

Management Alert



Newark Ordinance “Bans the Box” and Significantly Restricts the Use of Criminal History Information in Employment

The City of Newark, New Jersey recently passed an ordinance that will significantly impact employers’ and other entities’ ability to conduct criminal background checks or even ask about a candidate’s criminal background. The ordinance limits both when and the extent to which employers may ask about or use criminal history in employment. Newark’s ordinance 12-1630, entitled “Ordinance To Assist The Successful Reintegration Of Formerly Incarcerated People Into The Community By Removing Barriers To Gainful Employment And Stable Housing After Their Release From Prison; And To Enhance The Health And Security Of The Community By Assisting People With Criminal Convictions On Reintegration Into The Community And Providing For Their Families,” goes into effect on **November 18, 2012**.

Newark’s ordinance is the latest example of a series of efforts at the federal, state and local level aimed at curtailing employers’ ability to use criminal history information in employment. At the federal level, employers should be aware of the Equal Employment Opportunity Commission’s (EEOC) April 25, 2012 Guidance on the Use of Arrest and Convictions (the Guidance) which sets forth practices employers may want to consider so as not to be a target of the EEOC.¹ Similarly, a number of states have pending legislation seeking to follow the EEOC’s lead.² This, in addition to other states which have already regulated this area.³

Who is Covered Under Newark’s Ordinance

Newark’s ordinance is only applicable when the “the physical location of the prospective employment [is] in whole or substantial part, within the City of Newark.” In that sense, it is of limited local application. Importantly, the term “employer” is defined as “any person, company, corporation, firm, labor organization, or association, which has five (5) or more employees and does business, employs persons, or takes applications for employment within the city of Newark...”⁴ “Employment” is defined more broadly, however, as “any occupation, vocation, job, work or employment *with or without pay*, including temporary or seasonal work, *contracted work*, contingent work, and work through the services of a temporary or other employment agency, or *any form of vocational or educational training with or without pay*.” (emphasis added). These definitions suggest that the prohibitions contained in the ordinance, as well as the affirmative obligations it imposes, may apply with equal force when an employer is seeking volunteers, students, or independent contractors as opposed to solely employees.

1 See EEOC Enforcement Guidance No. 915.002 dated April 25, 2012: “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” available at: http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

2 See Seattle, Washington Proposed Ordinance 117583 and Washington D.C. Bill 19-889.

3 See NY Corr. Law § 750-754, 19 Pa. Cons. Stat. §9125, and Wash. Rev. Code. §§43.43.815.

4 Newark, N.J. Ordinance 12-1630 (Sept. 5, 2012)

Timing of Criminal History Questions

Employers covered by the ordinance are largely prohibited from inquiring about a candidate's criminal history. Specifically, the ordinance prohibits making any "pre-application criminal history inquiry". This means that employers may not engage in any conduct (direct or indirect) that is intended to gather information about a candidate's criminal history in the application or before the employer has extended a conditional offer of employment to the candidate. The ordinance makes clear that employers may not ask candidates about their criminal history in any way, shape or form until after they have been deemed otherwise qualified and eligible for employment. The only exception is to the extent the candidate voluntarily discloses information without being prompted.

Indeed, the ordinance even makes it unlawful for an employer to "produce or disseminate any advertisements that expresses, directly or indirectly, any limitation on eligibility for employment arising from a candidates' criminal history."

Employers may only inquire about a candidate or employee's criminal history when three criteria are met:

- The employer has already extended a conditional offer of employment to a candidate that is "otherwise qualified" for the position⁵; and
- The employer has provided the candidate advance written notice and the candidate has consented in writing to the specific inquiry about his/her criminal history; and
- The employer has made a "good faith determination" that such information is relevant due to the sensitivity of the position in question.

What Employers Can Ask About

Even in the limited instances when permitted to inquire, the ordinance places limits on what an employer may ask about. Employers may only seek information into:

- Convictions for Murder, Voluntary Manslaughter and Sex Offenses requiring registry under N.J. S.A. Title 2C Chapter 7, that are punishable by a term of incarceration in state prison, regardless of the length of time that has passed since the conviction;
- Indictable offense convictions for eight (8) years following the sentence thereof, including termination of any period of incarceration;
- Disorderly persons convictions or municipal ordinance violations of five (5) years following the sentence;
- Pending criminal charges.

In no event, may employers inquire about:

- Arrests or criminal accusations which are not pending or did not result in a conviction;
- Records that have been erased, expunged, pardoned or otherwise legally nullified; or
- Any juvenile adjudications of delinquency or any records which have been sealed.

Factors to Consider in Evaluating Criminal History

Similar to the Guidance, the Newark ordinance sets forth six (6) factors that employers must consider when evaluating the results of any criminal history inquiry:

⁵ In this regard, Hawaii, is the only other state or local regulation that requires a conditional offer of employment before an employer may seek criminal history information. See Haw. Rev. Stat. §378-2.5.

1. The nature of the crime and its relationship to the duties of the position sought or held;
2. Any information pertaining to the degree of rehabilitation and good conduct, including any information produced by the applicant or employee, or produced on his or her behalf;
3. Whether the prospective job provides an opportunity for the commission of a similar offense(s);
4. Whether the circumstances leading to the offense(s) are likely to reoccur;
5. The amount of time that has elapsed since the offense(s); and
6. Any certificate of rehabilitation issued by any state or federal agency.

Many, but not all, of these factors mirror factors enunciated in the EEOC Guidance. For instance, although the EEOC Guidance requires employers to consider evidence that the individual performed the same type of work post-conviction, it does not specifically require the evaluation of whether the prospective position provides an opportunity for the commission of a similar offense, as does the Newark ordinance.

One noteworthy feature of the ordinance is that it requires employers to document in writing their consideration of the above factors by using a "Applicant Criminal Record Consideration Form." Significantly, the ordinance does not provide a required form or a sample of such a document.

Adverse Action

If after conducting an inquiry into an a candidate's criminal history, an employer takes adverse action (e.g. refusal, rescission, revocation of offer or termination of employment), the employer must take several steps. First, as is the case under the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et. seq.*, the employer must notify the candidate in writing of the (potential) adverse employment decision and include a copy of the results of the criminal background report or inquiry made. Employers must also advise any affected individuals about the opportunity to present evidence related to the accuracy and/or relevance of the criminal history results, including any information concerning the above factors. Unlike the FCRA however, the written notice of rejection must indicate the particular conviction(s) that relate(s) to the position's responsibilities, specifically state the reasons for the adverse decision, include the employer's consideration of the required factors and provide the candidate or employee with the "Applicant Criminal Record Consideration Form."

Pursuant to the Newark ordinance, a candidate or employee has ten (10) business days after receipt of the employer's notice of adverse action to respond and provide information or evidence concerning the accuracy or relevance of his/her criminal history. The employer must then review any information and documentation provided by the candidate or employee before making a final determination. The ordinance requires employers to document the information or evidence received from the candidate or employee, as well as its consideration of any such evidence along with the final action taken. Employers must then notify the affected individual of the final determination within a reasonable period of time. In doing so, however, the employer *must specifically state its reasons for the adverse action and provide a copy to the individual of the documentation concerning the employer's consideration of any information presented.*

Exemptions

The ordinance contains only two exemptions which are to be narrowly interpreted:

- Instances where a federal or state law or regulation requires the consideration of an applicant or employee's criminal history information for employment, but only as to the offenses or types of offenses the law or regulation requires the employer to consider; and
- Instances where the employer has designated certain positions to participate in a federal, state or local government program or obligation designed to encourage the employment of those with criminal histories.

Enforcement

The ordinance does not include a private right of action but it does provide that employers may be fined up to \$1,000 for each violation. The mayor of Newark is to designate an agency to be responsible for enforcement of the ordinance.

Housing

As its title suggests, the ordinance also has provisions concerning the use of criminal history inquiries in housing. In sum, it prohibits consideration of an applicant's criminal history until after a formal application for housing has been submitted, after the landlord or real estate broker has provided specific written disclosures and notification to the applicant, and the applicant has consented in writing to the inquiry. The ordinance limits the types of convictions that landlords or real estate brokers may ask about in the same way as it does in the employment context. It also provides that landlords and brokers must consider and analyze very similar factors, adjusted for use in the housing context, than those enunciated above.

Best Practices for Compliance

As a result of this ordinance, employers and other entities in the city of Newark are well advised to reevaluate their criminal background inquiries with respect, not only to employees and applicants, but also as to volunteers, independent contractors and students. Companies should consider whether they are covered by the ordinance and if so, determine the steps necessary to bring them into compliance before the effective date of November 18, 2012.

Covered employers should review any advertisements for jobs in Newark to ensure they do not suggest any limitations to employment eligibility based on criminal history. Covered employers will likely need to review and modify existing job applications to ensure that candidates in Newark are not asked any information about their criminal history on the application or before a conditional offer has been extended. Because the ordinance requires employers to specifically detail the particular conviction(s) which relate to the positions' responsibilities and to specifically state the reason for adverse action, employers may also need to review and modify their background screening forms, including their FCRA pre and post-adverse action notices for use in Newark. It also behooves employers with operations in Newark to review and reassess their background screening policies and procedures and train their personnel accordingly.

Newark's ordinance demonstrates the increasing regulation that employers are being subjected to at the federal, state and local level alike, concerning background screening and use of criminal history in employment. This area is becoming a new hotbed of litigation. Given this increasingly changing landscape, all employers are well advised to closely monitor developments in this area of the law.

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