federal or New York law prohibits employees with certain convictions or violations from working in specified positions, the new ordinance does not interfere with the employer’s ability to request conviction information from an applicant seeking to work in the regulated position.

Where the ordinance’s constraints do not apply, an employer may consider conviction information, but the employer must comply with Article 23-A of the New York Correction Law, which requires, in relevant part, that employers consider eight factors to determine whether the conviction bears a direct relationship to the duties and responsibilities of the position sought. Under existing New York law, it is *per se* discrimination for an employer to fail to consider these eight factors. The Buffalo ordinance further provides that it must not be construed to limit an employer’s authority to withdraw conditional offers of employment for any lawful reason, including the determination that the candidate has a conviction that bears a direct relationship to the duties and responsibilities of the position sought, or that hiring would pose an unreasonable risk to property or to the safety of individuals or the general public.

The new ordinance does not apply:

- if the inquiries or adverse actions prohibited in the ordinance are specifically authorized by other applicable law;
- to the Department of Police or the Department of Fire, or to any other employer hiring for “police officer” and “peace officer” positions, as defined by applicable law; and
- to any public or private school, or any public or private service provider of direct services specific to the care or supervision of children, young adults, senior citizens, or the physically or mentally disabled.

The ordinance broadly defines a conviction to include any sentence imposed by a court of competent jurisdiction arising from a verdict or plea of guilty, including a sentence of incarceration, a suspended sentence, a sentence of probation, an unconditional discharge, or diversion program. It also covers a broad range of employment relationships, including temporary or seasonal workers, contractors and contingent workers.

Aggrieved individuals may pursue a private right of action for injunctive relief, damages, and any other appropriate relief, including attorney’s fees. In addition, third parties, whether or not they are aggrieved under the ordinance, may file a complaint with the Commission on Citizens’ Rights and Community Relations (Commission). If the Commission finds probable cause of a discriminatory practice, the Commission’s Director may request the Corporation Counsel to commence a civil action against the employer seeking penalties ranging from \$500 for the first violation to \$1,000 for each subsequent violation.

Effective July 1, 2013, Indiana Employers Will Be Prohibited From Inquiring About Certain Criminal Records on an Employment Application

Effective July 1, 2013, new legislation enacted in Indiana prohibits employers from discriminating against ex-offenders, which includes refusing to employ any person who has had his or her conviction or arrest record expunged or sealed as allowed by other provisions in the law. The new law, House Enrolled Act No. 1482, also states that the “civil rights of a person whose conviction has been expunged shall be restored” and the person “shall be treated as if the person had never been convicted of the offense.” Accordingly, employers that seek criminal history information from candidates are prohibited from inquiring about expunged convictions or arrests. The new law even provides an example of an appropriate criminal history inquiry: “Have you ever been arrested for or convicted of a crime that has not been expunged by a court?”

Employers that violate the new law will be found to commit a Class C infraction and may be held in contempt of court. The court also may award injunctive relief to the aggrieved individual, but damages and attorney's fees are not available as remedies.

Effective December 1, 2013, North Carolina Employers Will Be Prohibited from Requesting Information About Expunged Records on an Employment Application

Effective December 1, 2013, North Carolina employers will no longer be able to inquire on an employment application, during an interview, or "otherwise" about records of arrests, criminal charges or convictions that have been expunged. Moreover, in response to "any question concerning any arrest or criminal charge that has not resulted in a conviction," an applicant is not required to "include a reference to or information concerning arrests, charges, or convictions that have been expunged."

The law does not apply to state or local law enforcement agencies authorized by state law to obtain "confidential information for employment purposes." The new law also states that it shall not "be construed to prohibit an employer from asking a job applicant about criminal charges or convictions that have not been expunged and are part of the public record."

Aggrieved applicants and employees do not have a private right of action against an employer that violates the new law. However, the Commissioner of Labor has authority to issue to an employer a written warning for a first violation and a civil penalty of up to \$500 for each additional violation occurring after receipt of the written warning. Employers that disagree with the Commissioner of Labor's penalty may appeal the decision in writing.

Soon, Texas Employers May Have New Protections Against Tort Liability for Hiring Ex-offenders

Effective September 1, 2013, Texas may join a handful of states, including most recently Ohio,² that afford employers a measure of protection against tort claims arising from misconduct by an ex-offender.

Once enacted, the new law, House Bill 1188,³ will preclude civil suits against an employer for negligent hiring or failing to adequately supervise an ex-offender based on evidence of the ex-offender's prior conviction.

The protections of the law will not apply in two circumstances. First, with regard to suits against an employer concerning the misuse of funds or property, the protections will not be available to the employer if the ex-offender was hired for a position with fiduciary responsibilities in the management of funds or property and, at the time of hire, the ex-offender had a prior conviction for a crime that involved fraud or the misuse of funds or property. Second, and more generally, the proposed legislation provides that the protections will not apply if (1) the employer knew or should have known of the prior conviction, and (2) the prior conviction involved specified sexual or violent offense, or the crime was "committed while performing duties substantially similar to those reasonably expected to be performed in the employment, or under conditions substantially similar to those reasonably expected to be encountered in the employment."

Next Steps For Employers

The list of state and local laws affording employment-related protections to ex-offenders continues to grow and, in all likelihood, will continue to do so. Accordingly, it is timely for local employers and multi-state employers that use a nationwide form of job application to thoroughly assess whether their job application, including questions about prior criminal records, complies with state and local laws where the employer operates and hires from.

Of course, when conducting criminal background checks, employers also should be mindful of the various laws that relate the background check process. For example, as previously reported, the EEOC continues to vigorously investigate whether criminal background checks have a "disparate impact" on protected class members for purposes of Title VII.

² See Rod Fliegel, William Simmons and Inna Shelley, [Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders](#), Littler ASAP (Aug. 10, 2012).

³ House Bill 1188 was sent to Texas Governor Rick Perry on May 20, 2013 and currently awaits signature. Governor Perry has until June 16, 2013 to sign the bill into law.

In addition, when using a third-party screening firm (consumer reporting agency) to obtain background information on applicants or existing employees, employers must follow the requirements of the federal Fair Credit Reporting Act (FCRA), including the FCRA's provisions requiring advance consent for the background check and providing appropriate notices when any adverse employment decision is based, in whole or in part, on the information disclosed in a background report.⁴

Summary of Recently Enacted State and Local Laws Regulating Employer Use of Criminal History

Jurisdiction (alphabetically)	Littler ASAP
Indiana	Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks (June 2012)
Massachusetts	Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal History Records (March 2012)
Minnesota	Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers (May 2013)
Newark, New Jersey	Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes (October 2012)
Ohio	Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders (August 2012)

⁴ See Rod Fliegel and Jennifer Mora, [Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013](#), Littler ASAP (Sep. 4, 2012); Rod Fliegel and Jennifer Mora, [The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers](#), Littler Report (Dec. 12, 2011).