

Legal Update

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NEW ILLINOIS LAW RESTRICTS INQUIRIES ABOUT APPLICANTS' CRIMINAL RECORDS

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Illinois has joined several other states and cities by passing a “ban the box” statute prohibiting employers from asking a job applicant during the initial application process whether the applicant has been convicted of a crime. The legislation, called the Job Opportunities for Qualified Applicants Act (Act), will take effect on January 1, 2015.

The Act applies to all employers of 15 or more persons. It prohibits those employers from inquiring about, considering, or requiring disclosure of a job applicant’s criminal records until the employer has determined that the applicant is qualified for the position and the applicant has either been selected for an interview or, if the employer does not conduct interviews for the position, given a conditional employment offer.

Under the Act, employers are permitted to inform applicants that certain convictions disqualify them from employment, whether due to applicable law or employer policy. Any such policies, however, should take into account the 2012 Enforcement Guidance of the Equal Employment Opportunity Commission (EEOC). The Guidance indicates that hiring policies based on criminal histories may be considered discriminatory due to the disparate impact such policies may have on minority applicants, particularly where employers exclude applicants due to convictions that are not job-related. We wrote about the Enforcement Guidance in our [July, 2012 Legal Update](#).

The Act makes exceptions for (1) employers that are required to exclude applicants who have been convicted of certain crimes under applicable law, (2) applicants for positions for which a bond is required where specific criminal convictions might exclude the applicant from obtaining the bond, and (3) applicants for positions for which employees must be licensed under the Emergency Medical Services Systems Act.

The Act does not give rejected applicants the right to bring lawsuits against potential employers for asking about their criminal records but does allow the Illinois Department of Labor to investigate and initiate proceedings against employers for violations of the Act.

Related State Laws

Even prior to the enactment of the Act, the Illinois Human Rights Act and the Illinois Criminal Identification Act prohibited Illinois employers from making employment decisions based on records of applicants’ arrests (as opposed to convictions) or expunged or sealed convictions. Unlike the new “ban the box” Act, these laws do not only apply to initial applications – they prohibit employers from

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considering arrests or expunged convictions at any point in the hiring process, or even when making decisions regarding existing employees' continued employment or terms of employment. Although employers may consider independent information, aside from an arrest, indicating that an applicant or employee in fact committed the offense at issue, employers should be cautious in relying on this often fuzzy distinction.

Conclusion

Illinois employers covered by the Act should prepare to remove questions on their job application forms that require applicants to disclose past convictions and should consult with counsel regarding further measures they can take to identify and change job application procedures that violate the Act. Employers operating in multiple states should also consult with counsel to ensure that their application processes comply with applicable state laws.

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