Proskauer

Minnesota Joins a Handful of Other States and Cities to "Ban the Box" for Private Employment

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On May 13, 2013, Minnesota's governor signed S.F. 523 to preclude *private* employers from asking job 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. The new statute amends existing Minnesota law, which codified similar prohibitions for public employers.

The new Minnesota law's stated purpose is to encourage and contribute to the rehabilitation of criminal offenders and to assist them in resuming their responsibilities as citizens. Underlying the new law is the belief that the opportunity to secure employment or pursue, practice, or engage in a meaningful and profitable trade, occupation, vocation, profession or business furthers these rehabilitative goals.

The new law is part of a growing trend of "ban the box" laws at the state and local levels of government. Hawaii and Massachusetts, as well as Philadelphia, Pennsylvania and Newark, New Jersey already have laws generally prohibiting *private* employers from asking about criminal history on job applications, and a number of additional states and localities are considering similar legislation. Ban the box legislation also is pending at the federal level, although it appears unlikely that this legislation will pass in the current political environment. Further, a number of states and localities have enacted laws which apply exclusively to public employers and private entities that have contracts with the state or local government.

The new Minnesota law takes effect January 1, 2014. To better understand the new law, this alert addresses the prohibitions, exceptions, and remedies detailed therein.

Prohibitions

Under the new Minnesota law, a private employer may not inquire into, or consider or require disclosure of an applicant's criminal record or history before the interview selection and conditional offer stages of the hiring process.

Exceptions

The new Minnesota law does not apply to private employers with a statutory duty to conduct a criminal history background check or otherwise take into consideration an applicant's criminal history during the hiring process. Along those lines, the new Minnesota law makes clear that it does not supersede any legal requirement(s) for particular types of employment, such as a license.

The new Minnesota law also does not prohibit an employer from notifying applicants that, under the law or pursuant to the employer's policy, a certain criminal history background will act to disqualify an individual from employment for particular positions.

Penalties

The new law empowers the Minnesota Commissioner of Human Rights to investigate alleged violations of the statute and to impose modest penalties should the Commissioner determine that a violation has occurred.

For violations occurring before January 1, 2015, the penalties are as follows:

- for the first violation, the Commissioner is to issue a written warning to the employer that includes a notice regarding the penalties for subsequent violations;
- if the employer does not remedy the first violation within 30 days of the date upon which the warning was issued, the Commissioner may impose no more than a $500 fine; and
- for each subsequent violation before January 1, 2015, employers are subject to a fine of up to $500 per violation (not to exceed $500 in a calendar month).

For violations occurring after December 31, 2014, the penalties are as follows:

- for employers employing 10 or fewer persons at a site in Minnesota, the penalty is no more than $100 for each violation (not to exceed $100 in a calendar month);

for employers employing 11 to 20 persons at a site in Minnesota, the penalty is no more than $500 for each violation (not to exceed $500 in a calendar month); and

- for employers employing more than 20 persons at one or more sites in Minnesota, the penalty is no more than $500 for each violation (not to exceed $2,000 in a calendar month).

The remedies under the new Minnesota law are "exclusive," with a private employer not otherwise liable for complying with or failing to comply with the statute.

Best Practices

Unless otherwise permitted by law, employers in ban-the-box states or cities shouldremove the question on applications asking applicants about their criminal history

Moreover, given the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, as well as the existing obligations under the Fair Credit Reporting Act ("FCRA") and the various federal, state and local laws otherwise restricting the use of criminal records in hiring and personnel decisions, employers in ban-the-box states/cities *and* elsewherearound the country should:

- ensure that policies imposing a bar to employment based on any conviction are narrowly tailored and consistent with state and federal law;

- determine whether 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 FCRA and other state and local requirements before conducting background checks and taking adverse action against applicants or employees based on their criminal history; and

- keep information about applicants' and employees' criminal history confidential.

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If you have any questions or concerns regarding the new Minnesota law or related laws and proposals, please contact the lawyers at Proskauer. Please also see our past client alerts on criminal background checks: EEOC Issues New Guidance on Criminal Background Checks, Newark's Municipal Council "Bans the Box" by Restricting Criminal Background Checks on Applicants and Employees, and Guidance on CORI Reform in Massachusetts.

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