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Labor and Employment Alert: Washington Becomes The 11th State To Ban-The-Box

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Washington recently enacted the “Fair Chance Act” and in doing so joined the expanding list of state and local jurisdictions to “ban-the-box” and limit employer access to a prospective employee’s criminal record. Ten other states (California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island and Vermont) have removed criminal history questions from job applications for private employers. The Fair Chance Act becomes effective June 7, 2018.

Under the act, an employer is prohibited from including any question on an employment application, inquiring either orally or in writing, receiving information through a criminal history background check, or otherwise obtaining information about an applicant’s “criminal record” until after initially determining the applicant is “otherwise qualified” for the position. A “criminal record” means any record about a citation or arrest for criminal conduct, including juvenile records. “Otherwise qualified” means the applicant meets the basic criteria for the position without consideration of a criminal record. Once the employer has initially determined the applicant is otherwise qualified, the employer may inquire into or obtain information about a criminal record.

An employer is also prohibited from advertising for a job in a way that excludes people with criminal records from applying. For example, ads that state “no felons” or “no criminal background” are prohibited. Additionally, an employer may not implement any policy or practice that automatically or categorically excludes individuals with a criminal record from consideration before initially determining whether the applicant is otherwise qualified. This includes rejecting an applicant for failure to disclose a criminal record before that initial determination.

The Fair Chance Act does not apply to: (1) employers hiring a person who will or may have unsupervised access to children under the age of 18 or to statutorily-defined vulnerable persons; (2) employers, including a financial institution, who are expressly permitted or required under any federal or state law to inquire into, consider, or rely on information about an applicant’s or employee’s criminal record for employment

purposes; (3) law enforcement agencies; (4) employers seeking nonemployee volunteers; or (5) any entity required to comply with the SEC's rules or regulations for self-regulatory organizations. Employers are not required to provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant or employee with a criminal record or who is facing pending criminal charges.

The Fair Chance Act does not create a private right of action to seek damages or remedies of any kind. Instead, the state's attorney general has the exclusive enforcement authority. In doing so, the attorney general is required to use a "stepped enforcement approach," by first educating violators, then warning them, then taking legal, including administrative, action. Maximum penalties are set at: (1) a notice of violation and offer of agency assistance for the first violation; (2) a penalty of up to \$750 for the second; and (3) a penalty of up to \$1,000 for each subsequent violation.

Notably, Washington's new Fair Chance Act does not preempt local laws that provide additional protections to applicants or employees with criminal records, nor does it prohibit local governments from enacting greater protections for such applicants or employees in the future. For example, effective June 14, 2018, Spokane's own ban-the-box law takes effect, which is substantially similar to the Fair Chance Act.

Washington employers should review their hiring policies and practices to ensure they comport with the Fair Chance Act (as well as Spokane's ordinance if operating within the city). Contact your Vorys lawyer if you have questions about pre-employment hiring inquiries.