Proskauer

Buffalo's "Ban the Box" Ordinance Covers Private Employers

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On June 10, 2013, a new ordinance took effect in the City of Buffalo prohibiting public and private employers and City vendors from asking prospective employees about their criminal conviction history during the application process[1] *and* prior to the first interview.[2]

In "banning the box" for private employers, Buffalo joins the cities of Philadelphia, Pennsylvania and Newark, New Jersey, as well as the states of Minnesota, Massachusetts, and Hawaii. Moreover, Buffalo's ordinance is but one of many city ordinances (in addition to state laws) to ban the box for public employers and/or government vendors. Ban-the-box legislation also is pending in the U.S. Congress and in states and localities across the country.

This alert discusses the coverage, prohibitions, exceptions, and penalties of the Buffalo ordinance, and provides best practices for compliance.

Coverage

The Buffalo ordinance applies to the City of Buffalo itself, as well as its vendors (including those located outside of the City), and any employer with fifteen or more people located within the City.

The term "employment" is broadly defined as an occupation, vocation, job, work for pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency; or any form of vocational or educational training with or *without* pay. However, government law enforcement positions are excluded.

The Buffalo ordinance also defines "applicants" as those who are considered or who ask to be considered for employment.

Prohibitions

The Buffalo ordinance specifies that an employer may not inquire into or require any applicant to disclose or reveal a criminal conviction[3] during the application process and prior to a first interview. If an employer does not conduct interviews, the Buffalo ordinance requires that the employer inform the applicant whether he or she must undergo a criminal background check before his or her employment commences.

Exceptions

The Buffalo ordinance contains several exceptions, so as to not run afoul of state or federal laws.

- Employers may ask the same questions of candidates for licensed trades or professions (and interns and apprentices for those positions) as those asked by a trade or professional licensing entity in accordance with New York state law.
- Employers also may ask about convictions or violations if such convictions or violations would pose a bar to attaining employment under New York state or federal law.
- The Buffalo ordinance does not apply if another law authorizes an inquiry into or consideration of prior criminal history.
- The Buffalo ordinance does not cover the hiring of police, firefighters or any other peace officer positions, or any public or private school or any public or private provider of services in the supervision of children, young adults, senior citizens, or the physically or mentally disabled.

Penalties

The Buffalo ordinance creates a private right of action that would permit an aggrieved applicant to obtain injunctive relief, damages, attorney fees, and other appropriate relief.

In addition, the Buffalo ordinance permits any person or organization—whether or not aggrieved—to file a complaint with the Commission on Citizens' Rights and Community Relations (the "Commission"). If the Commission finds probable cause to believe that discrimination has occurred in violation of the Buffalo ordinance, it may request that the Corporation Counsel of the City of Buffalo commence a civil action against the accused party seeking a penalty of $500 for a first violation or $1,000 for a subsequent violation.

Takeaways

Unless otherwise exempted, all employers located in or doing business within the City of Buffalo should remove questions pertaining to criminal history from their job applications and refrain from asking applicants about their criminal convictions until a first interview. Although employers may still consider an applicant's criminal history at a later point in the hiring process, we also would remind any employer with locations in Buffalo or elsewhere in New York State that exclusions based on criminal history must comply with Article 23-A of the New York Corrections Law.[4]

In addition, employers everywhere should take heed of the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, and ensure that they are conducting background checks in compliance with the Fair Credit Reporting Act (and its state equivalents) and any federal, state or local laws restricting the use of criminal records in hiring and personnel decisions. Indeed, on June 11, 2013, the EEOC brought actions against two employers, Dollar General and BMW Manufacturing Co., LLC, alleging that their background check policies have a disparate impact on black employees and applicants.

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 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 federal, 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 Buffalo ordinance or other criminal background check laws, please contact the lawyers at Proskauer. Please also see our prior client alerts on criminal background checks: Minnesota Joins a Handful of Other States and Cities to "Ban the Box" for Private Employment, 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.

[1] Pursuant to the Buffalo ordinance, "application process" means from the time that the applicant makes an inquiry into the employment sought until the employer has accepted an employment application.

[2] Under the Buffalo ordinance, an "interview" is 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.

[3] The Buffalo ordinance defines "convictions" as sentences imposed by a court of competent jurisdiction arising from a verdict or plea of guilty, including a sentence of incarceration, a suspended sentence, a sentence of probation, an unconditional discharge, or diversion program.

[4] Article 23-A prohibits public agencies and private employers with ten or more employees from denying a license or application for employment due to the applicant's prior criminal conviction(s) unless: (1) there is a direct relationship between a prior criminal offense and the license or employment sought, or (2) the license or employment sought would pose an unreasonable risk to property or to individual or public safety or welfare.

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