Insight

IN-DEPTH DISCUSSION

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New York City Council Bans the Box

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Following closely on the heels of a citywide bill restricting employer's use of credit information for employment decisions,[1] on June 10, 2015, the New York City Council passed a new bill restricting an employer's ability to inquire into or obtain information about a job applicant's criminal history before extending a conditional offer of employment. New York City Mayor Bill de Blasio is expected to sign the bill, which will go into effect 120 days after it is signed into law. This legislation comes shortly after enactment of similar laws in other jurisdictions, such as the District of Columbia and the City of Columbia in Missouri.[2]

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] Most immediately, companies that employ persons in New York City should assess whether they are covered by the law, and if so, whether they need to revise their job applications, offer letters, background check letters (commonly known as "pre-adverse action" and "adverse action" notices), and guidelines and documentation for the hiring process and criminal background checks on current employees. Employers that also operate in Rochester and Buffalo, New York, should assess their hiring and background screening practices given the differences among the various New York ban-the-box laws.

Coverage

The prohibitions in the bill will be added to the New York City Human Rights Law (NYCHRL), which applies to virtually any employer of four or more persons.

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1 *See* Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions*, Littler Insight (Apr. 21, 2015).

2 *See* Rod Fliegel, Jennifer Mora, Joseph Harkins and Melanie Augustin, *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*, Littler Insight (Aug. 22, 2014); Jennifer Mora and Philip Gordon, *Columbia, Missouri Joins the Ranks of Ban-the-Box Jurisdictions*, Littler ASAP (Dec. 15, 2014).

3 *See* 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).

New Restrictions on and Related to Criminal History Inquiries

The bill makes it unlawful for an employer or employment agency to issue any solicitation, advertisement or publication that states, either directly or indirectly, any employment limitations or requirements based on a person's history of arrests or criminal convictions.

The bill also makes it generally unlawful for an employer or employment agency to "[m]ake any *inquiry* or *statement* related to the pending arrest or criminal conviction record of" most applicants unless and until the applicant has received a conditional offer of employment (emphasis added). For employees of temporary help firms, a conditional offer of employment means an offer to put the applicant in the temporary help firm's general candidate pool.

Prohibited, pre-conditional offer inquiries include "any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information." Thus, employers have to wait until after they have made a conditional offer of employment before (i) asking an applicant about his or her criminal history, and (ii) searching public records to find or otherwise procuring any criminal background information about the applicant.

The statements prohibited by the bill "include verbal or written statements to the applicant for the purposes of obtaining his/her "criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check."

Job applicants need not respond to impermissible inquiries and cannot be disqualified from employment for not responding to them.

Permissible Inquiries

The bill allows employers to inquire about an applicant's record of arrests, criminal accusations and/or convictions, either directly or through a background check, only if it is *after* making a conditional offer of employment and, in the event the employer ultimately decides to take an adverse action based on the results of such inquiry, it does the following *before* taking that action:

- provides the applicant with a written copy of the inquiry in a manner to be determined by the New York City Commission on Human Rights (NYCCHR);
- performs an analysis that considers the eight-factor test in Article 23-A of the New York Correction Law and provides the applicant with a copy of the analysis (in a manner to be determined by the NYCCHR), which includes the documents the employer relied upon and states the reason(s) for the adverse action; and
- allows the applicant at least three business days to respond, *while holding the position open for the applicant to do so.*

Unlawful Employment Practices

The bill also aims to add to the NYCHRL a new prohibition against denying employment to any applicant or taking an adverse action against any employee "by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of" the New York State Human Rights Law, which prohibits employers from inquiring about or taking adverse actions against persons based on arrests or criminal accusations that are not still pending at the time.

The bill further seeks to expand the NYCHRL's existing prohibition against denying employment to any person in violation of Article 23-A of the New York Correction Law to also bar taking an adverse action against an employee if it would violate that law.

Exceptions

The bill includes several exceptions. Specifically, it does not apply to any criminal history inquiries or adverse actions taken by an employer pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. It also does not apply to any actions taken by an employer against applicants for employment as a police officer or peace officer, including those applying for positions with the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, the district attorneys' offices, and other sensitive citywide administrative positions.

Enforcement

As the bill is designed to amend the NYCHRL, aggrieved applicants and employees will essentially have all the enforcement mechanisms and remedies available under that law. This includes, for example, a right to file a complaint with the NYCCHR or pursue a claim in court.

Recommendations

Most immediately, employers and employment agencies that employ persons in New York City should consult with experienced employment law counsel to determine whether they are covered by these anticipated amendments to the NYCHRL, and, if so, whether they need to do any the following:

- Revise job applications, interview guidelines and policies and procedures for criminal background checks;
- 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 ordinance.