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California Further Restricts Employer Use of Prior Convictions in Hiring Decisions

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On October 10, 2013, Governor Jerry Brown approved S.B. 530 to further limit public and private employers from inquiring into or otherwise considering certain types of criminal convictions.[1] The new law takes effect January 1, 2014.

Specifically, the new law amends, among other provisions, section 432.7 of California's Labor Code, which already prevents employers from inquiring into or considering arrests that did not result in convictions and participation in pre- or post-trial diversion programs. The new law adds to these proscriptions by further restricting employers from asking an applicant about, or from otherwise considering, a conviction that has been judicially dismissed or ordered sealed.

The new law makes exceptions for employers who are:

- required by law to obtain information regarding a conviction of an applicant;
- hiring for a position that would require the applicant to possess or use a firearm in the course of his or her employment;
- prevented from hiring an applicant who has been convicted of a crime because, as a matter of law, he or she may not hold the position sought (regardless of whether the underlying conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation); and
- prohibited by law from hiring an applicant who has been convicted of a crime.

For violations, an applicant may bring an action to recover damages or two hundred dollars, whichever is greater, plus costs, and reasonable attorney's fees. Moreover, an intentional violation entitles the applicant to treble actual damages, or five hundred dollars, whichever is greater, plus costs, and reasonable attorney's fees. An intentional violation also qualifies as a misdemeanor punishable by a fine of no more than five hundred dollars. The remedies under the new law are in addition to those that an applicant may enjoy under any other law.

Takeaway

California joins several states that have recently passed laws regulating employer use of criminal records. For example, laws that recently took effect in Indiana and North Carolina forbid employers from inquiring into expunged and other convictions. A number of other states also have prohibited or limited employers from asking about and/or considering a whole range of criminal records, including those that have been expunged, erased, impounded, sealed, pardoned, annulled, statutorily eradicated or vacated, dismissed upon condition or probation, or diverted to a successfully completed pre-trial or post-trial program, as well as criminal records that are withheld or arise from youthful offender adjudications.

These laws reflect an increasing trend, as a growing number of states and cities have passed laws that not only limit the *types* of convictions about which employers may inquire, but *when* an employer may make such inquiries. Within the past year, Rhode Island, Minnesota, Seattle and Buffalo "banned the box" for private employment (i.e., stopped employers from asking about conviction history on the initial job application). Also rising are the number of ban-the-box laws that apply to public employers (as in the State of California) and/or private entities that have contracts with the state or local government (as in Richmond, California).

Accordingly, employers should be aware of such recently enacted restrictions and the exceptions thereto when processing employment applications. Employers also should remember to comply with their existing obligations under the Fair Credit Reporting Act and the various federal, state and local laws that otherwise restrict the use of criminal records in hiring and personnel decisions. Additional concerns regarding the use of such information are addressed in the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions.

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If you have any questions or concerns regarding the new California law or related laws and proposals, please contact the lawyers at Proskauer.

[1] Pursuant to the statute, a conviction includes a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.

Authors of this alert:
Enzo Der Boghossian, Daniel L. Saperstein, and Kelly Anne Targett.

Related Professionals

- **Mark Theodore**
  Partner
- **Anthony J. Oncidi**
  Partner