A Timely Analysis of Legal Developments

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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

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Effective January 1, 2014, recent amendments to Minnesota law will restrict the timing of pre-employment inquiries by most private employers into a candidate's criminal past. Employers who are not exempted from the law may not (1) inquire into or consider or require disclosure of criminal record information until the applicant has been selected for an interview or, if there is not an interview, until a conditional job offer of employment has been extended to the applicant, and (2) use any form of employment application that seeks such criminal record information.

The new law does not outright preclude inquiries into or consideration of an applicant's criminal past. Representative Tim Mahoney, who sponsored the legislation, has stated that the law "does not prohibit private employers from eventually conducting background checks and fully investigating the criminal past of potential employees," but, "is designed to get applicants past the initial application stage, so that if they qualify for the job, they get a chance to explain themselves." Further, the statute expressly states that it does not prohibit an employer from notifying applicants that either law or the employer's policy will disqualify an individual with a particular criminal history background from employment for particular positions.

These new pre-employment restrictions, which previously applied only to public employers, reflect the trend towards so-called "Ban the Box" laws in some jurisdictions.[1] The Equal Employment Opportunity Commission (EEOC) has likewise suggested or endorsed this approach in its updated guidance regarding consideration of arrest and conviction records under Title VII of the Civil Rights Act of 1964.[2]

Enforcement

The statute does not afford a private right of action. Rather, violations by public employers are processed and adjudicated under Minnesota's Administrative Procedures Act, and violations by

1 *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. 22, 2012); Christopher Kaczmarek, Carie Torrence, and Joseph Lazazzero, *Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal History Records*, Littler ASAP (Mar. 9, 2012).

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).

private employers will be investigated by the Minnesota Commissioner of Human Rights (Commissioner). If the Commissioner finds a violation during the first year the law is in effect, the Commissioner will issue a written warning and may also impose a maximum penalty of $500 per violation, not to exceed $500 per calendar month. After the law has been in effect for a year, the Commissioner will no longer issue written warnings and the penalty, depending on the size of the employer, will be either $100 or $500 for each violation, with $100, $500 and $2,000 per month caps per calendar month.

Protections for Employers

The amended statute also affords protections to employers by limiting the admissibility of evidence of an employee's criminal history in civil litigation against the employer in the circumstance where:

- the civil action is based on the employee's conduct (whether a current or former employee at the time of the civil action); and
- the duties of the employee's position did not pose particular risk to others; or
- before the occurrence of the conduct at issue in the civil action, a court order sealed the criminal record or the employee received a pardon; or
- the record is of an arrest or charge that did not result in a conviction; or
- the action is based solely on the employer's compliance with the new restrictions imposed by the statutory amendment.

These protections reflect an effort by the Legislature to balance the competing risks to employers, *i.e.*, avoiding violations of the fair employment laws, on the one hand, and avoiding negligent hiring risks, on the other hand. A handful of states have enacted similar protections (*e.g.*, Ohio).[3]

Action Steps for Employers

Minnesota and multi-state employers need to consider whether their uniform job application and backgrounds check inquiries comply with applicable law, including Minnesota's new law. Given all of the recent attention on background checks by the EEOC, other agencies and plaintiffs' lawyers, this is also a good time for employers to review their application and hiring process. This process review should consider restrictions on use of criminal information under EEOC guidance and certain state laws (*e.g.*, Indiana)[4] and use of credit information under others (*e.g.*, Colorado),[5] and also should ensure federal and state Fair Credit Reporting Act compliance.[6]

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3 *See* Rod Fliegel, William Simmons, and Inna Shelley, *Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders*, Littler ASAP (Aug. 10, 2012).

4 *See* Rod Fliegel, Jennifer Mora, and William Simmons, *Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks*, Littler ASAP (Jun. 26, 2012).

5 *See* Rod Fliegel, Philip Gordon, and Jennifer Mora, *Colorado is the Latest and Ninth State to Enact Legislation Restricting the Use of Credit Reports for Employment Purposes*, Littler ASAP (Apr. 26, 2013).

6 *See* Rod Fliegel and Jennifer Mora, *Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013*, Littler ASAP (Sep. 4, 2012).