ALERTS

New York City to Ban Employer Pre-Offer Inquiries About Applicant Criminal Records

July 2, 2015

On June 10, 2015, by a 45-5 margin, the New York City Council passed a "ban the box" law prohibiting employers from asking about a job applicant's criminal record prior to extending a conditional offer of employment. New York City Mayor Bill de Blasio signed the bill on June 29, 2015, and the new law will go into effect on Oct. 27, 2015.

The bill amends the New York City Human Rights Law ("NYCHRL"), expanding its protections for job applicants and employees with criminal convictions and arrest records.

The new law will prohibit employers from making "any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment" until after the employer has extended a conditional offer of employment to the applicant. These limitations are broadly defined. "Any inquiry" is defined as any "question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purposes of obtaining an applicant's criminal background information." "[A]ny statement" is defined as "a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check." The new law will also bar employers from creating a job advertisement which expresses "directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction."

An employer will not be permitted to inquire about an applicant's arrest or conviction record until after extending a conditional offer of employment; however, the law includes specific procedures the employer must follow prior to taking any adverse action based on the inquiry. Specifically:

The employer must provide a written copy of the inquiry to the applicant in a manner to be determined by the New York City Human Rights Commission ("NYCHRC").

- If the inquiry reveals a criminal conviction, the employer must perform an analysis of the applicant under Article 23-A of the New York State Correction Law ("Article 23-A"). If the employer then decides to revoke the offer of employment, the employer must provide a written copy of the analysis to the applicant. Article 23-A requires that an employer must show a "direct relationship between one or more of the criminal offenses" and the "employment sought or held by the individual" before taking adverse action against an individual due to a criminal conviction. Article 23-A lays out eight factors an employer must consider in making a determination about a "direct relationship," including the "specific duties and responsibilities necessarily related to the … employment sought or held by the person."[1] The written analysis, which will be given to the applicant in a manner determined by the NYCHRC, will include "supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant."

- Before taking any adverse action, the employer must give the applicant a reasonable time to respond to the inquiry and analysis, which shall be no less than three business days. During this time, the employer must hold the position open for the applicant.

- The prohibition on inquiring about criminal history does not apply if a law or a self-regulatory organization (as defined in Section 3(a)(26) of the Securities Exchange Act of 1934 (e.g., FINRA)) bars employment based on criminal history or requires an employer to conduct a criminal background check for employment purposes.

The new law also expands the protections under the NYCHRL for employees with criminal convictions or arrest records. The NYCHRL will now provide that it is "an unlawful discriminatory practice" for an employer to deny employment to any person or take adverse action against any employee because of a criminal conviction when the denial or adverse

action is in violation of Article 23-A. It also will be an unlawful discriminatory practice for any "person" to make any inquiry or act adversely because of any arrest or criminal accusation of an individual which is not currently pending against that individual or has been resolved in favor of the individual. Because the new law amends the NYCHRL, employers that violate the law may be liable for compensatory and punitive damages, as well as attorney's fees and costs.

The new law represents a significant change in the process employers in New York City must undertake when conducting criminal history background checks. Employers need to consider city, state and federal laws when taking adverse employment actions based on an arrest or a criminal conviction. Most importantly, employers must not inquire about convictions until after a conditional job offer and must make sure to perform the required Article 23-A analysis before revoking a conditional job offer based on a criminal conviction. In light of New York City's recent ban on the use of credit information in making employment decisions,[2] New York City employers should review their hiring processes and modify them to ensure they are compliant with these new laws.

Authored by Mark E. Brossman, Ronald E. Richman, Holly H. Weiss, Scott A. Gold and Adam B. Gartner.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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[1] The eight factors are: "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."

[2] See our April 30, 2015 *Alert*, "New York City to Restrict Employers' Use of Credit History in Employment Decisions."

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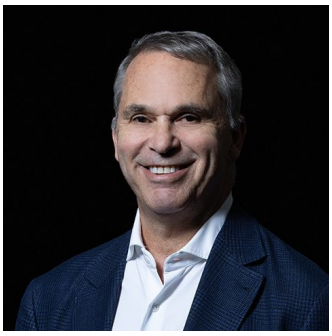

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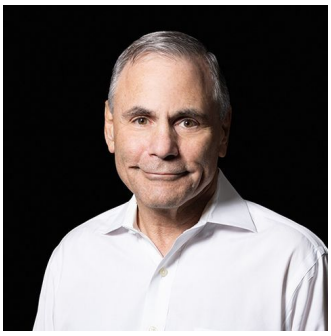

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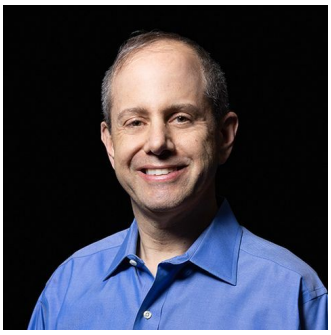

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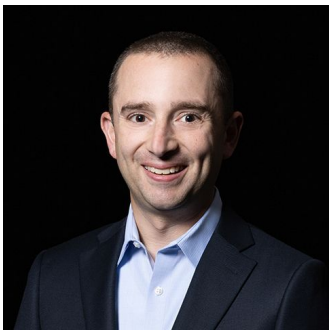

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