

SOUTH CAROLINA'S NEW EXPUNGEMENT LAW COULD INCREASE APPLICANT POOL

Insights
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In an effort to increase the state's potential workforce, the South Carolina General Assembly passed legislation last week that will expand the state's current expungement law and allow individuals to more easily remove criminal convictions from their records. The hope is that prospective employees with low-level crimes on their records will no longer be discouraged from applying for jobs; this, then, should make it easier for employers to recruit qualified workers. What do South Carolina employers need to know about this new law?

NEW LAW GOES ONE STEP BEYOND BAN-THE-BOX

Around the country, many states and localities have recently passed "ban-the-box" laws which generally prohibit employers from asking applicants about their criminal record on job applications. Employers covered by these laws are usually allowed to ask about criminal records only after an applicant is selected for an interview or given a conditional offer of employment. Proponents say these laws give offenders an improved chance to reenter the workforce, as employers are forced to first consider an applicant's qualifications and skills before being swayed by the stigma of a criminal record.

While South Carolina does not have a ban-the-box law, the state legislature has instead taken it one step further: the new law will make it easier for persons to erase certain convictions from their records. Current law permits persons to expunge a first-offense, low-level crime carrying a

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sentence of 30 days or less from their record following a period of good behavior. The new law removes the “first-offense” requirement and also allows persons to erase multiple convictions arising out of the same sentencing hearing if they are “closely connected.” Significantly, the law also allows offenders to expunge first-offense simple drug possession and possession of drugs with intent to distribute crimes. The law applies retroactively to those offenses committed prior to the law’s passage.

The bill was backed by several prominent business groups, including many local chambers of commerce. Those groups said the legislation was necessary to expand the potential workforce in the state by removing employment barriers for thousands of offenders. “South Carolina must grow its workforce if our state is to experience continued economic growth and prosperity,” said Greenville Chamber President and CEO Carlos Phillips. “Simple mistakes, including low-level nonviolent offenses, should not result in lifelong sentences.”

The bill was originally vetoed by Governor Henry McMaster on May 19; he said he was unwilling to sign legislation that would have the practical effect of erasing large categories of criminal records and telling employers what they can and cannot consider when making hiring decisions. Both houses of the General Assembly, however, overrode Governor McMaster’s veto by overwhelming margins and passed the legislation on June 27. It will take effect six months after passage, on December 27, 2018.

WHAT DOES THIS MEAN FOR EMPLOYERS?

From a practical standpoint, South Carolina job applicants with crimes expunged from their record under the new law will most likely not disclose that fact on a job application or during the hiring process. Employers also will be unable to discover the offenses on a commercial criminal background check.

However, employers should be relieved to know that the new legislation provides immunity to employers with respect to any administrative claim or lawsuit related to an employee’s expunged conviction. These often arise in negligent hiring, retention, and supervision claims against employers.

The law makes clear, though, that if employers somehow become aware of an employee's expunged offense, they may not use this information adversely against the employee. Therefore, employers should refrain from asking applicants to disclose any expunged offenses on applications or during the hiring process so they do not run afoul of the new law. Although the law does not set out any penalties or specifically allow individuals to sue employers for alleged violations, these issues may develop in the years to come.

If you would like a review of your hiring materials or processes for compliance with the law, contact any attorney in the Columbia office of Fisher Phillips or your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.