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Philadelphia Expands the Reach of Its ‘Ban the Box’ Ordinance

On Dec. 15, 2015, Philadelphia Mayor Michael Nutter amended the city’s current “ban the box” law to expand the number of employers it covers and increase restrictions on the use of criminal background checks during the hiring process. The amendments take effect in just 90 days and make several noteworthy changes to the city’s original Fair Criminal Screening Standards Ordinance enacted in 2012.

Among the amendment’s most important changes are additional restrictions on when and how an employer may consider a potential employee’s criminal convictions upon application for employment. The amendment also expands the ordinance’s application to all private employers in Philadelphia regardless of the number of employees, and prohibits policies that “automatically exclude[] any applicant with a criminal conviction from a job or class of jobs.” Instead, employers may reject an applicant based on his or her criminal record only when “such record includes conviction for an offense that bears such relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers, and that exclusion of the applicant is compelled by business necessity.”

This requirement that a connection exist between the applicant’s offense for which he or she was convicted and the specific job sought should be familiar to Philadelphia employers. Pennsylvania state law already prohibits employers from using “criminal history record information” in deciding whether to hire an applicant unless the applicant has a record of a felony or misdemeanor conviction and that conviction “relate[s] to the applicant’s suitability for employment in the position for which he [or she] has applied.” 18 Pa. C.S. § 9125.

The amended local ordinance, however, goes further. First, a prospective employer cannot inquire about criminal convictions until it makes a conditional offer of employment (defined as an offer that can be withdrawn if the employer subsequently determines in accordance with the law “that the applicant would pose an unacceptable risk in the position applied for” or that he or she “does not meet other legal or physical requirements of the job.”) Previously, the ordinance only prohibited employers from inquiring about criminal convictions at the application stage. Second, if a post-offer

background check reveals a criminal conviction, it can only be considered in the hiring decision “to the extent that the conviction occurred fewer than seven (7) years from the date of the inquiry.” An additional caveat: “[a]ny period of incarceration shall not be included in the calculation of the seven (7) year period.”

Further, the amended ordinance sets forth specific factors an employer must evaluate if it takes an applicant’s criminal history into consideration during the hiring process. The employer’s “individualized assessment of the risk presented” must include consideration of:

- (a) The nature of the offense;
- (b) The time that has passed since the offense;
- (c) The applicant’s employment history before and after the offense and any period of incarceration;
- (d) The particular duties of the job being sought;
- (e) Any character or employment references provided by the application; and
- (f) Any evidence of the applicant’s rehabilitation since the conviction.

Finally, the amended ordinance includes a notice provision, similar to state law. (See 18 Pa. C.S. § 9125(c)). Should an employer reject an applicant based in whole or in part on his or her criminal history, the employer must provide the applicant written notice of its decision and the fact that it was based (again, in whole or in part) on the applicant’s criminal history. The local notice provision creates other requirements, as well, similar to those imposed by the federal Fair Credit Reporting Act. The employer must also provide the applicant with a copy of the criminal history report that affected the employer’s decision, and “allow the applicant ten (10) business days to provide evidence of the inaccuracy of the information or to provide an explanation.”

The new 10-day notice period will no doubt require revisions to many employers’ background check policies. Philadelphia employers who use third party vendors to conduct applicant background checks need to ensure that the vendors’ standard background check and notice rules provide for this 10-day window.

Another notable change could require policy revisions as well: the amended ordinance specifies that asking about criminal convictions on an employment application is unlawful – regardless of whether certain applicants are told they need not answer the question. Employers who use form employment applications with carve outs for state and local law provisions should revise such applications to specifically address applicants in the City of Philadelphia.

Compliance with the new ordinance is especially important as it creates new potential penalties for non-compliance. Individuals who believe the ordinance has been violated may file a complaint with the Philadelphia Commission on Human Relations. If the Commission finds a violation has occurred, it may order equitable and/or injunctive relief; a cease and desist order; compensatory damages; punitive damages not to exceed \$2,000 per violation; and reasonable attorneys’ fees. Aggrieved individuals are also permitted to sue in court once administrative remedies are exhausted and may obtain the following damages: compensatory damages, punitive damages, attorneys’ fees and costs, and “[s]uch other relief, including injunctive relief, as the court may deem appropriate.”

The amended ordinance takes effect March 14, 2016. The Philadelphia Commission on Human Relations will provide a workplace poster containing the amended ordinance, which must be posted in an area where employees are likely to see it. See a copy of the amended [Philadelphia Fair Criminal Screening Standards Ordinance](#).

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