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Labor and Employment Alert: Los Angeles Continues the 'Ban the Box' Trend

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More than 100 cities and counties have adopted “ban the box” or “fair chance” laws prohibiting or restricting employers from asking about an applicant’s criminal history without first considering the applicant’s job qualifications. The majority of these laws currently apply only to public employers. However, 13 of those localities have extended their ban the box laws to all private employers in their jurisdiction. On January 1, 2017, Los Angeles will become the second city in California (along with San Francisco) to adopt an ordinance banning the box for private employers.

The Los Angeles “Fair Chance Initiative for Hiring Ordinance” applies to any private employer located or doing business in the City of Los Angeles that has 10 or more employees (including the owners, managers, and supervisors). An “employee” is any person performing two or more hours of work each week within the city and who is entitled to minimum wage. The ordinance broadly defines “employment” to include any occupation, vocation, job or work performed in the city, including temporary or seasonal work, part-time work, contracted work, contingent work, work on commission and work through the services of a temporary or other employment agency, or any form of vocational or educational training with or without pay.

The ordinance contains two prohibitions. First, employers may not include on employment applications any question that seeks disclosure of an applicant’s criminal history. Second, employers may not inquire about or require the disclosure of an applicant’s criminal history (either through application forms, interviews, or criminal history report) before a conditional offer of employment has been made. A conditional offer is one conditioned only on an assessment of the applicant’s criminal history, if any, and the duties and responsibilities of the position. There are exceptions for employers that are required by law to obtain information regarding convictions; applicants who would be required to possess or use a firearm in the course of employment; applicants who have been convicted of a crime that excludes them from holding the position sought; and employers that are prohibited by law from hiring an applicant who has been convicted of a crime.

An employer may not withdraw a conditional offer of employment or refuse to hire an applicant because of his or her criminal history unless the employer makes a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position. In performing the assessment, the employer must consider at least the factors identified by the federal Equal Employment Opportunity Commission and any other factors the city may require. In general, this requires an assessment of the nature and gravity of the offense, the time that has passed since the offense, and the nature of the job.

Then, the employer must provide the applicant a labyrinthine "fair chance process" through which the employer: (1) gives the applicant written notification of the proposed adverse action, a copy of the written assessment, and the supporting documentation; (2) holds off on taking adverse action or filling the position for at least 5 business days so the applicant can provide information; (3) considers the applicant's additional information performs a written reassessment of the adverse action; and (4) if not hired, notifies the applicant of its decision and provides a copy of the reassessment. Documents related to the fair chance process must be retained for three years.

Employers must include in solicitations or advertisements seeking applicants that it will consider for employment qualified applicants with criminal histories in a manner consistent with the ordinance. Additionally, employers must conspicuously post a notice informing applicants of the ordinance and send a copy of the notice to each labor union or representative of workers with which they have a collective bargaining agreement.

The ordinance prohibits retaliation against those who assert their rights under the ordinance. Further, an applicant may file a civil lawsuit, but only after first completing the administrative enforcement process within the city's Department of Public Works. Employers that violate the ordinance may be fined up to \$500 for a first offense, \$1,000 for a second offense, and \$2,000 for a third offense. However, the city will only issue written warnings until July 1, 2017.

Employers either located or doing business in the City of Los Angeles should review their hiring practices to ensure they comport with the new ordinance. Contact your Vorys lawyer if you have questions about these new ban the box requirements in Los Angeles or about similar requirements in other jurisdictions.