FDIC Publishes Final Rule on Section 19

Labor & Employment Law Update

on August 16, 2018

On August 3, 2018, the Federal Deposit Insurance Corporation (FDIC) published its final rule on proposed modifications to the Statement of Policy under Section 19 of the Federal Deposit Insurance Act. Section 19 prohibits, without prior written consent from the FDIC, the employment of any person who has either been convicted of, or who has entered a pretrial diversion program (program entry) for, a crime involving dishonesty, breach of trust or money laundering.

Certain modifications in the final rule are intended to expand the FDIC's *de minimis* criteria which obviate the need for a consent application. Currently, a covered offense is deemed *de minimis* if: 1) there is only one conviction or program entry; 2) the offense was punishable by imprisonment for a term of one year or less and/or a fine of $2,500 or less and the individual served three days or less of jail time; 3) the conviction or program entry was entered at least five years prior to the application; and 4) the offense did not involve a bank or insured credit union.

Pursuant to the new rule, not only will "jail time" be more specifically defined (to include significant restraint on individual's freedom of movement including confinement to a facility), but the following additional *de minimis* exceptions will be added:

1. A conviction or program entry that occurred when the individual was 21 years of age or younger;
2. Multiple conviction(s) or program entry(ies) for writing "bad" or insufficient funds check(s) if there is no other conviction or program entry and the aggregate value of all "bad" checks is $1,000 or less;
3. A conviction or program entry for small dollar, simple theft (less than $500);
4. A conviction or program entry for the use of a fake, false or altered form of identification for the purpose of obtaining alcohol

So why is this final rule important? On the one hand, FDIC institutions apply Section 19 and disqualify applicants with criminal histories because filing consent applications are neither a sure thing nor an immediate process. On the other, Section 19 generally conflicts with federal, state and local anti-discrimination laws. For instance, the use of arrest or criminal history information as a basis to refuse employment is a civil rights violation under the Illinois Human Rights Act.

As a result, FDIC institutions must be careful and thorough in their application of Section 19. This is particularly important in light of the expansion of the *de minimis* exceptions outlined in the final rule published last week. While Section 19 may serve as a defense to a claim of discrimination, such a defense may not hold if Section 19 is improperly applied. Accordingly, we recommend FDIC institutions consult experienced counsel regarding updates to internal policies and to ensure existing and new Section 19 *de minimis* exceptions are properly taken into account when evaluating candidates for employment.