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Publications

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New California Law Further Restricts Employers' Use of Criminal Records

Labor & Employment Law Alert

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On October 10, 2013, California Governor Edmund G. Brown Jr. signed into law legislation that prohibits employers from inquiring or using information about job applicants' expunged criminal records. These new restrictions are scheduled to take effect January 1, 2014.

Restrictions On Use of Expunged Convictions

Currently in California, employers are prohibited from asking job applicants if they have been arrested or detained unless it resulted in a conviction, or have participated in or been referred to any pretrial or post-trial diversion programs. Cal. Lab. Code § 432.7(a). Employers are also prohibited from seeking out this information from any other source or considering it as a factor in determining any condition of employment including, hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment. *Id.*

Effective January 1, 2014, in addition to not being able to ask or use information about an applicant's arrests that did not result in conviction or participation in diversion programs, employers will also be prohibited from asking or using information about any convictions that have been "judicially dismissed or ordered sealed."

Exceptions

The current law allows employers to ask applicants and employees about arrests for which the individual is out on bail or on his or her own recognizance pending trial. Likewise, employers at health facilities may require that applicants for positions with regular access to patients or to drugs and medication disclose certain arrests as required by law. Cal. Health & Safety Code § 11590; Cal. Penal Code §290.

In addition to these exceptions, the new legislation added several exceptions when arrests and criminal convictions may be considered. The new law now allows employers to ask or use information about convictions in four instances that are job-related, including where: (1) the employer is required by law to obtain information regarding a conviction of an applicant; (2) the applicant would be required to

possess or use a firearm in the course of his or her employment; (3) an individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; and (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

Damages and Penalties

The recoverable damages and penalties for violations of the law remain the same: actual damages of no less than \$200, plus costs, and reasonable attorneys' fees. Employers found to have intentionally violated the law may also be found guilty of a misdemeanor punishable by a fine not to exceed \$500, and subject to treble damages of no less than \$500.

What Should California Employers Do?

California employers, whether public or private, individual or corporation, should carefully assess whether they fit into one of the exceptions allowing the use of arrests and criminal records. Otherwise, employers should revisit their hiring practices and revise their employment applications to instruct applicants not to disclose any information about convictions that have been expunged, judicially dismissed, or sealed to ensure compliance with the law.

For more information about the new restrictions on employer's use of criminal records in California, please contact Marian Zapata-Rossa at (602) 229-5447 / marian.zapata-rossa@quarles.com, Craig O'Loughlin at (602) 230-4613 / craig.oloughlin@quarles.com or your Quarles & Brady attorney.

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