

June 30, 2015

New York City “Bans the Box”

On June 29, 2015, New York City enacted a “ban-the-box” law that prohibits public and private employers from asking about a job applicant’s criminal history until after they make a conditional offer of employment. New York City joins over 70 state and local jurisdictions that already ban or regulate employer inquiries regarding applicants’ criminal histories.

The law makes it an unlawful discriminatory practice to “make any inquiry or statement related to the pending arrest or criminal conviction record” of any applicant until after the employer has extended a conditional offer of employment to the applicant. Specifically, prior to making a conditional offer of employment, New York City employers cannot (1) ask applicants in writing or orally about their criminal history or (2) search publically available records or consumer reports for the purpose of obtaining an applicant’s criminal background information.

Once a New York City employer extends a conditional offer of employment to an applicant, the employer may inquire into the applicant’s arrest or conviction record and deny employment on that basis, but must do so according to a three-step process outlined by the law. First, the employer must give the applicant a written copy of the inquiry regarding his or her criminal history. The form and content of this inquiry will be determined by the New York City Commission on Human Rights (the “Commission”). Second, the employer must perform the analysis of the applicant’s criminal history already required under New York State law, and decide whether the applicant’s criminal history precludes him from the job at issue. This analysis must be performed under Article 23-A of the New York State Corrections Law, which states that an applicant

*747 Third Avenue
New York, N. Y. 10017
Tel: 212-758-7600
www.cfk-law.com*

cannot be rejected due to his or her criminal conviction unless (1) there is a “direct relationship” between the applicant’s criminal conviction and the employment sought or (2) the applicant would involve an “unreasonable risk” to property or the safety and welfare of specific individuals or the general public. Article 23-A also specifies eight factors, such as applicant’s age at the time of conviction, that must be considered in the analysis. Under the New York City legislation, if the employer determines that an applicant’s criminal history disqualifies him or her from employment in the position sought, the employer must provide the applicant with a written copy of the analysis described above, including any supporting documentation and the employer’s rationale for denying employment. Lastly, the employer must allow the applicant to respond to the employer’s analysis and decision to rescind the offer of employment. The applicant must be given no less than three business days to respond, during which time the employer must hold the position open for the applicant. The statute does not require the employer to change its decision based on the applicant’s response; however, this exchange should be handled carefully, because the employer’s failure to recognize, for example, relevant factual errors that the applicant identified in his or her response could give rise to a discrimination claim under state or city law.

Employers are also prohibited from publishing any job posting that states or implies any limitation in employment based on an applicant’s arrest or criminal conviction. The law does not appear to affect how an employer responds to the arrest or conviction of a current employee.

The law applies to all public and private employers with four or more employees. In determining whether an employer is covered, the law explicitly states that all independent contractors must be counted as employees. The law does not apply, however, where an employer is required by state, federal, or local law to conduct a criminal background check or prohibited by such laws from hiring applicants with criminal histories.

Applicants who believe their rights under the law have been violated can file a civil lawsuit against the employer or an administrative claim with

the Commission. Available remedies include compensatory damages, punitive damages, and injunctive relief.

The law does not take effect until September 27, 2015. However, employers should begin the process of revising their hiring practices to comply with the law. For example, employers should remove all questions pertaining to criminal history from written employment applications and instruct interviewers that they are no longer permitted to ask applicants about their criminal histories. In addition, employers should familiarize themselves with the three step process outlined above for rejecting an applicant due to his or her criminal history.

If you have any questions about revising your hiring practices in light of the new law, please contact Amanda M. Baker at (212) 758-7724, or any other attorney at the Firm.

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