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Rochester, New York Joins The “Ban-the-Box Movement”

By Trent Sutton, Philip Gordon, and Jessica Pizzutelli

On May 22, 2014, the City of Rochester became the second city in New York to “ban the box,” by adopting legislation restricting the timing of pre-employment inquiries by most Rochester public and private employers into a candidate’s criminal history. Rochester joins Buffalo,¹ as well as Baltimore, Newark,² Philadelphia,³ San Francisco,⁴ Seattle,⁵ Hawaii, Massachusetts, Minnesota,⁶ and Rhode Island⁷ in banning the box. More than 40 jurisdictions have enacted ban-the-box laws that apply to public employers. The “box” refers to the box on employment applications inquiring whether an applicant has any criminal history.

The new Rochester legislation prohibits employers from making any inquiry regarding, or to require any person to disclose or reveal, any criminal conviction information until after the initial interview. The ordinance defines “interview” to mean direct contact, by phone or in person, between the applicant and the prospective employer 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 is to begin and must wait until after it has extended a conditional offer of employment before conducting the background check or otherwise inquiring into the applicant’s criminal history.

The ordinance applies to applicants for all types of work, not just applicants for full-time employment. The ordinance encompasses part-time, seasonal, and temporary workers. It also covers employment for contract and contingent work and work obtained through any type of employment agency.

- 1 See 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* (Jun. 7, 2013).
- 2 See Rod Fliegel, Jedd Mendelson, and Jennifer Mora, [Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes](#), *Littler ASAP* (Oct. 2012).
- 3 See Rod Fliegel and William Simmons, [Philadelphia Passes Ordinance Restricting Certain Employer Inquiries Into, and Use of, Criminal Record History](#), *Littler ASAP* (Apr. 14, 2011).
- 4 See Rod Fliegel and Jennifer Mora, [“Ban-the-Box” and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records](#), *Littler ASAP* (Feb. 14, 2014).
- 5 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* (Jun. 20, 2013).
- 6 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).
- 7 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* (Jul. 17, 2013).

The ordinance expressly incorporates provisions of New York state law intended to facilitate the reintegration of ex-offenders into the workforce. More specifically, the statute requires Rochester employers to comply with Article 23-A of the New York State Corrections Law, which prohibits employment discrimination against ex-offenders and requires employers to consider a list of factors before declining to employ them. The Rochester law also expressly incorporates several provisions of New York law that prohibit employers from inquiring about any youthful offender convictions, as well as any sealed and expunged convictions.

These statutory provisions reflect the intent of the new law's sponsor to help ex-offenders find employment. In the words of City Councilman Adam McFadden, who sponsored the legislation: "Since one of the leading factors in preventing recidivism is employment, this measure will help to eliminate discrimination against ex-offenders and help put people to work and allow them to be successful and productive members of our community."

Employers Impacted

The legislation applies to any private employer located within the City of Rochester with four or more employees. It also applies to the City of Rochester itself and any of its vendors, contractors, or suppliers (including those located outside city limits).

The ordinance excludes several categories of employers from its purview. First, employers who are otherwise authorized by another law or by a licensing authority to inquire about criminal convictions may still do so. Second, the ordinance's prohibitions do not apply to applicants for positions in the City's Police or Fire Departments or to any other employer hiring for "police officer" or "peace officer" positions (as defined by Criminal Procedure Law). Finally, employers hiring for positions where certain convictions are a bar to employment under New York or federal law may inquire about those convictions during the application process.

Enforcement

The ordinance confers a private right of action on any person aggrieved by a violation of its provisions. Aggrieved persons may sue in court for injunctive relief, damages or other appropriate relief. The court may award attorneys' fees and costs to a prevailing plaintiff.

In addition, Rochester's Corporation Counsel may choose to bring an action to restrain or prevent any violation of the ordinance and may seek the imposition of penalties. The penalties potentially are steep depending upon how individual violations will be counted. They are \$500 for the first violation and \$1,000 for each subsequent violation.

Recommendations

The ordinance takes effect on November 18, 2014. Prior to November 18, 2014, employers should determine whether the law applies to them. Covered employers should review their employment applications and remove any questions about criminal convictions. Covered employers also should revise their hiring procedures to delay any inquiry about criminal convictions until after an initial employment interview has been conducted, or if no interview is conducted, until after a conditional offer of employment has been made.

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