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PHILADELPHIA TIGHTENS BAN THE BOX ORDINANCE

By Steven K. Ludwig

Philadelphia is making it more difficult for employers to use criminal history record information when offering employment to new employees. On March 14, 2016, amendments to the Fair Criminal Records Screening Standards Ordinance -- Philadelphia's "Ban the Box" law -- go into effect. These changes include:

- **Almost all employers are now covered.** While the original law, which became effective in 2012, applied to private employers with ten or more employees, the law now applies to all employers, even those with one employee. However, there is an exclusion for employees who provide domestic services in the private home in which the employer resides.
- **It is unlawful to ask about previous criminal convictions on the employment application.** Inquiries about criminal history only can be made after a conditional offer of employment has been made to the applicant.
- **An applicant's voluntary disclosure about the applicant's criminal history record opens the door to inquiries about the criminal history record during the application process.** If an applicant *voluntarily* discloses information regarding the applicant's criminal history record, the employer is permitted to discuss the criminal conviction disclosed by the applicant without waiting to make a conditional offer.
- **An employer is permitted to give notice of its intent to conduct a criminal background check after a conditional offer is made.** Even

though most employers cannot ask about a criminal history record at the time of the application, an employer may still advise the prospective applicant that the employer intends to conduct a criminal history background check after any conditional offer is made. The notice must be concise, accurate, made in good faith, and must state that any consideration of the background check will be tailored to the requirements of the job.

- **It is unlawful to maintain a policy of automatically excluding any applicant with a criminal conviction from a job or class of jobs.** An employer can only reject an applicant if the criminal history bears such a relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers and the exclusion of the applicant is compelled by business necessity. This assessment is only permitted after a review of the applicant's specific record and the particular job being sought and an individualized assessment of the risk presented. The assessment must include:
 - The nature of the offense;
 - The time that has passed since the offense;
 - The applicant's employment history before and after the offense and any period of incarceration;

- The particular duties of the job being sought;
 - Any character or employment references provided by the applicant; and
 - Any evidence of the applicant’s rehabilitation since the conviction.
- **Stale convictions cannot be considered.** The employer can only consider criminal convictions records that occur within seven years of the date of inquiry. Any period of incarceration is not included in the calculation of the seven year period.
 - **Written notice of rejection required.** If an employer rejects an applicant for a job opening based in whole or in part on criminal history record information, the employer is required to notify the applicant in writing of its decision, the basis for the decision, and must provide the applicant with a copy of the criminal history record report. The employer then must allow the applicant 10 business days to provide evidence of the inaccuracy of the information or to provide an explanation.
 - **Exemption where inquiry required or mandated by other law.** The ban-the box prohibitions do not apply if the employer is specifically authorized or mandated by other applicable law or regulation to make such an inquiry or to exclude employment.
 - **Enforcement and remedies.** The Philadelphia Commission on Human Relations (PCHR) now enforces this law. It is empowered to issue an

order directing an employer to redress any harm suffered by a complainant. This includes issuing a cease and desist order; securing injunctive relief; and directing the payment of compensatory damages, punitive damages not to exceed \$2,000 per violation, and reasonable attorney’s fees.

- **Private right of action.** After the exhaustion of administrative remedies, complainant can directly file suit.
- **Summary of law posting requirement.** All employers are required to post a summary of the law in a conspicuous place on the employer’s website **and** its premises. While the PCHR is responsible for creating the poster and issuing regulations, it has not yet done so.

In order to avoid liability, Philadelphia employers need to assess whether other laws or regulations provide an exemption to Philadelphia’s requirements (but otherwise comply with federal and state laws governing the use of criminal history record information). If a Philadelphia employer decides to utilize criminal history record information in its employment determination, it must carefully stage how and when this information is obtained, utilized, and communicated in order to adhere to the law’s exacting requirements.

If you have any questions regarding this alert, please contact Steven K. Ludwig at 215.299.2164 or sludwig@foxrothschild.com or a member of Fox Rothschild’s Labor and Employment Department.

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