A Timely Analysis of Legal Developments

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Private Sector Employers in the District of Columbia Will Soon Be Required to Comply with a New Law Restricting Their Ability to Rely on Criminal Records for Employment Purposes

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Update: The Fair Criminal Record Screening Amendment Act of 2014 went into effect on December 17, 2014.

On August 22, 2014, the District of Columbia Mayor signed a new law restricting most employers that operate in the District of Columbia in their ability to rely on criminal history information, including criminal background records, for employment purposes. In fact, the new District of Columbia law is one of the few in the United States that restricts the ability of private sector employers to screen applicants on the front end (i.e., before an interview or an offer). The law does this by prohibiting employers from both inquiring about criminal history information during the application process and obtaining a criminal background check until *after* a conditional offer of employment is made to the applicant.[1]

The District of Columbia law, entitled the "Fair Criminal Record Screening Amendment Act of 2014," is representative of the ongoing intensive focus on employer use of criminal records by federal, state and local governments, including the federal Equal Employment Opportunity Commission (EEOC).[2] Indeed, new legislation has recently been enacted in New Jersey and Illinois, which similarly restricts the ability of employers to inquire about criminal records in an employment application.[3] Employers throughout the U.S., and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws

1 The law will take effect following a 30-day period of Congressional review as provided in the District of Columbia Home Rule Act and publication in the District of Columbia Register.

2 *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).

3 *See* Adam Wit, Darren Mungerson and Jennifer Mora, *Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks*, Littler ASAP (July 20, 2014); 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); 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); Rod Fliegel, Phil Gordon, Jennifer Mora and Keith Rosenblatt, *New Jersey's "Opportunity to Compete Act" Continues the Nationwide "Ban-the-Box" Trend*, Littler ASAP (Aug. 12, 2014).

restricting the use of credit history information[4] and the fair credit reporting laws.[5] Most immediately, employers with significant operations in the District of Columbia should assess whether they are covered by the law, and if so, whether they need to revise their job applications, background check letters (commonly known as "pre-adverse action" and "adverse action" notices), and guidelines and documentation for the hiring process.

Covered "Employers"

The law defines an "employer" broadly as "any person, company, corporation, firm, labor organization, or association, . . . that employs more than 10 employees in the District of Columbia." Exempt from the law's coverage are the federal government and "the Courts."

The definition of the term "employment" is expansive and extends to "any occupation, vocation, job, or work for pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency; or any form of vocational or educational training with or without pay where the physical location of the employment is in whole or substantial part, within the District of Columbia."

The term "applicant" is broadly defined to include "any person considered or who requests to be considered for employment by an employer."

Exemptions

The prohibitions in the law do not apply where "any federal or District law or regulation requires the consideration of an applicant's criminal history for the purposes of employment," to "any positions designed by the employer as part of a federal or District government program or obligation that is designed to encourage the employment of those with criminal histories," or to a "facility or employer that provides programs, services, or direct care to minors or vulnerable adults."

Unlawful Employment Practices

The law makes certain employment practices unlawful and imposes affirmative obligations on covered employers.

Criminal History Inquiries

The law makes it unlawful for a covered employer to ever inquire about "any arrest or criminal accusation made against an applicant, which is not then pending against the applicant or which did not result in a conviction." Covered employers may not "make any inquiry or require an applicant to disclose or reveal any criminal conviction until after making a conditional offer of employment."

The law defines an "inquiry" broadly to mean "any direct or indirect conduct intended to gather criminal history information from or about the applicant, candidate or employee, using any method, including application forms, interviews, and criminal history checks." Accordingly, a covered employer seemingly cannot obtain a pre-offer criminal background check from a consumer reporting agency.

Affirmative Obligations

After a covered employer extends a conditional offer of employment to a job applicant that is conditioned solely on "the results of the employer's subsequent inquiring into or gathering information about the applicant's criminal record" or "some other employment related contingency expressly communicated to the applicant at the time of the offer," the employer "may only withdraw the conditional offer" or otherwise "take an adverse action against an applicant for a legitimate business reason." The employer's determination of a "legitimate business reason" must be reasonable in light of the following six factors:

- The specific duties and responsibilities necessarily related to the employment sought or held by the person;

4 *See* Rod Fliegel, Bruce Young and Jennifer Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (May 30, 2013).

5 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler ASAP (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

- The bearing, if any, of the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
- The time that has elapsed since the occurrence of the criminal offense or offenses;
- The age of the person at the time of the occurrence of the criminal offense;
- The frequency and seriousness of the criminal offense; and
- Any information produced by the person, or produced on his or her behalf, in regard to rehabilitation and good conduct since the occurrence of the criminal offense.

If an applicant *believes* that a covered employer withdrew a conditional offer or otherwise took adverse action against the applicant "on the basis of a criminal conviction," the applicant may request, within 30 days of the termination or adverse action, that the employer provide him or her with the following within 30 days after the employer's receipt of the request:

- A copy of any and all records procured by the employer in consideration of the applicant or employee, including criminal records; and
- A notice that advises the applicant of his or her opportunity to file an administrative complaint with the DC Office of Human Rights.

Enforcement

The new law does not provide an aggrieved applicant or employee with a private right of action against any covered employer. Rather, the applicant or employee may file an administrative complaint with the Office of Human Rights, which may be processed through to the Commission on Human Rights. If the Commission on Human Rights finds that an employer has violated the new law, the Commission will impose monetary penalties ranging between $1,000 and $5,000 (depending on the size of the employer), half of which will be provided to the aggrieved individual.

Recommendations

Most immediately, employers with operations in the District of Columbia should assess whether they are covered by the law, and, if so, whether they need to do the following:

- Revise job applications, interviewing guidelines and policies and procedures for background checks;
- Revise notice letters and the corresponding enclosures, including the notices required by fair credit reporting laws ("pre-adverse action" and "adverse action" notices);
- Revamp the sequencing and timing of events in the hiring process;
- Implement guidelines and documentation that comply with the ordinance; and
- Pay close attention to this evolving area of law.[6]

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6 Under the Home Rule Act, Congress has 30 legislative days to review any City Council legislation, during which time it may reject this legislation. Given the current makeup of Congress, such a rejection is unlikely to occur.