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San Francisco "Bans the Box" for Private Employers and City Contractors

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The Mayor of San Francisco recently signed an ordinance that prohibits private employers and city contractors and subcontractors (collectively "contractors") from asking job applicants about their criminal histories until after the first interview. In addition to "banning the box," the new Ordinance further restricts the types of criminal offenses about which employers and contractors may inquire or otherwise may consider when making hiring and personnel decisions. The new Ordinance, which becomes operative on August 13, 2014, also affords expansive anti-retaliation protections to employees who complain of violations, and imposes various notice, posting, and record-retention obligations on employers and contractors in connection with criminal background inquiries.

San Francisco becomes just the ninth jurisdiction to ban the box for *private* employers, joining the cities of Buffalo, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Seattle, Washington, and the states of Hawaii, Massachusetts, Minnesota, and Rhode Island. Many other jurisdictions have banned the box for public employers and contractors, and still more—including the U.S. Congress—have proposed legislation. A significant number of states and cities otherwise have limited the scope and duration of criminal background checks on job applicants and employees.

This client alert highlights key provisions of the new Ordinance regarding employee rights and employer/contractor obligations, record-keeping and notice/posting requirements, and enforcement and remedies.

Coverage

The new Ordinance defines the term "employer" as any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization that is located or doing business in the city and county of San Francisco (the "City"), and that employs 20 or more persons (including the owner(s) and management and supervisorial employees) regardless of location. Federal, state and local government entities are exempted from the new Ordinance.

The new Ordinance also applies to contractors whose operations are in furtherance of performing certain contracts with the City. However, not all City contracts trigger the new Ordinance's protections; by way of example, legal settlements, contracts for urgent litigation expenses, and contracts in the cumulative amount of less than $5,000 per vendor in each fiscal year are not covered by its provisions.

The term "employment" is broadly defined to include any occupation, vocation, job or work, including temporary, seasonal, and part-time work, as well as contracted, contingent and commission-based work. The term also includes employment via an employment agency as well as any form of vocational or educational training with or without pay. To be covered, the employment must occur in whole or substantial part within the City.

Prohibitions and Requirements

The new Ordinance prohibits employers and contractors from—at any time—inquiring into, requiring disclosure of, or basing an adverse action against a job applicant or existing employee on any of the following:

- An arrest not leading to a conviction (other than an "unresolved arrest" that is the subject of an ongoing criminal investigation or trial);
- Participation in or completion of a diversion or deferral of judgment program;
- A conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;
- A conviction or other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system;

A conviction that is more than seven years old (the date of conviction being the date of sentencing); and

- Criminal offenses other than felonies or misdemeanors, *e.g.*, infractions.

For convictions and arrests that the new Ordinance permits employers and contractors to consider, inquiries may be made and/or disclosure required only after the first live interview or following a conditional offer of employment. Prior to any such inquiry, however, the applicant or employee must be provided with a notice advising of his or her rights under the new Ordinance.[1] An employer or contractor may base an employment decision on a permissible aspect of a candidate or employee's conviction or arrest history only after performing an individualized assessment that considers: (i) only offenses that directly relate to the job in question; (ii) the time that has elapsed since the conviction or unresolved arrest; and (iii) evidence of rehabilitation or other mitigating factors.[2]

Before an employer or contractor takes an adverse employment action based on a permissible aspect of the applicant's or employee's conviction or arrest history, it must provide notice to the employee of the action contemplated and the basis for it.[3] If, within seven days of that notice, the applicant or employee provides the employer or contractor with notice, either orally or in writing, of evidence that the conviction or arrest history record is inaccurate, or any evidence of rehabilitation or other mitigating factors, the employer or contractor is to delay the adverse action for a reasonable period to reconsider its decision in light of the information. Upon taking any final adverse action based on conviction or arrest history, an employer or contractor is to furnish a notice of the decision to the applicant or employee.

The new Ordinance also prohibits employers and contractors from producing or disseminating solicitations or advertisements that either directly or indirectly express that any person with an arrest or conviction will not be considered or may not apply for employment.

Finally, the new Ordinance affords employees expansive anti-retaliation protections against employers when exercising their rights under the law. Such rights include, but are not limited to: (i) filing a complaint or informing any person about any employer's alleged violation of the Ordinance; (ii) cooperating with San Francisco's Office of Labor Standards Enforcement (the "OLSE") or other persons in the investigation or prosecution of an alleged violation of the Ordinance, (iii) opposing any policy, practice, or act that is unlawful under the Ordinance, and (iv) informing any person of his or her rights under the Ordinance. Should an employer take an adverse action against an applicant or employee within 90 days of the exercise of any such rights, there is a rebuttable presumption that the action was retaliatory.

Notice, Posting, and Recordkeeping Requirements

The new Ordinance tasks the OLSE with preparing and publishing a notice suitable for workplace posting that informs applicants and employees of their rights under the Ordinance. The notice is to be made available in English, Spanish, Chinese, and all other languages spoken by more than 5% of the San Francisco workforce.[4] Employers and contractors must post the notice in a conspicuous place at every workplace, job site, or other location in San Francisco under the employer's control or at which work is being done in furtherance of a City contract. The notice must be displayed in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace, job site or other location at which it is posted. Employers also must send a copy of the notice to each labor union or representative of workers with which they have a collective bargaining agreement or other agreement of understanding that is applicable to employees in San Francisco.

In addition, employers and contractors must state in all advertisements for employees that they will consider for employment qualified applicants with criminal histories. All City contracts and subcontracts must contain a provision requiring the contractor's compliance with the new Ordinance.

Employers and contractors must retain records of employment, application forms, and other pertinent data and records required under the new Ordinance for a period of three years, and allow the OLSE access to such records, with appropriate notice and at a mutually agreeable time, to permit monitoring of compliance. Employers and contractors also are to provide information to the OLSE on an annual basis, as may be required to verify compliance. Where an employer or contractor does not maintain or retain adequate records documenting compliance with the new Ordinance or does not allow the OLSE reasonable access to such records, the employer or contractor will be presumed not to have complied with the Ordinance, absent clear and convincing evidence to the contrary.

Enforcement and Remedy

The OLSE is tasked with enforcing the new Ordinance and may assess penalties against employers and contractors for non-compliance. Any employee, applicant, or other person may report to the OLSE any suspected violation of the new Ordinance within 60 days of the date the suspected violation occurred. For any first violation, or any violation within 12 months of August 13, 2014, the OLSE must issue warnings and notices to correct, and offer the employer/contractor technical assistance on how to comply with the requirements of the new Ordinance.

For second violations, the OLSE may issue a fine against the employer or contractor of no more than $50 for each employee or applicant as to whom the violation occurred or continued.[5] For subsequent violations, the OLSE may issue a fine of no more than $100 for each employee or applicant as to whom the violation occurred or continued.[6] In addition to these penalties, for contractors who violate the new Ordinance, the contract or property contract may be terminated or suspended, in whole or in part. A violation of the new Ordinance during the performance of a contract or property contract constitutes a "material breach" of the contract and the basis for a determination that the contractor is an "irresponsible bidder"; such contractor is not allowed to act as a contractor for a period of up to two years thereafter.

At any appeal of an OLSE determination of a violation, that determination will constitute *prima facie* evidence of a violation and the employer or contractor shall have the burden of proving, by a preponderance of the evidence, that the determination was incorrect. If there is no appeal of the OLSE's determination of a violation, that determination constitutes a failure to exhaust administrative remedies and serves as a complete defense to any petition or claim brought by the employer against the City regarding the OLSE's determination of a violation.

Moreover, if "prompt compliance" is lacking, the OLSE may refer the action to the City Attorney to consider initiating a civil action within one year of the alleged violation. Such actions promise lucrative remedies, including reinstatement, back pay, the payment of benefits or pay unlawfully withheld, the payment of an additional sum as liquidated damages in the amount of $50 to each employee, applicant or other person whose rights under the new Ordinance were violated for each day such violation continued or was permitted to continue; appropriate injunctive relief; and reasonable attorney's fees and costs. Such awards include interest on all amounts due and unpaid.

Takeaways

Unless otherwise exempted, employers located within San Francisco, and contractors with the City, should refrain from asking questions relating to arrests and/or convictions—in a written job application or otherwise—until after the first interview or following a conditional offer of employment. Even then, employers only may consider permissible convictions and unresolved arrests that directly relate to the job, and must take into account mitigating factors before making any adverse employment action (consistent with the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions).

Note further that there is a growing patchwork of California laws that have combined to restrict the use of criminal history in hiring and personnel decisions. Indeed, California has enacted several laws that limit private employers, in particular, from asking about or considering certain types of arrests and convictions. Most recently, the state largely prohibited employers from inquiring into or considering a conviction that has been judicially dismissed or ordered sealed. (For more on the California law, see our prior client alert: California Further Restricts Employer Use of Prior Convictions in Hiring Decisions.)

Given these many obligations and the potentially steep penalties for violating the new Ordinance, employers and contractors covered by the Ordinance should:

- ensure that policies imposing a bar to employment based on any conviction or arrest record are narrowly tailored and consistent with local, state, and federal law;
- determine whether arrest and conviction records are considered in a manner that is job related and consistent with business necessity;
- train hiring managers on the appropriate use of criminal history in hiring, promotion, and separation;
- adhere to the federal Fair Credit Recording Act and California state equivalent, as well as any other federal, state, and local requirements, before conducting background checks and taking adverse action against applicants or employees based on their criminal history;
- monitor for issuance of the new poster and notice form before August 13, 2014;
- establish procedures to comply with the individual notice, posting, and record-keeping, obligations of the Ordinance; and
- keep information about applicants' and employee's conviction and arrest records confidential.

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If you have any questions or concerns regarding the new Ordinance or related laws, please contact the lawyers at Proskauer.

[1] According to the new Ordinance, the form of the notice is to be drafted and published by San Francisco's Office of Labor Standards Enforcement on or before August 13, 2014.

[2] "Evidence of rehabilitation or other mitigating factors" may include, but is not limited to, (i) a person's satisfactory compliance with all terms and conditions of parole and/or probation (inability to pay fines, fees, and restitution due to indigence should not be considered "non-compliance"); (ii) employer recommendations, especially concerning a person's post-conviction employment; (iii) educational attainment or vocational or professional training since the conviction, including training received while incarcerated; (iv) completion of or active participation in rehabilitation treatment (*e.g.*, alcohol or drug treatment); (v) letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or parole/probation officers who have observed the person since his or her conviction; and (vi) the age of the person at the time of conviction. Examples of mitigating factors that are offered voluntarily by the applicant or employee may include, but are not limited to, explanation of the prior "coercive" conditions, intimate physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.

[3] Although San Francisco employers already have similar notice obligations under federal and state fair credit reporting laws when using a consumer reporting agency to obtain the applicant's or employee's criminal record, the new Ordinance appears to require notice even where the employer has not used a third-party vendor.

[4] As described above, this is the same notice employers and contractors must distribute to applicants and employees before making an inquiry into permissible conviction history events.

[5] If multiple employees or applicants are impacted by the same procedural violation at the same time (*e.g.*, all applicants for a certain job opening are asked for their criminal history on the initial application), the violation constitutes a single violation rather than multiple violations.

[6] The Director of the OLSE is to establish rules governing the administrative process for determining and appealing violations of the new Ordinance.

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