

One Minute Memo®



Austin, Texas Joins Movement To “Ban The Box” In Hiring Practices

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Seyfarth Synopsis in a Second: As of April 4, 2016, employers in Austin are prohibited from inquiring about an applicant’s criminal background until after a conditional offer of employment. Once criminal background information is obtained, Austin employers are prohibited from taking adverse action without first conducting an individualized assessment to determine whether the information renders the applicant unsuitable for the job.

Effective April 4, 2016, Austin’s Fair Chance Ordinance (the “Ordinance”) imposes a host of new unlawful hiring practices upon private employers regarding inquiries into criminal convictions. Chief among them, an employer may not ask about an applicant’s criminal history or conduct a criminal background check until *after* extending the conditional offer that is solely conditioned on the result of such check.

Coverage:

The Ordinance applies to any private employer that employs at least 15 individuals whose primary work location is in the City of Austin for each working day in 20 or more calendar weeks in the current or preceding calendar year. It also applies to “an agency acting on behalf of an employer.” The Ordinance does not apply to the federal, state, or political subdivisions, as well as Section 501(c) bona fide private membership clubs (except labor organizations) or any “job for which a federal, state, or local law disqualifies an individual based on criminal history.”

The Ordinance defines “employment” broadly to include temporary and seasonal work, contract and contingent employment, work through a temporary or other employment agency, and participation in a vocational, apprenticeship, or educational training program.

The Ordinance does not apply to jobs for which a federal, state, or local law, or compliance with legally mandated insurance or bond requirements, disqualifies an individual based on a criminal history.

Unlawful Hiring Practices:

The Ordinance establishes several unlawful practices. Namely, it is unlawful for any covered employer to solicit criminal history information about an individual, or consider an individual’s criminal history, unless the employer has first made a

conditional employment offer, which is a job offer that is conditioned solely on the employer's evaluation of the individual's criminal history.

Further, a covered employer cannot take "adverse action" against an individual because of an individual's criminal history without first conducting an "individualized assessment." The term "adverse action" includes a refusal hire or promote, as well as revocation of a conditional offer of employment or promotion. Thus, the Ordinance affects both prospective and incumbent employees.

In conducting an individualized assessment, a covered employer must, at minimum, consider:

- The nature and gravity of any offenses in the individual's criminal history;
- The length of time since the offense and completion of the sentence; and
- The nature and duties of the job for which the individual has applied.

The Ordinance expressly permits a covered employer to withdraw a conditional offer of employment for any lawful reason, including the determination that an individual is unsuitable based on an individualized assessment.

The Ordinance permits a staffing agency to solicit criminal history information and make an individualized assessment when the staffing agency has either identified a job for an individual, or placed an individual within a staffing pool.

A covered employer who takes adverse action against an individual because of criminal history must inform the individual in writing that the adverse action was based on their criminal history.

It is also unlawful for covered employers to:

- Publish information about a job that states or implies that an individual's criminal history automatically disqualifies the applicant from consideration.
- Solicit or otherwise inquire about the criminal history of an applicant in an application for a job covered by the Ordinance.
- Refuse to consider employing an applicant who submits an application for a covered job because the individual did not provide criminal history information before the individual received a conditional employment offer.

Enforcement:

The Ordinance does not provide a private right of action against a covered employer. Rather, the Equal Employment/Fair Housing Office is charged with enforcement. Potential claimants must file complaints no later than 90 days after they receive knowledge of an alleged violation, but in no event, later than one year from the alleged violation.

The Equal Employment/Fair Housing Office is empowered to impose civil penalties up to \$500 for each job related to the violation. The Equal Employment/Fair Housing Office is required to obtain voluntary compliance with the Ordinance. Before assessing any civil penalty, a covered employer must receive written notice of the violation. If a covered employer fails to cure

a violation within ten business days after receiving written notice, it is liable for a civil penalty of up to \$500. For first-time violations, an employer is entitled to a warning if the employer attends an appropriate training session about compliance with the Ordinance.

Civil penalties will not be imposed for violations before April 4, 2017—one year following the effective date of the Ordinance. Violations that occur during the first year will result in a written warning that a civil penalty may be assessed for any violations after April 4, 2017.

The Ordinance also prohibits retaliation against individuals who report violations or participate in an administrative proceeding.

Questions Around:

The Ordinance raises many issues regarding coverage and compliance. For example, the Ordinance does not define “primary work location” or “workday.” Thus, it is unclear to what extent individual must work within the City of Austin and for how long to count towards the employee threshold for a covered employer.

Further, while the Ordinance bars employers from soliciting or considering any criminal history information until after a conditional employment offer, an employer may explain to individuals, in writing, the individualized assessment system the employer uses to consider criminal history. Nevertheless, the Ordinance is silent on when and how employers may provide this written explanation to an individual.

It is also unclear what positions are exempted from the Ordinance as jobs to which a federal, state, or local law, or compliance with legally mandated insurance or bond requirements, disqualifies an individual based on criminal history.

Employer Outlook:

Employers with employees in the City of Austin should review their employment applications and relevant employment forms to ensure compliance with federal, state, and local law, especially if using standardized forms across multiple jurisdictions. Impacted employers also should ensure that all hiring and recruiting personnel are aware of “ban the box” laws—whether they currently apply to them or not. Employers with questions regarding “ban the box” should consult with counsel.

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