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An Employment Law Tightrope: Criminal Background Checks

From the Experts

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Employers are forced to walk an increasingly narrow tightrope as they decide whether to use an individual's criminal history in making employment decisions. On the one hand, employers are concerned about subjecting themselves to liability by not having enough information about potential employees. On the other, many states and local governments are enacting "ban the box" laws that limit employers' use of criminal history information.

This already precarious tightrope is being shaken as some states enact laws *requiring* employers to conduct background checks. Foreexample, in the wake of widely publicized abuses involving former Pennsylvania State University football coach Jerry Sandusky, the Pennsylvania legislature recently enacted Act 153 of 2014, which requires specific types of employers, including colleges and universities, to require that certain applicants and employees submit to criminal background checks.

But the trend, overall, is strongly heading in the other direction—state and local legislators are limiting employers' ability to check job candidates' backgrounds. Many employers are jumping ahead of the curve and are removing questions about criminal convictions from employment applications across the board, regardless of jurisdictional requirements.

On the federal level, in 2012 the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance that



advises employers to remove questions about prior convictions from employment applications and to address this issue later in the selection process. In doing so, the EEOC pointed to a "significant increase" in the number of Americans who have served time in prison in the last 20 years and noted that arrest and incarceration rates are particularly high for African American and Hispanic men. The EEOC guidance advises employers to ensure that its criminal record screening policy doesn't violate Title VII by having a discriminatory disparate impact on any protected classes.

'BAN THE BOX' LEGISLATION

While many employers are likely aware of the EEOC's guidance, there is a new wave of local legislation regarding background checks that should be on everybody's radar. Across the country, nearly 100 cities

and counties and 17 states have enacted "ban the box" laws that require public or private employers—or both—to remove questions about criminal history from job applications. Three of those states (Georgia, Ohio and Virginia) enacted laws in the last few months alone, and legislation is pending elsewhere.

These laws are motivated by a growing public interest in reducing recidivism rates by, according to the National Employment Law Project, "providing applicants a fair chance by removing the conviction history question on the job application and delaying the background check inquiry until later in hiring."

There are a total of 17 states that have adopted "ban the box" policies: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New

Mexico, Ohio, Rhode Island, Virginia and Vermont. Of those, six states have removed the conviction history question on job applications for private employers, while the rest solely deal with public employers: Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island.

For instance, New Jersey's Opportunity to Compete Act bars public *and private* employers in New Jersey from inquiring about a job applicant's criminal record—either on the application or orally—prior to the first interview—unless the applicant discloses information about his or her criminal history. The law, which took effect in March, explicitly states that it does not preclude inquiries about an applicant's criminal record *after* the initial application process. It also states that while it generally doesn't preclude an employer's refusing to hire an applicant for employment based upon the applicant's criminal record, an employer cannot refuse to hire an individual because of his or her criminal record if that record—or the relevant portion of that record—has been expunged or erased through executive pardon. New Jersey's law applies to employers with 15 or more employees.

There are exceptions to this general prohibition on inquiring about an applicant's criminal record during the initial employment application process. For instance, inquiry into an individual's criminal record is not barred during the initial application process for applicants for positions in law enforcement, corrections, the judiciary, homeland security or emergency management. The New Jersey law also bars employers from publishing advertisements that solicit applicants for employment where that advertisement explicitly states that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses. While the Opportunity to Compete Act does not set forth a private cause of action for an aggrieved person, it does provide for civil penalties—fines starting at \$1,000—for violations.

In accordance with the trend, more states and local governments are looking to enact "ban the box" laws that would apply to private employers. For instance, the New York City Council recently passed the Fair Chance Act (FCA). Once it goes into effect, the FCA will supplement New York State's protections for ex-offenders as well as New York City's current "ban the box" law, which applies only to public employers.

Commentators have noted that the FCA will be among the most expansive ban the box laws in the country. Under it, employers will have to make a conditional job offer before inquiring into the criminal history of an applicant or conducting any criminal history search. If, after receiving information regarding the applicant's record, the employer does not want to employ the applicant, the employer must provide a copy of the record and explain why the applicant cannot be employed. The employer then must hold the position open for seven days so that the employer and applicant can engage in a discussion that takes into account the employer's requirements and the applicant's evidence of good conduct. During this time, the applicant also has an opportunity to question any inaccuracies in his or her record. The FCA also prohibits employers from considering felonies more than 10 years old and misdemeanors more than five years old, running from the date of conviction or release from incarceration, whichever is later.

BEST PRACTICES

While there are many reasons why an employer may want to conduct background checks on potential or current employees, it is essential that these hiring procedures comply with the vast array of federal, state and local laws. It is important to be aware of those laws—both nationally and in the jurisdictions where your business operates. Further, employers should be aware of the kinds of information and the timing of inquiries that is permitted in the relevant jurisdictions. If a third party is engaged to

conduct background checks, ensure that you know what information that vendor is obtaining and when and how that information is being used.

If an employer is conducting background checks, it should draft a clear and specific policy on how they are being used: the type of information that is being sought, when that information is sought and the process for handling the results of prior convictions. Supervisors and decision-makers should be clearly trained on the policy. In addition, review employment applications and interview guidelines to ensure they comply with all applicable "ban the box" laws.

A policy should avoid blanket exclusions and afford applicants an opportunity to explain. The procedure should describe, and your hiring supervisors should conduct, an individualized assessment including the nature and severity of the crime, the time since conviction, the duties of the job sought, any subsequent employment held and any relevant efforts at rehabilitation when making determinations based on the result of a criminal background check.

By being aware of federal, state and local law and what it requires of them, and drafting a clear and specific written policy on background checks, employers will be able to better navigate the increasingly difficult tightrope of conducting criminal background checks in compliance with the law.

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