“Ban the Box” Comes to Illinois: Employers Must Now Revise Hiring Practices and Employment Applications

Labor & Employment Law Update

By Jeffrey Risch on July 15, 2014

The Illinois “Job Opportunities for Qualified Applicants Act” has been approved by the Illinois legislature. It was sent to Governor Quinn on June 27, 2014, and he is expected to sign it into law.

Once signed (or if the Governor doesn’t veto it by August 27, 2014), the Act would go into effect January 1, 2015. Illinois would become the fifth state on a growing list of states (currently Massachusetts, Rhode Island, Minnesota and Hawaii) to enact “ban the box” legislation that applies to public and private employers. Another five states (California, Colorado, Connecticut, Maryland and New Mexico) have laws prohibiting state government employers from asking about conviction records. Additionally, approximately 50 cities and counties throughout the United States have similar ordinances that apply to the municipalities and, in some cases, vendors who do business with those municipalities.

In anticipation of the new Illinois law, and the trend among states to adopt such laws, employers should prepare to review and, if necessary, modify their job applications and hiring policies and procedures to ensure compliance with the Act.

The Act applies to employers with 15 or more employees or employment agencies working on behalf of such employers. It forbids those employers and employment agencies from inquiring about a job applicant’s criminal record or criminal history prior to the applicant being selected for an interview or, if there is no interview, prior to a conditional offer of employment.

Once an applicant is selected for an interview or receives a conditional offer of employment, the employer may make inquiries into the criminal record or history, including conducting a criminal background check. That is, they can do so without violating the Job Opportunities for Qualified Applicants Act. Employers should be aware that such inquiries still may run afoul of Title VII and the Illinois Human Rights Act, depending on the position in question – consideration of conviction records still must be job related and consistent with business necessity.

The Job Opportunities for Qualified Applicants Act does contain three exceptions. First, the Act does not apply to positions from which federal or state laws require the exclusion of applicants with certain criminal convictions.

Second, the Act does not apply to positions that require a standard fidelity bond or equivalent bond and an applicant's conviction on one or more specified criminal offenses would disqualify the applicant from obtaining such a bond. In that case, the employer may include a question during the application process whether the applicant has ever been convicted of any of those offenses.

The third exception is for applications for positions that are licensed by the Emergency Medical Services Systems Act (210 ILCS 50/1 *et seq.*).

Employers should note that they are allowed to notify applicants in writing, before or during the application process, of specific offenses that will disqualify the applicant from employment in a particular position due to federal or state law or the employer's policy. Again, however, compliance with the Job Opportunities for Qualified Applicants Act may not insulate an employer from scrutiny by the EEOC, the Illinois Department of Human Rights ("IDHR"), or other agencies that investigate alleged discrimination – they may find such inquiries not to be job related and consistent with business necessity.

Potentially complicating matters is that the Job Opportunities for Qualified Applicants Act will be enforced by the Illinois Department of Labor ("IDOL"), not the IDHR.

The IDOL is authorized by the Job Opportunities for Qualified Applicants Act to investigate alleged violations and impose the following civil penalties:

For the first violation, the IDOL will issue a written warning requiring compliance within 30 days and a notice that non-compliance and/or further violations may lead to additional penalties.

For a second violation, or failure to remedy the first violation within 30 days, there is a civil penalty of up to $500.

For the third violation, or failure to remedy the first violation within 60 days, there is a civil penalty of up to $1,500.

For any subsequent violations, or failure to remedy the first violation within 90 days, there is a civil penalty of up to $1,500 for **every 30 days that pass without compliance**.

The Act does not contain a private right of action; that is, an applicant cannot (yet) sue an employer for a violation of the Act. The applicant will have to make a claim to the IDOL, which will investigate. The fines collected will be used only to fund enforcement of the Act, so employers can expect the IDOL to be aggressive in its enforcement in order to increase its resources to enforce the Act.

The Act also empowers the IDOL to adopt rules and regulations to administer the Act. That has not happened yet, of course; but continue to follow the blog for updates on that issue.