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Seattle Latest City to "Ban the Box" for Private Employers

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On June 20, 2013, the Mayor of Seattle signed an ordinance to "ban the box" and otherwise restrict the use of arrest and conviction records in the hiring and personnel decisions of most private employers and of the City itself. Seattle joins Buffalo, New York; Philadelphia, Pennsylvania; and Newark, New Jersey; as well as the states of Massachusetts, Minnesota, and Hawaii, in "banning the box" for private employers. In addition, many more jurisdictions have banned the box for public employers and public contractors, and still more – including the U.S. Congress – have some form of ban-the-box legislation pending.

This alert explores the coverage, prohibitions, and penalties of the new Seattle ordinance, which takes effect on November 1, 2013, and offers best practices for compliance.

Coverage

The coverage of the new Seattle ordinance is expansive, as the term "employer" covers any person with one or more employees, or a designee or any person acting in the interest of the employer.[1] The term also includes job placement, referral, and employment agencies.

The new Seattle ordinance covers "employees," *i.e.*, anyone who performs any services for an employer, when the physical location of such services is in at least substantial part (at least 50% of the time) within the City.[2] It also protects "job applicants," broadly defined as anyone who applies for a job or is otherwise a candidate to become an "employee."

Prohibitions

Under the new Seattle ordinance, employers may not advertise, publicize or implement any policy or practice automatically or categorically excluding all individuals with any arrest or conviction record from any employment position to be performed in at least substantial part (at least 50% of the time) within the City of Seattle.[3]

Notwithstanding this prohibition, an employer may perform a criminal background check or require a job applicant to provide criminal history information *after* the employer has completed the initial screening of applications or resumes to eliminate unqualified applicants, subject to the following limitations:

- An employer may not carry out a tangible adverse employment action[4] solely based upon an arrest record;
- An employer may inquire into the *conduct* related to an arrest record, but may not take a tangible adverse employment action solely based on that conduct without a legitimate business reason[5];
- An employer must have a legitimate business reason for carrying out a tangible adverse employment action solely based on the criminal conviction record or pending criminal charge of an employee or job applicant.

Moreover, before an employer is to take any tangible adverse employment action based solely on a criminal conviction record, the conduct relating to an arrest record, or a pending criminal charge, the new Seattle ordinance requires that the employer apprise the employee or applicant of the record(s) or information on which they are relying and hold a position open for a minimum of two business days to provide a reasonable opportunity for the employee or applicant to explain or correct the information.

The new Seattle ordinance also prohibits an employer from interfering with any right afforded therein, and from retaliating against an employee or applicant for exercising his or her rights in good faith under the ordinance.

Penalties

The new Seattle ordinance explicitly rejects a private civil right of action for an aggrieved employee or job applicant, but does allow such persons to file a complaint with the Seattle Office for Civil Rights (the "Agency").[6] The Agency is tasked with enforcing the new Seattle ordinance, promulgating guidelines and regulations for that purpose, and conducting investigations into complaints. The Agency also may initiate investigative procedures independent of a complaint by an employee or job applicant.

Employers found to have violated the ordinance are subject to a notice of infraction and an offer of assistance from the Agency for the first infraction. For the second violation, the employer is required to pay a penalty of up to $750, and for the third violation, the penalty increases to up to $1,000. The monetary penalties are payable to the aggrieved employee or job applicant. Sanctioned employers also may have to pay the Agency's attorney fees.

Takeaways

Unless exempted, employers located within the City of Seattle (and those who employ workers who spend a substantial amount of time working within the City) should refrain from asking questions relating to arrests, pending criminal charges, and/or convictions—in a written job application or otherwise—until after the initial screening of resumes and/or job applications. Even after such a screening, employers must proffer a "legitimate business reason" before taking an adverse action on the basis of an applicant's or employee's conviction record, pending criminal charge, or the conduct underlying an arrest.

In addition, employers in Seattle and across the country should take note of the Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, to ensure that they are conducting background checks in compliance with the Fair Credit Recording Act (and its state equivalents) and any federal, state or local laws limiting the use of criminal records in hiring and personnel decisions. Indeed, the EEOC recently has brought actions against several companies, including national retailers and manufacturers, alleging that their background check policies have a disparate impact on black employees and applicants.

Given these many obligations, employers in ban-the-box states/cities and elsewhere around the country should:

- ensure that policies imposing a bar to employment based on any conviction or arrest record are narrowly tailored and consistent with local, state, and federal law;
- determine whether conviction records are considered in a manner that is job related and consistent with business necessity;
- train hiring managers on the appropriate use of criminal history and arrest records in hiring, promotion, and separation;
- adhere to the FCRA and other federal, state, and local requirements before conducting background checks and taking adverse action against applicants or employees based on their criminal history and arrest record; and
- keep information about applicants' and employee's criminal history and arrest records confidential.

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If you have any questions or concerns regarding the new Seattle ordinance, its interaction with other local, state, and/or federal laws, or other criminal background check laws, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

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[1] Although the definition of employer includes the City of Seattle, the new ordinance explicitly excludes the federal, state, county, and other local governments from coverage.

[2] The definition of "employee" does not include various law enforcement personnel, as well as any individual who will or may have unsupervised access to children under the age of sixteen, developmentally disabled persons, or vulnerable adults during the course of his or her employment.

[3] The new Seattle ordinance is not intended to interfere with collective bargaining agreements, nor with any provisions of state or federal law. In addition, there is no requirement for an employer to provide accommodations to a job applicant or employee with a criminal conviction history or facing pending criminal charges.

[4] A "tangible adverse employment action" is a decision by an employer to reject an otherwise qualified job applicant, or to discharge, suspend, discipline, demote, or deny a promotion to an employee.

[5] Under the new Seattle ordinance, a "legitimate business reason" exists when the employer believes in good faith that the nature of the criminal conduct underlying the conviction or the pending criminal charge either: (1) will have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held; or (2) will harm or cause injury to people, property, business reputation or business assets, where the employer has considered (a) the seriousness of the underlying criminal conviction or pending criminal charge; (b) the number and types of conviction or pending criminal charges; (c) the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration; (d) any verifiable information related to the individual's rehabilitation or good conduct, provided by the individual; (e) the specific duties and responsibilities of the position sought or held; and (f) the place and manner in which the position will be performed.

[6] Although the new Seattle ordinance contains independent penalty provisions, its enforcement structure incorporates by reference Seattle's "Paid Sick Time and Paid Safe Time" ordinance, SMC 14.16.080, which, among other procedures, requires that charges be filed within 180 days after an alleged violation, and sets forth the parameters for the Agency investigation and resolution of the charge.

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