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DC Employers: It's Time to Check Your Employment Application
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A recent change in the employment law landscape in Washington, DC provides employers with an opportune time to ensure that their employment applications comply with legislation, new and old.

Fair Criminal Record Screening Amendment Act of 2014

The Fair Criminal Record Screening Amendment Act of 2014 became effective December 17, 2014, imposing new obligations on Washington, DC employers investigating an applicant's criminal background. The law, known as the "Ban the Box" law, prevents an employer from asking applicants about their prior arrests, criminal accusations that are not pending or did not result in a conviction, and criminal convictions before the employer makes a conditional offer of employment to the applicant. The goal of the law is to "assist in the successful reintegration of previously incarcerated persons into the community by removing barriers to gainful employment." In addition to Washington, DC, 13 states and 96 cities and counties have enacted similar Ban the Box laws.

Once an employer makes a conditional offer of employment, the employer may ask about the applicant's criminal convictions. However, in accord with Equal Employment Opportunity Commission enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII, the employer may withdraw the conditional offer only for a "legitimate business reason," which requires consideration of six different factors. The factors include: (1) the specific duties and responsibilities necessarily related to the employment sought or held by the applicant, (2) the bearing, if any, of the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities, (3) the time elapsed since the occurrence of the criminal offense, (4) the age of the applicant at the time of the occurrence of the criminal offense, (5) the frequency and seriousness of the criminal offense, and (6) any information produced by the applicant in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense.

The Fair Criminal Record Screening Amendment Act applies to any person, corporation, labor organization, and association that employs more than 10 employees in the District of Columbia, with some limited exceptions. In the event an applicant believes a conditional offer was terminated or an adverse action was taken against the applicant because of a criminal conviction, the applicant can request from the employer a

copy of all records the employer procured in consideration of his or her application, including criminal records, and a notice that advises the applicant of his or her right to file an administrative complaint with DC's Office of Human Rights. Although the Act does not provide a private cause of action to an aggrieved person, an employer can still face costly penalties for violations. The penalty for non-compliance is a maximum of $1,000 for employers that employ 11 to 30 employees; $2,500 for employers that employ 31 to 99 employees; and $5,000 for employers that employ 100 or more employees. Moreover, if the Office of Human Rights determines that an employer has engaged in an unlawful discriminatory practice, the Office of Human Rights may require the employer to hire, reinstate, or promote the complainant, and award back pay, compensatory damages, and reasonable attorney fees.

Fair Credit Reporting Act

In addition to the Ban the Box laws, employers must also comply with the restrictions on background checks contained in the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* The FCRA applies to any third-party consumer or investigative report that bears on an individual's creditworthiness, character, general reputation, personal characteristics, or mode of living, when such information is collected for employment purposes. Third parties include professional screening companies, credit bureaus, or private investigators. Consumer reports are typically credit reports, but the statute is broad enough to cover many other types of reports, including criminal background histories.

Specifically, before using a consumer report, an employer must notify the applicant that the employer might use information in the consumer report to make decisions related to hiring and obtain written permission from the applicant. Before rejecting a job application based on the information contained in the consumer report, the employer must notify the applicant and include a copy of the consumer report as well as advise the applicant of his or her rights under the FCRA. The applicant then has an opportunity to review the report and explain any negative information or dispute its accuracy. The Federal Trade Commission has suggested that a five-day period in which the applicant has the opportunity to review the report is generally reasonable, though the time period may depend on the facts of the particular employment situation. Once the applicant is denied the job, the employer must also give the applicant notice of that fact.

Complex Compliance Difficulties

Although compliance with Ban the Box laws and the FCRA may seem as straightforward as eliminating a checkbox on the employment application inquiring about criminal history or getting permission from an applicant to investigate his or her background, many related issues can and do arise. DC's Ban the Box law contains limitations on withdrawing a conditional offer of employment as well as notice obligations and may require employers to restructure their hiring process. Ban the Box laws in other jurisdictions vary and have other nuanced requirements. Furthermore, although the FCRA and Ban the Box laws are complementary, compliance with one does not guarantee compliance with the other. Given the increased interest in banning the box in Washington, DC and around the country, employers should consider reviewing their hiring processes to avoid costly mistakes.