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Management Alert

Rhode Island Joins The Private Employer "Ban-The-Box" Trend

For the past couple of years we have been reporting about the increasing number of ban-the-box laws (prohibition of asking about criminal history on an employment application) spreading across the United States. It is now apparent that ban-the-box laws are more than just a trend in state and local governments—they are becoming the norm across the county.

At the present time ban-the-box laws have been enacted in more than 50 state and local governments. While the majority of these laws apply only to public employers, there is a new "trend" applying ban-the-box laws to private employers or government contractors. There are currently state-wide private employer ban-the-box laws in Hawaii, Massachusetts, and most recently in Minnesota and Rhode Island. There are also local city/county ban-the-box laws that apply to private employers and/or government contractors in certain California, Connecticut, Massachusetts, Michigan, New Jersey, New York, Pennsylvania, and Washington localities. For example, Newark, NJ, Philadelphia, PA and most recently Seattle, WA have enacted private employer ban-the-box laws. Other state and local governments are considering similar legislation.

While these laws have different titles and do not expressly use the term "ban the box," they all serve the same purpose—either out right prohibiting or severely restricting employers from asking applicants about their criminal history in the initial employment application before conducting an interview or making a conditional offer of employment (depending on the specific state or local law). The newly enacted ban-the-box laws in Rhode Island, Minnesota, and Seattle highlight the importance for private employers to pay close attention to this new trend.

Rhode Island Limits Private Employers' Ability To Ask About Criminal History

Rhode Island is the latest state to enact a ban-the-box law applicable to private employers. The new law (enacted Senate Bill 357) prohibits inquiries on employment applications regarding prior criminal convictions except when federal or state law mandates disqualification of a person from employment because of a prior conviction or specifically authorizes such inquiries. It applies to both public and private employers in Rhode Island employing four or more individuals, or any person acting directly or indirectly in the interest of an employer. The enacted law was signed by Governor Linc Chafee on July 16, 2013. It takes effect on January 1, 2014.

Senate Bill 357 amends Chapter 28-5 of the State of Rhode Island General Laws entitled "Fair Employment Practices." Specifically, the new law amends Section 28-5-7 entitled "Unlawful Employment Practices" and will make it an "unlawful employment practice" for an employer to inquire about whether an applicant has ever been convicted of a crime *before the first interview* unless:

- the application is for law enforcement agency positions or positions related to law enforcement agencies;
- a federal or state law or regulation creates a mandatory or presumptive disqualification from employment based on a person's conviction of one or more specified criminal offenses (then an employer may include a question or otherwise inquire whether the applicant has ever been convicted of any of those offenses); or

- a standard fidelity bond or an equivalent bond is required for the position for which the applicant is seeking employment and his or her conviction of one or more specified criminal offenses would disqualify the applicant from obtaining such a bond (then an employer may include a question or otherwise inquire whether the applicant has ever been convicted of any of those offenses).

Under Section 28-5-7, it is still an unlawful employment practice in Rhode Island for an employer to ask about arrests or criminal charges (as compared to convictions) on an employment application or to otherwise inquire either orally or in writing whether the applicant has ever been arrested or charged with any crime (except applications for law enforcement agency positions or positions related to law enforcement agencies).

Minnesota And Seattle, WA Also Recently Enacted Private Employer Ban-The-Box Laws

Minnesota. Minnesota Governor Mark Dayton signed SF 523 on May 13, 2013. It takes effect on January 1, 2014.

Minnesota SF 523 amends Section 364.021 of the Minnesota Statutes concerning consideration of criminal records in employment, which applied only to public employers. The new law will prohibit private employers from inquiring into or requiring disclosure of an applicant's criminal history until the applicant is selected for an interview, or has received a conditional offer of employment (if no interview is conducted). Under the new law private employers may still notify applicants that either under applicable law or the employer's policy a criminal history may disqualify an individual from employment in particular positions.

The new law does not apply to the Department of Corrections or to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process.

Minnesota SF 523 gives the Commissioner of Human Rights the responsibility to investigate violations of Section 364.021 and impose monetary penalties. Depending on when the violation occurs (before or after January 1, 2015), and the size of the employer (less than 11 employees to more than 20 employees), the employer can be ordered to pay anywhere from $100 to $500 per violation (capped between $100 to $2,000 per month depending on the size of the employer). These monetary penalties are exclusive and do not otherwise provide a private cause of action.

Seattle, WA. Seattle Mayor Michael McGinn signed Council Bill Number 117796 (Ordinance Number 124201) on June 20, 2013. It takes effect on November 1, 2013.

The ordinance prohibits employers from advertising, publicizing or implementing any policy or practice that automatically or categorically excludes all individuals with any arrest or conviction record from any employment position that will be performed at least 50% of the time within Seattle. Employers may still perform criminal background checks and inquire into the individual's criminal history after the employer has conducted an initial screening of applications or resumes to eliminate unqualified applicants. Even then, employers cannot take tangible employment actions based solely on non-conviction information. And, employers can only take tangible employment actions based solely on conviction data if they have a legitimate business reason (as defined by the ordinance) and they hold the position open for a minimum of two days after they notify the individual about the criminal history information to give him or her the chance to respond.

The ordinance does not apply to individuals whose job duties or prospective job duties include law enforcement, policing, crime prevention, security, criminal justice, private investigation services, unsupervised access to children under sixteen years of age, unsupervised access to developmentally disabled persons, or unsupervised access to vulnerable adults during the course of his or her employment.

The Seattle Office for Civil Rights is responsible for investigating violations of the ordinance. While the ordinance does not create a private cause of action, employers can be ordered to pay monetary penalties up to $750 for the first violation and up to $1,000 for each subsequent violation. Employers can also be ordered to pay the Seattle Office for Civil Rights attorneys' fees for investigating ordinance violations.

Private Employers Should Respond To The New "Ban-The-Box" Law Trend

Ban-the-box laws are no longer just a concern for public employers. Because of the new private employer ban-the-box trend—including Rhode Island, Minnesota, and Seattle, WA ban-the-box laws; current restrictions in multiple states on what can be asked about criminal history and when (CA, CT, WA, MA, NJ, etc.); the EEOC Criminal History Guidance published in April 2013; and other pending state and local ban-the-box legislation—private employers should reevaluate their pre-employment and hiring practices on a regular basis. Specifically, private employers impacted by ban-the-box laws should review their employment applications to ensure that any questions regarding an applicant's criminal history are legally compliant. Impacted employers should also make sure all hiring/recruiting managers are apprised of the new laws through training and revision of policies. Employers should also be aware of the limitations on requesting and using criminal history information throughout the hiring process (after an initial interview or after a conditional offer of employment) and have discussions with their background screening providers to ensure they know what information they are getting and when.

There are still many questions surrounding the application and administration of these new and proposed "ban-the-box" laws. Employers with questions regarding their particular employment practices should consult with counsel.

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