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Proposed Rules to Implement Job Assistance Ordinance and Request for Comment

By Jared Van Kirk on 9.16.13 | Posted in Employment Law

The Seattle Office of Civil Rights has recently issued proposed rules to implement the Job Assistance Ordinance, which limits the consideration of criminal history information in hiring and employment decisions within the City of Seattle. See my previous post on the topic HERE. The Office of Civil Rights is seeking public comment on these proposed rules.

In many ways the proposed rules hew closely to the language of the ordinance and do not significantly alter the law or compliance burden. However, in a few areas the proposed rules differ from the ordinance in ways that are important to the hospitality industry.

The first area of concern relates to the exemption of positions whose job duties include "security" services, which are not covered by the ordinance. For example, questions have been raised about various positions in a hotel that have security functions and whether they would be considered exempt, such as night managers who are directly responsible for managing security situations in hours of lean staffing. The proposed rules take a strict view of a "security" position that would not cover non-traditional security employees. Specifically, the proposed rules state that "security" includes any person who is required to be licensed as a "security guard" under Washington State law and who would typically be referred to as a security officer or guard, patrol service officer or guard, armed escort or bodyguard, armored vehicle guard, burglar alarm response runner, or crowd control officer or guard (these terms and the State licensing requirement come from the Washington statute RCW 18.170). This narrow definition would render the "security" exemption inapplicable to many if not most hotel employees who might be thought to perform security functions.

The second area of concern is the proposed rule's definition of "verifiable information" of rehabilitation or good conduct that an employer should consider before deciding it has a "legitimate business reason" to make an adverse employment decision based on criminal history information. The term "verifiable information," though vague, seemed to refer to information that could be checked—like work experience, certificates, diplomas and the like—and not to mere statements from an applicant or employee. However, the Office of Civil Rights believes differently. The proposed definition of "verifiable information" includes "any" information produced by the applicant or employee related to rehabilitation or good conduct,

and specifically lists as examples “a written or oral statement” from the applicant, law enforcement or probation officer, member of the clergy, counselor, therapist, social worker, or member of a community or volunteer organization. Thus, under the proposed rules an employer would generally have to consider all applicant or employee statements of good conduct and rehabilitation when determining whether it had a “legitimate business reason” to make an adverse employment decision based on criminal history information.

The third issue is that the proposed rules make a technical change to the definition of “legitimate business reason” that requires the consideration of individualized factors in all circumstances prior to an adverse employment decision. Under the ordinance, a “legitimate business reason” was one of two things:

1. a good faith belief that the criminal conduct would have a negative impact on the applicant or employee’s fitness or ability to perform the position or
2. a good faith belief that the criminal conduct will harm or cause injury to people, property, or business assets, after considering specified individualized information about the criminal history and the applicant or employee.

Under the proposed rules, however, the definition of “legitimate business reason” has been changed to require consideration of individualized information before reaching either type good faith belief. In other words, under the proposed rules an employer cannot reach a good faith belief that the criminal conduct would have a negative impact on the applicant or employee’s fitness or ability to perform the position without first considering individualized information. Although it is generally good practice to consider individualized factors in all cases, regardless of the technical requirements of the ordinance, the proposed rules would now require this individualized consideration in all cases.

Finally, the proposed rules are disappointing in what they do not do. Specifically, the proposed rules to not attempt to further define or explain the contours of the two types of “legitimate business reason” noted above. What is a “negative impact” on “fitness or ability to perform the position”? What does it mean to believe that past criminal conduct will “harm or cause injury to” people, property, or business assets? What are “business assets” in this context? Does that term include assets other than physical property, such as public good will? These questions and others remain unanswered in the proposed rules.

Please contact me or Greg if you have questions.