

Portland Passes Strict New "Ban The Box" Law

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The Portland City Council passed its own version of a "Ban The Box" law right before the Thanksgiving holiday, which will require most businesses operating in the city to adjust their hiring practices. Under the strict new rules, covered Portland businesses will be prohibited from asking prospective job applicants about their criminal history until after a conditional job offer has been made. This new law will be effective July 1, 2016.

Goes Much Further Than Impending Oregon Law

Oregon passed a more traditional version of a Ban The Box law this past legislative session, barring employers from asking applicants about criminal histories on job applications (the referenced "box" that is banned is the "yes or no" box an applicant must check in response to an inquiry about criminal history). Beginning January 1, 2016, Oregon businesses cannot include such a question during preliminary hiring stages, but they do have permission to ask about an applicant's criminal history during the interview process.

Under Oregon's new law, employers who are required by federal, state, or local laws to consider an applicant's criminal history (e.g., schools, law enforcement, criminal justice, etc.) are still permitted to make such inquiries. But the majority of Oregon employers will need to review their job applications to make sure the offending questions are stricken.

Portland's New Law: One Step Further

Portland's law goes one very big step further. Not only will covered businesses be barred from including such questions on their job applications, but such questions cannot be asked at the job interview or at any point before a conditional job offer is made.

Under the new law, employers cannot inquire about or even access an applicant's criminal history from any other source before making a "conditional offer of employment." This is defined as being any offer that is conditioned solely on the results of the criminal background inquiry or some other contingency that is expressly communicated to the applicant at the time of the offer.

If, after making the conditional job offer, an employer learns of an applicant's criminal background, the new law states that an employer can rescind the offer after determining that rejecting the applicant would be job related and consistent with business necessity.

Very small businesses are excluded from coverage, as the new law does not cover businesses with fewer than six employees. However, any workplace with six or more employees is covered so long as they have workers who perform a majority of their time within the City of Portland (including full-time, part-time, temporary, or seasonal workers).

Just as with Oregon's Ban the Box law, certain businesses are excluded from coverage when hiring certain positions, including those hiring for law enforcement, criminal justice, and positions working with children, the elderly, people with disabilities, and other groups considered vulnerable.

The ordinance states that Oregon's Bureau of Labor and Industries (BOLI) will work with the City of Portland to enforce the new law; stay tuned for fine-tuning of the enforcing regulations to determine possible punishments for noncompliance.

Five Things Portland Employers Need To Do To Comply

If there's any good news, it's that you have time before Portland's law goes into effect to adjust your hiring processes to this new reality. The new law will not kick in until July 1, 2016. Here are five steps you should take to make sure you come into compliance:

1. Amend Your Job Applications

First, if you have not done so already, review your standard job application to ensure that questions about criminal history are removed. All businesses in Oregon will be required to eliminate these inquiries starting January 1.

2. Train Your Hiring Managers On Avoiding Illegal Inquiries

Before July 1, make sure your hiring managers know that criminal history should be added to list of prohibited topics not to be discussed at the interview stages (along with such obvious topics as religion, family status, age, etc.).

Instruct your managers on how they should react if an applicant volunteers information about criminal history in an off-topic response to an innocuous question. The best practice is usually deflecting the information, letting the applicant know that you hire based on skills, experience, and qualifications, that you will not consider that history in making your decision, and documenting the exchange.

3. Adjust Timing Of Background Checks

If your company's standard practice is to request a third party to conduct a background check on your applicants, make sure that you adjust the timing of these inquiries. They can now only be carried out after a conditional offer is made. You may even want to amend the authorization page signed by your applicants to make clear that a check will not be conducted until after an offer is made, or, if possible, wait to seek authorization until after you extend an offer.

4. Be Prepared To Conduct Individualized Assessments

You should start preparing now to deal with the inevitable situation where an applicant discloses a criminal background after an offer is made. Be prepared to make an individualized assessment of the situation to determine whether that particular applicant would be hireable for that particular position. The Portland ordinance requires you to consider:

the nature and seriousness of the criminal history;
the time elapsed since the most recent crime(s); and
the nature of the employment being sought.

Other factors worth considering include the number of occurrences of criminal wrongdoing, the applicant's age at the time of the crime(s), the applicant's entire work and educational history, and the employment references and recommendations describing the applicant's work history since the last crime occurred.


5. Document, Document, Document

Finally, make sure you step up your documentation efforts at all stages of the hiring process so you are in a position to prove compliance with the new law. You and your managers should provide a dated document to applicants informing them of the conditional job offer and the remaining hoops that need to be jumped through before the offer is finalized. Include the criminal background check and any other contingencies associated with the position.

If you decide to rescind the offer, you would be well served to create an internal document explaining your decision-making process. Make sure you address the factors identified above and document your reasons for coming to the conclusion to reject.

If you have any questions about this new law, or how it may affect your business, please contact your Fisher & Phillips attorney or one of the attorneys in our Portland office at 503.242.4262.

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

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