

# Indiana and North Carolina Limit Employer Inquiries into Criminal Records

**June 14, 2013**

A new Indiana law takes effect on July 1, 2013 to prohibit employers from asking about (or otherwise considering) expunged or sealed arrests and convictions. Similarly, a new North Carolina law takes effect December 1, 2013 to prevent employers from inquiring into expunged arrests, criminal charges, or criminal convictions. To assist employers in understanding the new Indiana and North Carolina laws, this alert discusses their prohibitions, enforcement, and remedies.

## **Indiana**

### *Prohibitions*

Indiana's new law prohibits employers from refusing to employ or from otherwise discriminating against any person because of an expunged or sealed conviction or arrest record. The new law specifically provides that a job application only may include a question that excludes such arrests and convictions, such as "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?"

To avoid a Catch-22, the new law allows employers to use an order of expungement in any judicial or administrative proceeding in which negligence or other fault is alleged as evidence of due care in hiring, retaining, or otherwise transacting business or engaging in activity with the person subject to the order. Conversely, under the new law, the aggrieved party may not use an expunged conviction as evidence in a negligent hiring action *against* an employer who relied on the order.

### *Enforcement & Remedies*

An employer found to have violated Indiana's new law may be held in contempt of court. The new law empowers the court to award injunctive relief to the aggrieved party.

## **North Carolina**

## *Prohibitions*

Under the new North Carolina law, an employer may not require, in any application, interview or otherwise, an applicant to disclose information concerning any expunged arrest, criminal charge, or criminal conviction, and may not knowingly and willingly inquire about a known expunged arrest, charge, or conviction. Moreover, an applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning arrests, charges, or convictions that have been expunged.[\[1\]](#)

The new law makes clear, however, that it does not prevent an employer from asking applicants about criminal charges or convictions that have not been expunged and are part of the public record.

## *Enforcement & Remedies*

The new law does not allow for a private right of action. Instead, North Carolina's Commissioner of Labor ("Commissioner") is charged with investigation and enforcement. Employers will receive a written warning for their first violation and are subject to a civil penalty of up to five hundred dollars for each additional violation.[\[2\]](#)

The Commissioner's determination is final unless the employer takes exception within fifteen days of receiving notice of the determination. In such a case, the final determination of the penalty is to be made in an administrative proceeding and in a judicial proceeding.

## **Takeaway**

Indiana and North Carolina join several states regulating employer use of criminal records.<sup>[3]</sup> Moreover, the new laws come at a time when legislators are proposing and passing laws to prohibit employers generally from asking about an applicant's criminal record on the initial job application. Indeed, Minnesota and Buffalo, New York recently joined Hawaii and Massachusetts, as well as Philadelphia, Pennsylvania and Newark, New Jersey, in "banning the box" for private employment, and the U.S. Congress and a number of additional states and localities are considering similar legislation. Further, a number of states and localities recently have enacted (or are considering) laws that apply exclusively to public employers and private entities that have contracts with the state or local government.

Employers also should comply with their 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, as well as follow the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions.

\* \* \*

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

<sup>[1]</sup> These prohibitions do not apply to state or local law enforcement agencies authorized by law to obtain confidential information for employment purposes.

<sup>[2]</sup> In determining the amount of a penalty, the Commissioner may consider the size of the employer's business, the gravity of the violation, the employer's good faith, and the record of previous violations.

<sup>[3]</sup> Indeed, a number of states have prohibited or limited employers from asking about and/or considering criminal records that have been expunged, erased, impounded, sealed, pardoned, annulled, statutorily eradicated or vacated, dismissed upon condition or probation, diverted to a successfully completed pre-trial or post-trial program, or that are withheld or youthful offender adjudications.

---

***Authors of this alert:***

*Katharine H. Parker, Leslie E. Silverman, Daniel L. Saperstein and Kelly Anne Targett.*