

District of Columbia Enacts Ban-the-Box Legislation Limiting Employers' Criminal Background Inquiries on Applicants

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A new District of Columbia law prohibits employers from inquiring into a prospective employee's criminal conviction background on its application and before making a conditional offer of employment.

Under the Fair Criminal Record Screening Amendment Act of 2014 (Act Number A20-0422), signed by Mayor Vincent C. Gray on August 21, 2014, an employer may withdraw a conditional offer of employment to an applicant based on criminal conviction information only for a "legitimate business reason."

The reason must be reasonable in light of the six factors listed in the Act, including: 1) the specific duties and responsibilities related to the job sought, 2) the bearing the crime will have on the applicant's ability to perform his or her job duties, 3) the time elapsed since the occurrence of the criminal offense, 4) the age of the applicant at the time of the crime, 5) the frequency and seriousness of the crime, and 6) information produced by the applicant establishing rehabilitation or good conduct. Further, the law prohibits an employer from making such a conviction inquiry or conducting a criminal background check until after a conditional offer of employment is made. The new law, which amends the Re-entry Facilitation Amendment Act of 2012, likely will become effective in early October, after a 30-day period of Congressional review and publication in the District of Columbia Register.

Employers Covered

Under the Act, an "employer" is any person, company, corporation, firm, labor organization, or association that employs more than 10 employees in the District of Columbia.

An "applicant" is any person considered (or who requests to be considered for employment) by an employer. However, unpaid interns and independent contractors also are covered — the Act defines "employment" as any occupation, vocation, job, or work for pay, including temporary or seasonal work, contracted work, contingent work and work through the services of a temporary or other employment agency, or any form of vocational or educational training, with or without pay, where the physical location of the prospective employment is in whole or substantial part, within the District of Columbia.

Prohibitions

The new law prohibits employers from making an inquiry about, or requiring an applicant to disclose or reveal, a criminal conviction until after a conditional offer of employment has been made. However, the Act does not apply where a federal or D.C. law or regulation "requires" the consideration of an applicant's criminal history. It also does not apply to a position designated as part of a government program or obligation designed to employ those with criminal histories or to any facility or employer providing programs, services, or direct care to minors or vulnerable adults.

After a conditional offer is made and the employer obtains criminal conviction information, the conditional offer can be withdrawn only if the employer can establish that it has a "legitimate business reason" for doing so.

Employers may still attach additional "typical" conditions associated with the conditional offer, such as proof of eligibility to work or passing a pre-employment physical, so long as those conditions are expressly communicated

to the applicant at the time of the conditional offer.

Enforcement

If an applicant believes a conditional offer was withdrawn or an adverse action was taken based on a criminal conviction, he or she may request (within 30 days of the action) that the employer provide (within 30 days of receipt of the request) a copy of all records obtained by the employer in its consideration of the applicant and a notice that advises the applicant of the opportunity to file an administrative complaint with the Office of Human Rights. There is no private right of action available in court.

An employer found in violation of the law could face penalties of at least \$1,000 and as much as \$5,000, depending on the number of employees, of which half will be awarded to the complainant.

Next Steps

As many employment applications ask about prior convictions, employers with operations in the District should review their employment application materials and make any necessary revisions to remove questions about criminal background for positions that are not exempt from the Act. Employers also should review job descriptions and requirements carefully to determine whether any positions fall under one of the listed exceptions. Finally, employers should update offer letters, to clearly state the conditions for employment in addition to any post-offer conviction background check and/or inquiry.

If you have questions regarding this new law or need assistance in reviewing application materials and procedures to ensure compliance, please contact a member of our Background Checks practice, Garen E. Dodge, at DodgeG@jacksonlewis.com, Susan M. Corcoran, at Susan.Corcoran@jacksonlewis.com, Richard I. Greenberg, at GreenberR@jacksonlewis.com, or the Jackson Lewis attorney with whom you regularly work.

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