

Philadelphia Continues National Trend by Enacting “Ban the Box” Ordinance Prohibiting Inquiries Regarding Criminal Convictions on Employment Applications

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A Philadelphia law that prohibits covered employers from inquiring about applicants’ criminal histories until after the first interview was signed into law today by Philadelphia Mayor Michael Nutter. The Fair Criminal Record Screening Standards Ordinance (the Ordinance) will take effect on July 12, 2011. As a result, Philadelphia employers will soon be prohibited from including a “box” on employment applications that an applicant is required to check if he or she has been convicted of a crime.

The Ordinance covers any person or company that employs 10 or more persons within the City of Philadelphia and makes it an “unlawful discriminatory practice” for a covered employer “to make any inquiry regarding or to require any person to disclose or reveal any criminal convictions during the application process.” The “application process,” as defined by the Ordinance, begins at the time an individual inquires about employment and ends when the employer has accepted that individual’s employment application. Clearly, the intent of the Ordinance is to prohibit use of the “box” relating to criminal convictions, which is common on most employment applications.

The Ordinance specifically provides that it “should not be construed to require an employer to hire someone with a criminal record, nor to limit an [employer’s] ability to choose the most qualified and appropriate applicant for the employment opportunity at hand.” However, a covered employer is not allowed to ask any questions regarding an individual’s criminal conviction history “before and during the first interview.” An “interview” is defined as “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.” If an employer does not conduct an interview for a position, the employer is prohibited from asking for or gathering any information on an applicant’s criminal conviction history. If the applicant voluntarily discloses information about his or her criminal convictions at the interview, then the employer may discuss the convictions disclosed.

In addition to requiring all covered employers to remove the box on employment applications and prohibiting inquiries about criminal history until after an applicant’s first direct contact with the employer by phone or in person, the Ordinance makes it unlawful for a covered employer to take any adverse action against an individual on the basis of an arrest or criminal accusation that did not result in a conviction. Because employers may not consider arrests that did not lead to convictions, they are also not permitted to require that applicants disclose such information unless criminal allegations are pending.

The Ordinance builds upon, but does not alter, the Pennsylvania law that prohibits employers from denying employment on the basis of a criminal conviction unless the nature of the crime is sufficiently related to the position for which the applicant is applying. 18 Pa. C.S. § 9125. Employers are also reminded that under 18 Pa. C.S. § 9125(c), written notification is to be provided to denied applicants when the basis for such denial is a past conviction. The Ordinance also does not change state laws requiring employers in certain industries (banking, education, child care) to complete background checks and deny employment where necessary.

Violation of the Ordinance will be considered a Class III offense, subject to fines of \$2,000 per violation.

National Trend of “Ban the Box” Legislation

The Ordinance continues a growing trend of “ban the box” legislation that has been enacted in states as well as local municipalities. California, Connecticut, Hawaii, Massachusetts, Minnesota, and New Mexico have all enacted such legislation, along with more than 25 municipalities, including Chicago, Baltimore, Seattle, and Atlanta. Proponents of the legislation believe that expanding employment opportunities for offenders is a major factor in lowering recidivism rates. “Ban the box” legislation is thought to reduce the obstacles to obtaining employment for individuals with a criminal record by allowing applicants to demonstrate their skills and qualifications prior to revealing criminal histories.

Although the “ban the box” movement is gaining ground, jurisdictions that have implemented “ban the box” provisions, except Hawaii and Massachusetts, have limited the legislation to public employers, or public employers and vendors and contractors serving public entities. Philadelphia is the first city to pass a law that covers private employers of 10 employees or more in addition to public employers. However, in other respects, the Ordinance is somewhat modest as compared to other “ban the box” laws. For example:

- In Hawaii and Massachusetts, private and public employers are not allowed to consider felony convictions that are more than 10 years old. Massachusetts employers are additionally not allowed to consider misdemeanor convictions that are more than five years old.
- Hawaii and the cities of Chicago, Hartford, and Cincinnati allow an employer to inquire as to an individual’s criminal record only *after* a conditional offer of employment has been extended.
- The cities of Chicago, San Francisco, and Boston require a public employer denying employment on the basis of a conviction to justify the denial based on factors suggested by the EEOC, including the nature and gravity of the offense, the time that has passed since the conviction, and the connection of the nature of the crime to the nature of the position sought by the applicant.

Practical Consequences

The most obvious first step for compliance with the Ordinance is for covered employers to remove the “box” asking about criminal history from employment applications. Employers should also advise their interviewing managers and recruiters, as well as all employees involved with the screening and interview process, that they cannot ask about criminal history in the first interview unless an applicant first brings it up in conversation.

Under the Ordinance, an “interview” is defined as “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.” This language seems to indicate that a traditional screening interview meets the Ordinance’s definition of a “first interview,” and, after that time, an employer can ask about an applicant’s criminal history. Moreover, while the Ordinance contemplates the possible disclosure of convictions by an applicant at the “interview” stage, it does not contemplate possible disclosures prior to the “interview”—presumably because there is no possible earlier contact between the employer and the applicant during which the applicant could make such a disclosure. This also suggests that what employers consider a “screening” phone call would meet the definition of first “interview.” Employers will have to decide at what point in their hiring processes they want to inquire about applicants’ criminal histories, and how they will collect such information.

Conclusion

Regardless of whether your company does business in a location that is subject to a “ban the box” law, many states and municipalities have other laws restricting an employer’s ability to make hiring decisions on the basis of an applicant’s criminal background. Employers need to be aware of such restrictions. Employers that operate in multiple jurisdictions or nationwide and utilize standard employment applications and hiring procedures are encouraged to review their applications and employment procedures to determine if they are in compliance with all applicable laws regarding the consideration of applicant criminal history.

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