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“Ban the Box” Amendment Strengthens Applicant Privacy by Further Restricting Employers’ Ability to Request Criminal History

BY AMY CONDON • MAY 1, 2018

As part of [Senate Bill 2371](#), “An Act Relative to Criminal Justice Reform,” an employer’s ability to ask an applicant about their criminal past was recently further constrained. The “Ban the Box” law was originally enacted in 2010, and prohibited employers from:

1. Asking about an applicant’s criminal history in the initial written application, and
2. Asking an applicant about (a) “an arrest, detention, or disposition regarding any violation of law in which no conviction resulted,” (b) a first conviction of a misdemeanor for “drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace,” or (c) any misdemeanor where the date of conviction or completion of incarceration occurred five years or more prior to the date of the application, unless the applicant had been convicted of any offense within the prior five year period.

MISDEMEANOR CONVICTIONS LESS AVAILABLE TO EMPLOYERS

This new amendment, which goes into effect on October 13, 2018, further limits an employer’s ability to obtain arrest and conviction information on a prospective employee. Specifically, the prohibition on asking for information about misdemeanor convictions was further strengthened, and employers may only ask for misdemeanor conviction information that occurred three years, as opposed to five years, prior to the date of application, unless the applicant was convicted of any crime within the prior three years.

SEALED OR EXPUNGED RECORDS UNAVAILABLE

The new amendment also added a new restriction, namely, employers are prohibited from asking applicants about any criminal records that were sealed or expunged.

MANDATORY NOTICE LANGUAGE ADDED

Lastly, if an employer is asking for criminal history information during the application process, the application must include the following language “an applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer ‘no record’ to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications or convictions.”

Client Tip: Employers should consult with counsel on the implications of these new provisions on their respective hiring processes. As these amendments apply to both oral and written requests for criminal history information, employers should also ensure training is provided to the appropriate human resources staff.