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D.C. Mayor Signs "Ban the Box" Law

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Mayor Vincent Gray has signed the Fair Criminal Record Screening Act of 2014 to prevent most employers in the District of Columbia from asking prospective employees about their criminal history on the initial job application. In "banning the box" for private employment, D.C. joins a growing list of states (Hawaii, Illinois, Massachusetts, Minnesota , New Jersey, and Rhode Island) and cities (Philadelphia (PA), Newark (NJ), Buffalo (NY), Seattle (WA), San Francisco (CA), Baltimore (MD), and Rochester (NY)). This alert highlights key provisions of the Act, which will take effect following the statutorily mandated 30-day period of U.S. Congressional review and after publication in the D.C. Register.

Key Provisions

The Act covers any employer with more than 10 employees working in D.C. (including the D.C. government, but excluding the courts). Subject to the exceptions listed below, the Act prohibits an employer from inquiring[1] about or requiring an applicant[2] to disclose or reveal:

- (i) an arrest or (ii) a "criminal accusation,"[3] which is not pending or did not result in a conviction; or
- a criminal conviction until after a conditional offer of employment[4] has been made.

Even after making a conditional offer of employment, an employer only may take an adverse action against an applicant on the basis of his or her criminal record for a "legitimate business reason."[5] Moreover, if an applicant "believes" that the employer took an adverse action on the basis of his or her criminal conviction, he or she may request, within 30 days of the adverse action, that the employer provide within 30 days of receipt of the request:

- a copy of any and all records procured by the employer in consideration of the applicant, including criminal records;[6] and

- a notice that advises the applicant of his or her opportunity to file an administrative complaint with the D.C. Office of Human Rights ("OHR").[7]

Exceptions

The Act does not apply:

- where a federal or D.C. law or regulation requires the consideration of an applicant's criminal history for purposes of employment;
- to a position designated by the employer as part of a federal or D.C. program or obligation designed to encourage the employment of individuals with criminal histories; or
- to any employer that provides programs, services, or direct care to minors or vulnerable adults.

Enforcement and Remedy

"Aggrieved" persons may file an administrative complaint with the OHR. For violations of the Act, the OHR is to impose fines (half of which is to be awarded to the complainant) on employers with:

- 11 to 30 employees of no more than $1,000;
- 31 to 99 employees of no more than $2,500; or
- 100 or more employees of no more than $5,000.[8]

The Act expressly disavows a private cause of action in any court.

Takeaway

Unless otherwise exempted, D.C. employers should remove any inquiries concerning an applicant's criminal history from their initial job applications, and should wait to commence a criminal background check until after extending a conditional offer of employment. 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 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; and
- adhere to Fair Credit Reporting Act and other state and local requirements before conducting background checks and when considering or taking adverse actions against applicants or employees based on criminal history.

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

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[1] The Act defines an "inquiry" to mean any direct or indirect conduct intended to gather criminal history information from or about an applicant using any method, including application forms, criminal history checks, and interviews (an "interview" being any direct contact by the employer with the applicant, whether in person or by telephone, to discuss the employment being sought or the applicant's qualifications).

[2] For purposes of the law, "applicants" include applicants for paid employment, including work that is temporary or seasonal, contracted, contingent, or through an employment agency, as well as any form of vocational or educational training with or without pay, where the physical location of the employment is in whole or substantial part within D.C.

[3] Under the Act, a "criminal accusation" is one made by a law enforcement agency by way of indictment, information, complaint, or other formal charge.

[4] Pursuant to the Act, a "conditional offer of employment" is one that is conditioned solely on (i) the results of the employer's subsequent inquiry into or gathering of information about the applicant's criminal record, or (ii) some other employment-related contingency expressly communicated to the applicant at the time of the offer.

[5] Consistent with the 2012 guidance issued by the Equal Employment Opportunity Commission, an employer should consider the following factors when determining whether there is a "legitimate business reason" for an adverse action against the applicant: (1) the specific duties and responsibilities necessarily related to the employment sought or held by the applicant; (2) the bearing, if any, of the criminal conviction on the applicant's fitness or ability to perform one or more such duties or responsibilities; (3) the time that has elapsed since the criminal offense; (4) the age of the applicant at the time of the offense; (5) the frequency and seriousness of the offense; and (6) any information produced by the applicant (or on his or her behalf) with regard to his or her rehabilitation and good conduct since the criminal offense.

[6] The Act's requirement that employers provide "a copy of any and all records" to an applicant who makes such a request ostensibly extends the existing obligations of D.C. employers. For instance, pursuant to the federal Fair Credit Reporting Act, should an employer intend to take an adverse action against an applicant based in whole or in part on the results of a "consumer report" provided by a third-party consumer reporting agency as part of a background check, the employer must furnish a copy of the report to the individual (but not "any and all records").

[7] The Act is silent on whether the Office of Human Rights will provide the notice of rights or whether the employer must create its own.

[8] Based on the nebulous wording of the Act, it is unclear whether employers may be subject to other administrative remedies set forth in Title III of the D.C. Human Rights Act of 1977.

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