Insight

IN-DEPTH DISCUSSION

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Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law

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New York City's Fair Chance Act (FCA), which became effective on October 27, 2015, imposes obligations on covered employers and employment agencies well beyond all other "ban-the-box" laws.[1] On November 5, 2015, the New York City Commission on Human Rights (the Commission) released its 13-page Interpretative Enforcement Guidance regarding the FCA. As explained in our previous Insight, the ambitious scope of the Guidance makes the onerous nature of the FCA more apparent, with the Commission expounding at length on protections that ex-offenders enjoy in New York City throughout the hiring process—as well as during employment—as the Guidance defines the term "applicant" to include both prospective and existing employees.[2]

More recently, however, the Commission published proposed regulations clarifying the FCA, and is accepting comments on those proposed regulations in connection with a hearing to be held in New York City on March 21, 2016. These regulations expand upon the already onerous requirements of the FCA, making it even more difficult for New York City employers to screen applicants whose criminal history may disqualify them from their job or pose an unreasonable risk to their business, reputation and employees. Covered employers, particularly those with a single hiring process applied in multiple jurisdictions, including an on-line applicant tracking system, will want to review very closely the FCA, the Guidance, and the proposed regulations to identify measures needed to ensure compliance with the FCA.

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1 See Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (June 12, 2015).

2 See Jennifer Mora, David Warner and Rod Fliegel, *New York City Commission on Human Rights Issues Guidance on Citywide "Ban-the-Box" Law*, Littler Insight (Nov. 9, 2015).

Provisions of the Proposed Regulations

The Commission's proposed regulations clarify and expand upon the FCA in a number of ways, including:

- Defining numerous terms in the FCA including, among others, "adverse employment action," "conditional offer of employment," "inquiry," "non-convictions," and "terms and conditions";
- Spelling out the types of questions and statements barred under the FCA;
- Allowing an aggrieved individual to establish a per se violation of the FCA and establishing an expedited process for resolving those types of violations;
- Clarifying how an employer should consider inadvertently discovered criminal history information; and
- Requiring employers to consider any information the individual presents to show inaccuracy of criminal history information reported, and also consider an individual's request for more time to respond.

More important to employers, however, are the following new requirements of the proposed regulations:

- Article 23-A of the New York Correction Law currently requires an employer to consider eight factors before rejecting an individual with a conviction. The proposed regulation would require employers to conduct the Article 23-A analysis for pending criminal charges as well as convictions. This is contrary to the language of Article 23-A and the Guidance previously issued by the Commission.
- Employers will be barred from inquiring about or considering any criminal history information not only of applicants, but also of current employees who are applying for promotions, transfers or any change in employment status or in the terms and conditions of employment until after a conditional offer for that position or change has been made.
- It will be unlawful for an employer who has extended a conditional offer of employment and then conducts a criminal background check to rescind that offer unless the decision is based on the criminal record, a failed medical examination, or the discovery of information the employer could not reasonably have discovered before extending the conditional offer.
- Employers doing business in multiple jurisdictions will be explicitly prohibited from using an employment application that asks for criminal history information with an instruction for applicants in New York City and other "ban-the-box" jurisdictions not to answer the criminal history questions.

Recommendations

Employers and employment agencies that employ persons in New York City should consult with experienced employment law counsel to determine whether their current hiring practices are impacted by these anticipated regulations. In particular:

- Employers and employment agencies should proceed cautiously when considering pending criminal charges. Consider conducting an Article 23-A analysis if adverse action is contemplated while the criminal proceeding is ongoing.
- Incumbent employees seeking a promotion, transfer or change in title or status should be treated in the same manner as applicants with respect to consideration of criminal history information.
- Employers may wish to consider whether it would be prudent first to conduct a background check that does not inquire into an applicant's criminal history (such as employment and educational history checks) before a conditional offer is made, so that they can consider such information before making a conditional offer and before the individual's criminal record and any medical examinations are

considered. Such a two-step procedure may have significant drawbacks, however, such as increasing the time, expense and potential for error in the process.

Even if the proposed amendments are not adopted, employers and employment agencies also should consider the following action items:

- Review and revise job applications, interviewing guidelines, and policies and procedures for conducting and evaluating criminal background checks;
- Review and revise notice letters and the corresponding enclosures, including the notices required by the fair credit reporting laws ("pre-adverse action" and "adverse action" notices);
- Revamp the sequencing and timing of events in the hiring process; and
- Implement guidelines and documentation that comply with the FCA.

In addition, employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of criminal and credit history information and the fair credit reporting laws.[3]

3 See Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016) Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (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).