Employers beware: New York City’s new “ban-the-box” law takes effect this October

Employment Alert

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An increasing number of jurisdictions across the country have adopted legislation in recent years restricting a prospective employer’s ability to run a criminal background check. Colloquially known as “ban the box,” the legislative intent of these laws is to prevent discrimination in employment on the basis of criminal records where such background is not otherwise relevant for employment purposes.

This summer, New York City added itself to the growing list of ban-the-box jurisdictions with the enactment of the Fair Chance Act (the FCA), which goes into effect on October 27, 2015. New York City employers should act now to review and adapt their hiring and employment practices to ensure compliance with this new law.

Scope of the new prohibition

As of October 27, all employers in New York City with at least four employees will be prohibited from making any inquiry into a job applicant’s criminal history until after a conditional offer of employment has been extended to that applicant. This prohibition substantially increases existing federal and state regulation (including the federal Fair Credit Reporting Act) concerning use of third-party vendors to run background checks. Under the FCA, employers may not include a requirement that the applicant check a “box” on the employment application if they
have been convicted of a crime or have a pending arrest, directly ask the applicant about criminal history, or
search any publicly available sources of information for information about an applicant’s criminal background. Employers also may not include in a job description or posting that a criminal conviction could have an impact on
an applicant’s chance of employment (unless otherwise required by law).

Addition to existing state law

The FCA joins the existing body of New York law regulating and restricting the use of criminal background checks. Article 23-A of the New York Correction Law already required employers who make criminal conviction inquiries to conduct an analysis of the relationship between a criminal conviction and the job for which the applicant has applied, before making a decision regarding employment. After performing this analysis, employers may not deny employment on the basis of a criminal conviction unless either: (i) hiring the applicant would pose an unreasonable risk to property or the safety of specific individuals or the general public, or (ii) the conviction bears a direct relationship to the job. “Direct relationship” is defined to mean that the nature of the criminal conduct underlying the conviction has a direct bearing on the applicant’s fitness or ability to perform one or more of the duties or responsibilities that are necessary for the job. Article 23-A includes a number of factors that employers are required to consider when performing this analysis, such as the nature of offense, how long ago the offense occurred, and the age of the person at the time of the offense.

New York employers also remain strictly prohibited from considering pending arrests, arrests that never led to a conviction, certain sealed records and juvenile adjudications.

New notification requirements

Even after making a conditional offer of employment, if an employer then runs a criminal background check and decides to take adverse action based on that inquiry, the FCA requires the following additional notification procedures:

- Provide the applicant with a written copy of the inquiry
- Provide the applicant with a copy of the above-referenced Article 23-A analysis (including supporting documentation and explanation of the employer’s decision) and
- Allow the applicant at least three business days to respond to the analysis by holding the position open during that time.

Employers must keep in mind that these new notification requirements are in addition to, and do not supersede, the procedural notification requirements under the federal Fair Credit Reporting Act.

Exemptions

Notably, the FCA expressly does not apply to employer actions taken pursuant to federal, state or local laws that require criminal background checks for employment purposes, or that bar employment based on criminal history, including the rules or regulations of a self-regulatory organization as defined by the Securities Exchange Act of 1934. The FCA also provides limited exemptions for certain positions, such as police officers.

Enforcement and penalties

The FCA amends the New York City Human Rights Law by making it an unlawful discriminatory practice to make pre-conditional offer criminal conviction inquiries. Affected individuals will be able to pursue remedies through administrative procedures or the courts pursuant to this law.

What employers should do to prepare

Before the FCA takes effect on October 27, 2015, employers are strongly urged to take the following actions with respect to their hiring procedures:

- Remove any criminal background inquiries from standard employment applications
- Instruct hiring managers and interviewers not to ask applicants any questions about criminal records or search any publicly available sources of information about an applicant’s criminal history until after a conditional offer
of employment has been made (and, if applicable, only following discussion with counsel) and
- Review posted job descriptions and remove or modify any references to the impact that a criminal conviction
could have on an applicant’s chances for employment.

For more information about the Fair Chance Act, contact any of these partners in DLA Piper's Employment group:
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