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Latest Criminal Background Check Developments Affect San Francisco, Illinois, and Alabama Employers

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Employers should be aware of the following developments across the country before running a criminal background check:

- San Francisco's new "ban the box" ordinance is set to take effect next week, including the requirement that employers post and distribute a notice of rights;

- the Northern District of Illinois recently granted the Equal Employment Opportunity Commission's (EEOC) motion to compel the production of documents and information concerning the defendant company's criminal background check policies and data; and

- a new Alabama law took effect this past month to prevent employers from inquiring into certain expunged criminal records on a job application.

This alert details these new developments and examines their implications for employers.

San Francisco

Starting on August 13, 2014, employers and contractors in San Francisco may no longer ask applicants about their criminal history until after the first live interview or following a conditional offer of employment. Even when permitted to inquire into or otherwise consider an applicant's or employee's criminal record, employers and contractors face several restrictions on the types of arrests or convictions they may take into account in hiring and personnel decisions. For more on the prohibitions of the new ordinance, see our prior client alert.

Employers and contractors in San Francisco also must remember to abide by the notice and record retention obligations set forth in the ordinance (for more, see our prior client alert). San Francisco's Office of Labor Standards Enforcement (OLSE) recently updated the notice of rights it had issued in English several months ago. Although the changes to the notice are primarily stylistic, employers and contractors should endeavor to post and distribute the *updated notice* in the manner required by the ordinance beginning on August 13, 2014.

The OLSE also recently made the notice of rights available in Spanish, Chinese, and Tagalog. Per our prior client alert, employers and contractors should distribute and post the Spanish and Chinese versions of the notice, as well as the version in Tagalog (if that language is spoken by at least 5% of the workplace).

Illinois

In *U.S. Equal Employment Opportunity Commission v. Dolgencorp, LLC d/b/a Dollar General*, No. 13-cv-04307, 2014 WL 3734361 (N.D. Ill. July 29, 2014), the Northern District of Illinois granted the EEOC's motion to compel the production of documents and data in the suit the agency brought against Dolgencorp alleging that the company's hiring procedures had a disparate impact on African Americans in violation of Title VII of the Civil Rights Act of 1964 (Title VII). Specifically, the court required Dollar General to produce conditional hire and background screening data dating back several years from 2004 through 2008, and information relating to the company's purported business necessity for performing criminal background checks on applicants. The court also declined to shift the cost of the production to the EEOC.

The EEOC has suffered some noteworthy setbacks in recent months when challenging the legality of employer background check policies (see our prior alert). Still, this case demonstrates that the EEOC is persistent in challenging background check policies it deems improper.

Alabama

A new Alabama law that took effect this past month allows prospective employees to refuse to disclose certain expunged criminal records on a job application.[1] The law provides exceptions for government regulatory or licensing agencies, utilities (and their agents and affiliates), or any bank or other financial institution. Moreover, absent unreasonable, wanton, willful, or intentional conduct, an employer is immune from civil liability for any damage caused by a person hired with a criminal record, if the employer was not aware of the record due to an expungement under the new law.

Takeaway

These developments serve as a reminder that, when employers ask about or otherwise consider criminal history in hiring and personnel decisions, they should:

- ensure that hiring guidelines regarding employment of individuals with criminal records are consistent with federal, state, and local law;
- conduct individualized assessments of candidates when possible;
- train managers on the appropriate use of criminal history in hiring, promotion, and separation;
- comply with Title VII, the Fair Credit Reporting Act, and other state and local requirements before conducting background checks and before taking adverse actions against applicants or employees based on criminal history; and
- preserve records concerning background check policies and data.

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If you have any questions or concerns regarding these developments, please contact the lawyers at Proskauer.

[1] Records that may be expunged under the new Alabama law include charges for certain nonviolent felonies, misdemeanors, traffic violations, and municipal ordinance violations.

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