California Just Banned the Box!

Insights
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On October 14, Governor Brown signed AB 1008 to prohibit most public and private employers with five or more employees from asking applicants about criminal conviction histories until after a conditional offer of employment has been made. The new law will become effective January 1, 2018.

What is "Ban the Box?"
One of the more interesting and prolific issues in employment law in recent years has been state and municipal proposals to restrict when an employer may consider criminal conviction history information concerning applicants for employment.

In general, proponents of these efforts argue that the "stigma" of previous criminal convictions can unfairly hold individuals back from meaningful employment and economic advancement. They note that approximately 7 million Californians (nearly 1 in 3 adults) have an arrest or conviction record that may become a barrier to employment.

Employers have concerns about hiring individuals with criminal conviction histories, which is why many employers ask about criminal convictions on employment applications and run criminal background checks on applicants for employment. For many employers, this is a response to an increase in litigation against employers for negligent hiring or retention. When an employee harms another employee or a member of the public, the employer may be sued for negligence for hiring that employee in the first place, or retaining that employee (especially if that person has a prior criminal history).

Nationally, 29 states and over 150 cities and counties have enacted some type of "ban the box" proposal. Some of these laws applyonly to government sector employers when they hire their own employees. This includes California, which in 2013 enacted a law (Labor Code Section 432.9) that applies to state agencies, cities and counties, and special districts. That law prohibits public employers from asking about conviction history until the employer has determined that the applicant meets the minimum qualifications for the job.

However, nine states and 15 cities have gone further and adopted "ban the box" laws that apply to private sector employers. In California, this includes San Francisco and Los Angeles, which have adopted their own local ordinances to "ban the box."

Assembly Bill 1008 (McCarty) – The Basics

On October 14, Governor Brown signed Assembly Bill 1008 by Assemblymember Kevin McCarty (D-Sacramento). Largely based on the City of Los Angeles "ban the box" ordinance, AB 1008 applies to public and private employers with ***five or more*** employees.

AB 1008 repeals existing Labor Code Section 432.9 (which, as discussed above, only applies to public employers) and would instead enact a new provision to the Fair Employment and Housing Act (FEHA) in the Government Code to apply to both public and private employers. Like the Los Angeles ordinance, AB 1008 generally bars criminal conviction history inquiries until ***after*** a conditional offer of employment has been made. If an employer wants to deny an applicant the position based after reviewing the conviction history, the employer must make an individualized assessment and provide the applicant with an opportunity to respond before making a final decision

No More Questions About Conviction History on Employment Applications
AB 1008 prohibits an employer from including on any application, before the employer makes a conditional offer of employment, any question that seeks the disclosure of the applicant's conviction history.

For many California employers, this will necessitate revising initial employment applications to remove "boxes" or questions that ask applicants to disclose criminal convictions. If the employer has a "supplemental" application or form that is only provided to applicants ***after*** a conditional offer of employment has been made, that document may continue to ask about conviction history.

No Inquiries About Conviction History Until After Conditional Offer of Employment
The new law prohibits an employer from "inquiring into or considering" the conviction history of the applicant until after a conditional offer of employment has been made. This means not asking questions of the applicant about conviction history during the hiring and interview process, until an offer of employment is made. And this means not utilizing background checks that reveal criminal conviction history until after an offer is made.

"Fair Chance" Process
Under AB 1008, if an employer does decide to deny employment to the applicant solely or in part because if the applicant's conviction history, the employer must embark on a specified process. In some local ordinances, this procedure is referred to as a "fair chance" process.

First, employers must make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In making this assessment, the employer is required to consider (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and completion of the sentence, and (3) the nature of the job held or sought.

Second, if the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant for employment, the employer must notify the applicant in writing. Notably (and unlike the Los Angeles ordinance, which requires employers to complete a lengthy

form and provide it to the applicant), AB 1008 states that the notification may, but is not required to, justify or explain the employer's reason for making the preliminary decision. However, the notification must contain (1) notice of the disqualifying conviction that is a basis for the preliminary decision, (2) a copy of the conviction history, if any, and (3) an explanation of the applicant's right to respond before the decision becomes final and the deadline by which to respond.

Third, after the employer provides the written notification, the applicant shall have at least ***five*** business days to respond before the employer may make a final decision. The applicant's response may include submission of evidence challenging the accuracy of the conviction history, evidence of rehabilitation or mitigating circumstances, or both. If the applicant notifies the employer that he or she disputes the accuracy of the conviction history and is obtaining evidence to support that assertion, the applicant shall have five additional business days to respond to the notice.

Finally, if (after receiving the response from the applicant), the employer makes a final decision to deny employment, it must notify the applicant in writing. This notice must notify the applicant of (1) the final denial or disqualification, (2) any existing procedure the employer has for the applicant to challenge the decision or request reconsideration, and (3) the right to file a complaint with the Department of Fair Employment and Housing (DFEH).

Exceptions

The requirements of AB 1008 do not apply to (1) positions for which a state or local agency is required by law to conduct a conviction history background check, (2) criminal justice agencies, (3) farm labor contractors, and (4) employers required by state, federal, or local law to conduct background checks or restrict employment based on criminal history.

No Relief for Employers From Negligence Liability

As discussed above, one of the reasons employers seek to obtain conviction history about applicants is concern over liability for negligent hiring or retention. During the legislative process, several stakeholders sought an amendment that would have afforded employers some form of qualified immunity for such claims in situations where they took a chance on an applicant with a criminal conviction history. However, no such amendment was taken. Therefore, employers may find themselves in the uncomfortable position of choosing between not hiring an applicant with a conviction history (and risking a lawsuit for employment discrimination) and hiring the individual (and risking a negligent hiring or retention lawsuit if there is a resulting incident or problem).

Additional Litigation Concerns

Moreover, employers expressed concern that the very structure of the bill will engender more lawsuits against employers. If an employer has previously made an offer of employment to an applicant, and only revokes that offer ***after*** reviewing the criminal conviction history, it may be very clear what the basis is for the employer's action. The employer may have painted themselves into a "box" that would make it difficult to offer any other justifiable reason for the decision. Some employers have raised concerns that this simply invites litigation against employers. Moreover, employers have expressed significant concern about the provision of AB 1008 that requires the final

employers have expressed significant concern about the provision of AB 1008 that requires the final notice to an applicant advise them of their right to go file a complaint with DFEH. Employers have cautioned that this is leading the applicant "to the courthouse steps" and will almost certainly result in increased litigation against employers.

Relationship with Local "Ban the Box" Ordinances?

Now that AB 1008 has been signed into law, does this mean it supersedes local ordinances, like those in San Francisco or Los Angeles? Unfortunately, no. AB 1008 specifically provides that it does not affect other rights and remedies that an applicant may have under any other law, "including any local ordinance."

Recent FEHC Regulations

AB 1008 is not the only development in California concerning the use of criminal conviction history information in employment. As we informed you earlier this year, the California Fair Employment and Housing Council (FEHC) enacted new regulations on the use of criminal history information that went into effect on July 1, 2017. These regulations provide that the use of criminal history information may have a "disparate impact" on individuals in protected classifications and may give rise to liability under FEHA. The regulations set forth new standards that must be met and a complex procedural process that must be followed when considering criminal convictions in hiring, with most of the burden falling on employers to satisfy certain requirements of the law.

The interplay between the new FEHC regulations and AB 1008 may create confusion for employers. On the one hand, AB 1008 uses many of the same terms and mentions an "individualized assessment," much like the FEHC regulations. However, the regulations and AB 1008 represent fundamentally different approaches to this issue. AB 1008 seeks to establish a ***process*** which employers must utilize if they seek to rely on criminal conviction history. The FEHC regulations provide a ***content*** requirement that allows an applicant to challenge an employer's decision not to hire (i.e. not "job-related" or "consistent with business necessity"). These differences and distinctions may lead to employer confusion, which may lead to mistakes, which may lead to more lawsuits against employers.

Staff at the Department of Fair Employment and Housing have acknowledged that there may be a need to revisit the FEHC regulations in light of the enactment of AB 1008. However, there has been no timeline provided for such a process.

What Should Employers Do Next?

AB 1008 goes into effect on January 1, 2018. Prior to that date, employers should carefully review their employment applications and hiring processes to ensure compliance with the law's requirements – specifically not seeking or relying on criminal history information until *after* a conditional offer of employment has been made. Employers that wish to rely on criminal history information will need to understand and follow the specific individualized assessment and employee notice requirements contained in the new law. For more information about this new law, please contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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