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Four New Laws Within 40 Miles: The Washington, DC Area Accelerates the “Ban-the-Box” Movement

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Update: Washington, DC’s Fair Criminal Record Screening Amendment Act of 2014 went into effect on December 17, 2014.

The Washington, DC area has become the leading edge of the “ban-the-box” movement, with four new ban-the-box laws applicable to private employers enacted in the past six months. Baltimore, Maryland, started the trend when the City enacted an ordinance banning the box on May 15, 2014. Washington, DC and Montgomery County, Maryland, followed, passing legislation on August 28, 2014,¹ and October 28, 2014, respectively. On November 19, 2014, Prince George’s County, Maryland, became the latest jurisdiction to ban the box. These laws “ban” the criminal history check box by prohibiting employers from asking about an applicant’s criminal record on the initial employment application. Moreover, as discussed below, these laws impose additional and varying requirements creating significant compliance challenges for multi-jurisdictional employers.

The concentration of ban-the-box laws in the capital area region is particularly striking because there was no such legislation in the region six months ago. This wave of legislation in the DC area follows a nationwide trend, although at an accelerated pace. In the last four years, 15 jurisdictions have enacted legislation banning the box for private employers, bringing the total number of jurisdictions with such legislation to 16. Dozens of additional jurisdictions have enacted ban-the-box legislation applicable to public employers or private employers with government contracts.

As in the DC area, local governments are now leading this legislative movement. Ten of the 16 jurisdictions are cities or counties. The DC-area legislation also illustrates the challenges for multi-jurisdictional employers of complying with these laws. Like other ban-the-box legislation, the capital region’s legislation varies in many key respects.

First, the legislation imposes varying requirements on the point in the hiring process after the employment application is completed when an employer may inquire into criminal history. Both Montgomery and Prince George’s counties allow such inquiries after the initial interview. Employers in the District and Baltimore must wait until they make a conditional offer of employment.

¹ The District of Columbia law currently is subject to congressional review, a process that must be completed before the law goes into effect.

Second, the laws impose varying requirements to provide applicants with a pre-adverse action notice and final adverse action notice. Montgomery and Prince George's counties, but not DC or Baltimore, require pre- and final adverse action notices. The two counties' notice requirements are essentially identical. With regard to the pre-adverse action notice, if an employer in either Montgomery or Prince George's County intends to withdraw a conditional offer of employment based on the applicant's criminal history, the employer must:

1. provide the applicant with a copy of the criminal record report;
2. notify the applicant of the intention to rescind the offer of employment and specify the items that are the basis for the intention to rescind the offer of employment; and
3. delay rescinding the offer of employment for seven days to permit the applicant to notify the employer that the information on which it intends to rely is inaccurate.

Employers in Montgomery and Prince George's counties must also provide a final adverse action notice by notifying the applicant in writing if the employer ultimately decides to rescind the offer. DC's law requires employers to provide a comparable final adverse action notice, but only when an applicant requests the notice within 30 days of the adverse action. The City of Baltimore does not require a pre- or final adverse action notice.

Significantly, these requirements supplement the pre- and final adverse action notice requirements of the federal Fair Credit Reporting Act (FCRA). To begin with, the new requirements apply regardless of whether the employer obtains criminal history information from a third-party consumer reporting agency, *i.e.*, a background check vendor, whereas the FCRA's requirements apply only with respect to adverse employment decisions based on criminal history or other background information obtained from a background check vendor. In addition, the FCRA, in contrast to the counties' ban-the-box laws, does not require that employers specify in the pre-adverse action notice the items of adverse information on which the employer intends to base its adverse action. Finally, the FCRA requires that employers wait a "reasonable" period of time after sending the pre-adverse action notice before sending the final adverse action notice, which the Federal Trade Commission and the courts have construed to mean five days. By contrast, the counties' laws require employers to wait a minimum of seven days between delivery of the pre-adverse action notice and the final adverse action notice. In light of these differences, employers in Prince George's and Montgomery counties will need to supplement their existing procedures for complying with the FCRA.

Third, the DC region's ban-the-box laws vary not only in the procedure for using criminal history information, but also in the substance of evaluating that information. DC and Prince George's County require employers to conduct an individualized assessment, considering factors such as the relation of the criminal history to the job's responsibilities. This requirement incorporates the EEOC's April 2012 Enforcement Guidance on the use of criminal history for employment decisions, which recommends that employers conduct an individualized assessment before relying on criminal history to reject a job applicant. Neither Baltimore nor Montgomery County requires an individualized assessment.

Fourth, the District's law prohibits questions *at any time* about an arrest or criminal charge that did not lead to a conviction or is not pending at the time of the inquiry. In the three other jurisdictions, inquiries about arrests are permissible as long as the timing requirements are satisfied. DC-area employers should note, however, that the EEOC's April 2012 Enforcement Guidance disapproves of any reliance by employers on historical arrest records for employment decisions, except with respect to recent pending charges. Moreover, many other states prohibit employers from considering historical or non-pending arrest records.

Finally, the laws vary in their exceptions. All four jurisdictions exempt employers that serve minors and vulnerable adults and criminal history inquiries that are required by law. With the exception of DC, the jurisdictions exempt other governments in their capacity as employers. Montgomery and Prince George's counties each provide two additional exceptions. Both exempt county agencies involved in public safety. Prince George's County also provides an exception for sensitive positions, such as jobs that provide access to confidential information, and Montgomery County exempts positions requiring a federal government security clearance.

Some employers may be relieved to note that only organizations with a significant number of employees within each jurisdiction must comply with the new legislation. In Prince George's County, the law applies only to employers that employ at least 25 full-time employees in the county. In Montgomery County, the minimum number of full-time employees is 15. Covered employers in DC and Baltimore must employ at least 10 employees, although in DC, the employees need not be full-time. Given these minimum thresholds, an employer with a main office in one of the four jurisdictions and a few employees in any of the other jurisdictions would be required to comply with only the ban-the-box law of the jurisdiction where the main office is located.

In terms of remedies, DC, Baltimore, and Montgomery County do not confer on job applicants the right to file a civil lawsuit to recover damages. Prince George's County does not appear to provide a private right of action either. Rather, all four jurisdictions rely on administrative enforcement, which includes the authority to impose fines. These fines range from \$500 per violation in Baltimore to \$10,000 in Prince George's County. Montgomery County and DC can impose fines of up to \$1,000 and \$5,000 respectively. Additionally, Baltimore and Prince George's County authorize an award of back pay and compensatory damages, including damages for emotional distress, as well as the recovery of expenses incurred in seeking other employment, among other relief.

Baltimore's ordinance went into effect in August 2014. Montgomery and Prince George's counties' laws will be effective on January 1 and January 3, 2015, respectively. DC's law will be effective once the opportunity for Congress to review has expired, and the law has been published in the District of Columbia Register, which is [projected](#) to be December 11, 2014.

Recommendations for Employers

To comply with the new ban-the-box laws in the DC area, covered employers hiring for positions located in any of these jurisdictions should consider taking the following steps:

- Revise their employment applications to remove questions about criminal history;
- Modify their hiring procedures to delay any inquiry about criminal history until after the initial interview or conditional offer of employment, as applicable;
- Develop a supplement to their employment application, to be completed at this later stage in the hiring process, that requests self-disclosure of criminal history;
- Conduct an individualized assessment of applicants in Prince George's County and the District of Columbia before rejecting applicants based on their criminal history and consider whether to do so in other jurisdictions given the EEOC's April 2012 Enforcement Guidance; and
- In Prince George's and Montgomery counties, provide pre-adverse action notices to applicants being considered for rejection based on criminal history and provide final adverse action notices in both counties and DC (and in Baltimore when required by the FCRA).

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