A Timely Analysis of Legal Developments

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April 2011

Philadelphia has joined a growing chorus of states and cities in passing legislation restricting certain employer inquiries into, and use of, criminal record history information.

Philadelphia Passes Ordinance Restricting Certain Employer Inquiries Into, and Use of, Criminal Record History

By Rod Fliegel and William Simmons

On April 13, 2011, the Mayor signed Philadelphia Bill 110111-A, captioned the Fair Criminal Record Screening Standards Act, which, among other things, prohibits employers from including criminal record history questions on an employment application and from making personnel decisions based on records of an arrest that did not result in a conviction.

The Ordinance

The new ordinance creates three basic restrictions on the use of criminal record histories by employers subject to the Act:

1. Employers may not inquire of applicants or employees about any arrest or criminal accusation that is not still pending and did not result in a conviction.
2. Employers may not require job applicants to disclose any criminal convictions during the application process through the first "interview," and if employers do not conduct "interviews," they are prohibited from gathering any information regarding the applicant's criminal convictions during the hiring process. (The term "interview" is broadly defined to include "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.")
3. Employers may not take any adverse action against an applicant or incumbent employee (*e.g.*, refuse to hire, transfer, promote, or terminate) because of past arrests or criminal accusations which did not result in convictions.

The new ordinance does not entirely prohibit Philadelphia employers from using any criminal record history information, but rather *postpones* the time frame where such inquiries are appropriate. Employers may continue to conduct background check screening that includes a criminal record history component or inquire about an applicant's criminal record history, provided that the screening or inquiry takes place after the initial "interview" (as broadly defined) and does not include information on past arrests or criminal accusations that did not lead to conviction.

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The Philadelphia ordinance becomes effective 90 days from the date of passage, and applies to any employer that "employs ten or more persons within the City of Philadelphia," including job placement and temporary employment agencies. Employers who violate the new ordinance's provisions will be subjected to a fine, currently $2,000, for each violation. The Mayor's Office of Labor Standards or its designee will administer and enforce the ordinance. The ordinance does not explicitly provide for a private right of action to aggrieved applicants or employees. Accordingly, it remains to be seen whether a private remedy will be available otherwise.

In passing the ordinance, Philadelphia has now joined a growing chorus of states and cities to impose further restrictions on employer inquires into criminal record history. Massachusetts and Hawaii have enacted similar so-called "ban the box" legislation governing private sector employers. Minnesota, New Mexico and Connecticut have enacted analogous laws that apply only to public sector employers. Several other cities, such as Boston, Massachusetts, and Madison, Wisconsin, have implemented similar legislation in recent years.

Open Questions

There are many important questions regarding application and administration of the new Philadelphia ordinance to employers. Philadelphia employers should consult with counsel regarding the ordinance's applicability based on the particulars of their operations. For instance:

- Though the ordinance states that it applies to every business that "employs ten or more persons within the City of Philadelphia," it does not clarify what it means to employ someone "within" the City, nor whether it purports to govern the practices of an otherwise covered employer with respect to employees having a primary place of work outside Philadelphia (for example, outside sales representatives).
- The ordinance provides an exemption for private employers only where "the inquiries or adverse actions prohibited [by the ordinance] are specifically authorized by any applicable law." The ordinance omits any definition of what "specifically authorized" means.
- The ordinance does not discuss whether the Office of Labor Standards will employ a fault-based or strict liability standard in assessing alleged ordinance violations.
- It is unclear whether the Philadelphia ordinance may be subject to preemption arguments given the potential overlap with the laws protecting ex-offenders in Pennsylvania.

Action Steps for Employers

Philadelphia employers should take the following steps to ensure compliance with the new ordinance within the next 90 days:

- review the company's employment application to ensure that any questions regarding an applicant's criminal record history are removed;
- consider using some direct telephone or in-person contact for all applicants to the extent that the employer wants to utilize criminal records in the hiring process;
- verify that the company's agreements with, and instructions to, its designated background screening company prohibit the disclosure to the employer of information regarding past arrests and criminal accusations not leading to conviction; and
- counsel human resources representatives, recruiters, managers and supervisors not to take adverse action against incumbent employees for past arrests of which they may learn that are no longer pending against the employees and that did not result in a conviction.

Of course, when conducting employment-related background screening, employers should be mindful of the various laws that relate to the use of criminal records. For example, Pennsylvania employers are subject to the job-relatedness statute, 18 Pa. Cons. Stat. § 9125, which allows employers to consider convictions in hiring decisions only if they "relate to the applicant's suitability" for the position in question, and prohibits consideration of any other criminal record history information in hiring decisions. The Equal Employment Opportunity Commission also has taken a renewed and vigorous interest in whether routine pre-employment criminal record screening

has a "disparate impact" on protected class members for purposes of Title VII of the Civil Rights Act of 1964. Finally, when using a background check company, employers must follow the requirements of the federal Fair Credit Reporting Act (FCRA), including the FCRA's provisions requiring advance consent for the background check and providing appropriate notices when any adverse employment decision is made based in whole or in part on the information disclosed in a background report.

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