Proskauer

Rhode Island Fourth State To “Ban the Box” for Private Employers

July 19, 2013

The Governor of Rhode Island recently signed a law to prohibit employers from asking job applicants about their criminal conviction history until the first interview. In "banning the box" for *private* employers, Rhode Island joins Hawaii, Massachusetts, and Minnesota, as well as the cities of Seattle, Washington; Buffalo, New York; Philadelphia, Pennsylvania; and Newark, New Jersey. In addition, many more jurisdictions have banned the box for public employers and public contractors, and still more – including the U.S. Congress – have some form of ban-the-box legislation pending.

This alert explores the coverage, prohibitions, and penalties of the new Rhode Island law, which takes effect on January 1, 2014, and offers best practices for compliance.

Coverage

The new Rhode Island law amends the state's Fair Employment Practices Act ("FEPA"), which covers any employer in the state employing four or more individuals as well as any person acting in the interest of an employer.[1]

Prohibitions & Exceptions

As noted above, the new Rhode Island law prohibits an employer from inquiring into whether the applicant has been convicted of a crime before the first interview[2] unless:

- a federal or state law or regulation creates a mandatory or presumptive disqualification from employment based on a person's conviction of one or more criminal offenses, or
- a standard fidelity bond or an equivalent bond is required for the position for which the applicant is seeking employment and his or her conviction of one or more specified criminal offenses would disqualify the applicant from obtaining such a bond.

Employers may inquire about the applicant's criminal convictions during the first interview and thereafter in accordance with all applicable state and federal laws.

Enforcement & Remedy

Like other unlawful employment practices prohibited by the FEPA, the "ban-the-box" provision will be enforced by the Rhode Island Commission for Human Rights ("Commission"). In short, the FEPA allows a complainant to file a charge with the Commission or, under the appropriate circumstances, ask for a right to sue in state court. Should the complainant prevail, the FEPA allows for monetary damages and injunctive relief.

Takeaway

Unless exempted, employers located within Rhode Island should refrain from asking questions relating to convictions – in a written job application or otherwise – until the first interview. In addition, employers in Rhode Island and across the country should take note of the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions to ensure that they are conducting background checks in compliance with the Fair Credit Recording Act (and its state equivalents) and any federal, state or local laws limiting the use of criminal records in hiring and personnel decisions.

Given these many obligations, employers in ban-the-box states/cities and elsewhere around the country should:

- ensure that policies imposing a bar to employment based on any conviction or arrest record are narrowly tailored and consistent with local, 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 in the appropriate use of criminal history and arrest records in hiring, promotion, and separation;
- adhere to the FCRA and other federal, state, and local requirements before conducting background checks and taking adverse action against applicants or

employees based on their criminal history and arrest records; and

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

* * *

If you have any questions or concerns regarding the new Rhode Island law or other criminal background check laws, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

Employment Counseling Group Co-Chairs

Katharine H. Parker, Partner

Leslie E. Silverman, Partner

Allan H. Weitzman, Partner

Frederic C. Leffler, Senior Counsel

Marc. A. Mandelman, Senior Counsel

[1] However, and unlike the broader provisions of the FEPA, the provisions of the new Rhode Island law specifically exclude law enforcement agency positions or positions related to law enforcement agencies from coverage.

[2] The Rhode Island Fair Employment Practices Act already prohibits employers from making such inquiries with regard to an arrest or criminal charge.

Authors of this alert: *Katharine H. Parker, Leslie E. Silverman, Daniel L. Saperstein and Kelly Anne Targett.*