A Timely Analysis of Legal Developments

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New California Laws Restrict the Discretion Employers Have to Inquire Into and Use Criminal Record Information

By Rod Fliegel, Jennifer Mora and Amanda Fu

On October 10, 2013, California joined the growing list of states with expanded protections for individuals with prior criminal records when Governor Jerry Brown approved a bill (SB 530) amending the California Labor Code.[1] Effective January 1, 2014, SB 530 amends Labor Code section 432.7 to include an additional prohibition for public and private employers related to pre-employment inquiries, and adds section 4852.22 to the Penal Code shortening the waiting period to receive a Certificate of Rehabilitation. Governor Brown also signed AB 218, which, effective July 1, 2014, will bar public sector employers from asking about criminal records on employment applications (a so-called "ban the box" law).

California's Public and Private Sector Employers are Prohibited From Inquiring About Expunged, Sealed or Dismissed Records

Labor Code section 432.7 currently prohibits public and private employers from requesting job applicants to disclose, or considering as a factor in determining any condition of employment, information concerning (1) an arrest or detention that did not result in a conviction or (2) referral to, or participation in, a pretrial or posttrial diversion program. The penalties for intentional violation of these provisions as set forth in Labor Code section 432.7 are the greater of $500 or treble actual damages, reasonable attorney's fees and costs, and a fine not to exceed $500. SB 530 does not change the penalty and enforcement provisions in section 432.7, but amends section 432.7 to prohibit public and private employers from asking job applicants about criminal records that have been expunged, sealed or dismissed.

Employers are exempt from these requirements in the following circumstances: (1) the prospective employer is required by law to obtain that information; (2) the job position requires the applicant to possess or use a firearm in the course of his or her employment; (3) an individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that crime has been judicially dismissed, expunged, statutorily eradicated or ordered sealed; or (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

1 *See* Rod Fliegel, Pam Salgado, Dan Thieme and Jennifer Mora, *Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes*, Littler ASAP (June 20, 2013).

Additionally, SB 530 adds Penal Code section 4852.22 to shorten the waiting period for certain individuals seeking to apply for a Certificate of Rehabilitation. A Certificate of Rehabilitation does not expunge an individual's criminal record but is instead a court finding that an individual has been rehabilitated following a criminal conviction. Among the benefits of a Certificate of Rehabilitation is that former offenders have an increased likelihood of being granted a professional or occupational license. Prior to the Governor signing SB 530, former offenders were permitted to apply for a Certificate of Rehabilitation following a minimum seven-year waiting period after discharge from custody or release on parole or probation, whichever came first. Penal Code 4852.22 will now permit a trial court to grant an application for a Certificate before the seven-year waiting period has expired if the court, in its discretion, has determined that the interests of justice are served.

The California Governor "Banned the Box" For Public Sector Employers

In recent years, there has been an increase in the number of state and local jurisdictions that have enacted so-called "ban the box" laws, which generally prohibit employers from inquiring about an applicant's criminal record on an employment application. Rhode Island and Minnesota are the most recent states to enact such legislation for private sector employers.[2] The Equal Employment Opportunity Commission has likewise endorsed this limitation in its updated guidance regarding consideration of arrest and conviction records under Title VII of the Civil Rights Act of 1964.[3]

Most of these "ban the box" laws apply to cities as "employers" with such laws recently enacted in municipalities including Pittsburgh, Pennsylvania and Wilmington, Delaware, or to city vendors and contractors, such as in Detroit, Michigan. In fact, most recently, the governor of Illinois issued an administrative order prohibiting state agencies from asking about an applicant's criminal history before evaluating his or her knowledge, skills and ability to perform the job.

Effective July 1, 2014, California will join this growing list of jurisdictions that "ban the box," but only for public sector employers. Even before Governor Brown signed AB 218, however, several California cities had passed ordinances with similar restrictions. For example, Richmond, California's ordinance prohibits private businesses contracting with the city "from asking about prior criminal convictions on employment applications." Other California cities that have banned the box include Berkeley, East Palo Alto, Oakland and San Francisco.

Under AB 218, California state and local agencies, cities and counties must first determine an applicant's minimum qualifications for the position before inquiring about the applicant's conviction history. AB 218 does not, however, apply to law enforcement positions or positions where the applicant will work with children, the elderly, the disabled or other sensitive positions.

Action Steps for Employers

The number of state and local laws affording employment-related protections to ex-offenders has grown and, in all likelihood, will continue to do so. Now is an excellent time for local employers and multi-state employers that use a nationwide form of job application to assess thoroughly whether their job application, including questions about prior criminal records, complies with state and local laws where the employer operates and hires.

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

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

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2 *See* Rod Fliegel and Jennifer Mora, *Rhode Island Enacts "Ban the Box" Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (July 17, 2013); 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).

3 *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).

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]

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4 *See* Rod Fliegel and Jennifer Mora, *Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013*, Littler ASAP (Sept. 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).