Proskauer

New "Ban the Box" Developments in Baltimore, Rochester, and Minnesota

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Criminal background checks and a desire to increase employment opportunities for the formerly incarcerated continue to be a hot topic in state and local legislatures. This month the cities of Baltimore, Maryland and Rochester, New York prohibited private employers from asking about an applicant's criminal history on the initial job application (*i.e.*, "ban the box"), joining the cities of Philadelphia (PA), Newark (NJ), Buffalo (NY), Seattle (WA), and San Francisco (CA), as well as the states of Hawaii, Massachusetts, Minnesota, and Rhode Island. The new Baltimore and Rochester laws take effect August 13, 2014 and November 18, 2014, respectively. In addition, the Minnesota Department of Human Rights recently released guidance on the state's existing "ban the box" law. This alert highlights the key provisions of the new ordinances and guidance and examines the implications for covered employers.

Baltimore Ordinance

Key Provisions

The new Baltimore ordinance regulating criminal background checks applies to any person[1] that employs 10 or more full-time equivalent employees in the City of Baltimore. Under the new law, employers must wait until after a "conditional offer of employment"[2] to:

- require an applicant to disclose whether he has a criminal record or otherwise has had criminal accusations brought against him;
- conduct a criminal record check on an applicant; or
- otherwise make any inquiry[3] of the applicant or others about whether the applicant has a criminal record or has had criminal accusations brought against him.

For purposes of the law, "applicants" include applicants for employment in the City of Baltimore, whether for paid employment or an internship or trainee position, or through an employment agency. The new law also prohibits retaliation against any person who complains about violations of the law.

Employers who are required or expressly authorized under federal, state, or city law or regulation to conduct background checks fall under an exception to the new law and may collect information and conduct checks as required or authorized by statute or regulation. Employers providing programs, services, or direct care to minors or "vulnerable adults" (*i.e.*, an adult who lacks the physical or mental capacity to provide for his own daily needs) also are exempt from the law and may conduct criminal background checks earlier in the hiring process.

Enforcement and Remedy

The Baltimore Community Relations Commission is tasked with enforcing the new law. The Commission may award a range of remedies, including back pay, reinstatement, compensatory damages, and/or reasonable attorney's fees. (A final decision of the Commission is subject to judicial review.) Additionally, any person who violates the new Baltimore Ordinance may be charged with a misdemeanor, which, for each offense, may result in a fine of $500 and/or imprisonment for no more than 90 days.

Rochester Ordinance

Key Provisions

The new Rochester ordinance regulating criminal background checks applies to the city, [4] its vendors (including those located outside of the city) and any other entity that employs persons in positions for which the primary place of work is located within Rochester. To be covered by the new law, employers must employ four or more persons.

Under the new law, employers may not inquire into or require any person to disclose a criminal conviction during the application process. For purposes of the law, the application process begins when an applicant inquires about employment and ends when the employer has conducted an initial employment interview[5] or extended a conditional offer of employment. "Applicants" include applicants for paid employment in the City of Rochester, including work that is temporary or seasonal, contracted, contingent, or through an employment agency.

Employers are exempt from the new law when they inquire into criminal convictions that pose a bar to employment under state or federal law, or when they are otherwise authorized by applicable law to ask about criminal convictions. Employers hiring for licensed trades or professions (including interns and apprentices for those positions) also fall under an exception to the new law when they make criminal conviction inquiries required by a licensing authority or state or federal law.

Enforcement and Remedy

The new law allows an aggrieved person to commence a civil action for injunctive relief and/or damages (including attorney's fees and costs) within one year of an alleged violation. The Corporation Counsel of Rochester also may file suit to enjoin a violation of the new law, or to seek a penalty of $500 for a first violation and $1,000 for each subsequent violation.

Minnesota Guidance

The Minnesota Department of Human Rights recently issued guidance on the state's ban-the-box law, offering helpful clarification on certain ambiguities in the law. Minnesota's ban-the-box law took effect on January 1, 2014 and prohibits employers from asking applicants about their criminal history on the initial job application and from making such inquiries until the applicant has been selected for an interview or has received a conditional offer of employment. (For more on the coverage, prohibitions, exceptions, and remedies of the Minnesota law, see our prior client alert.)

Of particular note, the guidance makes clear that the Minnesota law does not "compel" employers to interview applicants with a criminal record. If an employer conducts interviews before hiring an applicant, the employer may initiate a criminal background check after it has decided to interview the applicant. If an employer does not conduct interviews, it must wait until after it makes the applicant a conditional offer of employment.

The guidance also clarifies that:

- the law applies to private employers in Minnesota regardless of size;
- multistate employers still may use one electronic application for all of their offices so long as they provide "clear and unambiguous" language on the application that Minnesota applicants do not have to answer questions concerning their criminal history; and
- employers who are exempt from the Minnesota law may use an application stating that individuals with a particular criminal history will be disqualified from employment.

Takeaway

Unless otherwise exempted, Baltimore, Rochester, and Minnesota employers shouldremove any inquiries from their initial job applications concerning an applicant's criminal history, if they have not done so already, and wait to commence a criminal background check until a time that is permitted under the law. When asking about or otherwise considering criminal history in hiring and personnel decisions, employers should remember to:

- ensure that hiring guidelines regarding employment of individuals with criminal records are tailored to be consistent with federal, state, and local law;
- conduct individualized assessments of candidates when possible, consistent with applicable federal, state, and local laws and guidance;
- train hiring managers on the appropriate use of criminal history in hiring, promotion, separation; and

- adhere to Fair Credit Reporting Act and other state and local requirements before conducting background checks and taking adverse action against applicants or employees based on their criminal history.

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If you have any questions or concerns regarding the recent ban-the-box laws and guidance, please contact the lawyers at Proskauer. Please also see our past client alerts on criminal background checks.

[1] A "person" is (i) an individual; (ii) a receiver, trustee, guardian, personal representative, fiduciary, or representative of any kind; or (iii) a partnership, firm, association, corporation, or other entity of any kind. The term does not include a governmental entity or an instrumentality or unit of a governmental entity.

[2] A "conditional offer of employment" is one that is conditioned solely on: (i) the results of the employer's subsequent inquiry into or gathering information about an applicant's criminal record; or (ii) some other contingency expressly communicated to the applicant at the time of the offer.

[3] An "inquiry" is as any direct or indirect conduct intended to gather information, using any mode of communication.

[4] The new law exempts the City's Police and Fire Departments and any other employer hiring for "police officer" or "peace officer" positions (as defined under applicable law).

[5] An "interview" occurs when an employer has any "direct contact" with an applicant, whether in person or by telephone, to discuss the position or the applicant's qualifications. If an employer does not conduct an interview, it must inform the applicant whether it intends to conduct a criminal background check before the start of his employment.

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