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Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes

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Effective November 1, 2013, Seattle, Washington will join various other jurisdictions (most recently Minnesota, Indiana, North Carolina and Buffalo, New York) that limit inquiries into and the use of criminal records for employment purposes.¹ On June 10, 2013, the Seattle City Council adopted Seattle Ordinance 124201 (the "Ordinance"), which Mayor Mike McGinn signed on June 20, 2013.² The Ordinance provides for administrative enforcement but affords no private right of action. Nonetheless, employers with operations or employees in Seattle should review the prohibitions in the Ordinance and should also continue to monitor related developments across the U.S.

Using criminal record information for employment purposes is currently a hot-button issue. In addition to the passage of ordinances such as this, earlier this week the Equal Employment Opportunity Commission (EEOC) filed two new disparate impact discrimination lawsuits asserting that the employers used criminal records for employment purposes in a manner that violates Title VII of the Civil Rights Act of 1964.³ There has also been a considerable spike in class action lawsuits filed against employers for using background checks in violation of the federal Fair Credit Reporting Act (FCRA).⁴

Limitations Under the Ordinance

- **No "Blanket Exclusion."** Employers may not advertise, publicize or implement any policy or practice that automatically excludes all individuals with any arrest or conviction records from employment for a job that will be performed at least 50% of the time within city limits.

1 See Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *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*, Littler ASAP (May 17, 2013); Jennifer Mora, Rod Fliegel and Sherry Travers, *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*, Littler ASAP (June 7, 2013).

2 Seattle Ordinance 124201 is located at http://clerk.ci.seattle.wa.us/~scripts/nph-brs.exe?s3=117796+&s4=&s5=&s1=&s2=&s6=&Sect4=AND&l=0&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F-publi_c%2Fcbor1.htm&r=1&f=G.

3 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 ASAP (June 12, 2013).

4 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).

- **No Criminal Background Inquiries or Criminal Background Checks Until After Initial Screening.** Employers may continue to ask applicants about their criminal histories (subject to other existing legal restrictions), and may continue to perform criminal background checks, but may do either only after the employer has completed an initial screening of applications or resumes to eliminate unqualified applicants.
- **Limitations Regarding Arrest Records.** Employers may inquire about the conduct related to an arrest record, but may not carry out a tangible adverse employment action “solely based on” such a record. Employers must also have a legitimate business reason for taking any tangible adverse employment action “solely based on” the conduct relating to an arrest.
- **Limitations Regarding Conviction Records and Pending Charges.** Employers may not carry out a tangible adverse employment action “solely based on” an employee’s or applicant’s criminal conviction record or pending criminal charge unless the employer has a legitimate business reason for taking such action.
- **Notice Obligation and Waiting Period.** Before taking any tangible adverse employment action “solely based on” an individual’s criminal conviction record, the conduct relating to an arrest record, or pending criminal charge, the employer must identify for the individual the record(s) or information on which the employer is relying and provide the individual with a “reasonable opportunity” to explain or correct that information. Employers must hold open a position for a minimum of two business days after providing such notice in order to afford the individual a reasonable opportunity to respond, correct or explain that information. After two business days employers may, but are not required to, hold open a position until a pending charge is resolved or adjudicated or questions about an applicant’s criminal conviction history or conduct relating to an arrest are resolved.
- **No Retaliation.** Employers may not retaliate against any individual for exercising his or her rights under the Ordinance.

Which Employers, Employees and Applicants are Covered?

A covered “employer” means any person who has one or more employees, the employer’s designee, or any person acting in the interest of such employer. Job placement, referral and employment agencies are included, while certain public sector employers are excluded.

A covered “employee” means any individual who performs any services for an employer when the physical location of such services is in whole or in substantial part (at least 50% of the time) within the city. The definition excludes any individual whose job duties or prospective job duties include law enforcement, policing, crime prevention, security, criminal justice, or private investigation services. Also excluded are individuals whose job duties or prospective job duties include or may include unsupervised access to children under 16 years of age, developmentally disabled persons, or vulnerable adults.

A covered “job applicant” means any individual who applies or is otherwise a candidate to become an employee.

Other Definitions Used in the Ordinance

“Tangible adverse employment action” means a decision to reject an otherwise qualified job applicant or to discharge, suspend, discipline, demote or deny a promotion to an employee.

A “legitimate business reason” exists where, based on information known to the employer at the time the employment decision is made, the employer believes in good faith that the nature of the criminal conduct underlying the conviction or the pending criminal charge either:

- Will have a negative impact on the employee’s or applicant’s fitness or ability to perform the position sought or held, or
- Will harm or cause injury to people, property, business reputation, or business assets.

The Ordinance requires the employer to also consider the following specific factors:

- the seriousness of the underlying criminal conviction or pending criminal charge;
- the number and types of convictions or pending criminal charges;
- the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration;

- any verifiable information related to the individual's rehabilitation or good conduct, provided by the individual;
- the specific duties and responsibilities of the position sought or held; and
- the place and manner in which the position will be performed.

Remedies

The remedies, which are exclusive and vary for first and subsequent violations, are as follows: for a first violation, a notice of infraction and an offer of assistance from the Seattle Office for Civil Rights (the Agency); for a second violation, a \$750 penalty and the Agency's attorney's fees; and for third and subsequent violations, a \$1,000 penalty and the Agency's attorney's fees. Penalties and fees are recoverable only by the Agency. No private right of action is available to a complaining applicant or employee.

Action Steps for Employers Subject to the Ordinance

- Review job postings to ensure they do not state or imply that individuals with an arrest or conviction record or pending charges will be automatically excluded from consideration for employment.
- Review the flow of events in the hiring process (e.g., employment applications) to ensure the proper sequencing of background inquiries and checks. Review policies and procedures concerning inquiries into and the use and consideration of arrest and conviction records and pending charges.
- Review existing notices and procedures to ensure compliance with the waiting period imposed by the ordinance.
- Consider whether it may be beneficial to conduct a privileged audit of compliance with the various interrelated and overlapping federal, state and local laws, including Title VII and the FCRA.

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