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*Practice Group(s):
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EMPLOYERS BEWARE

The City of Seattle's Controversial New Criminal Offender Job Assistance Legislation Imposes Significant Regulations on Hiring Practices and Decisions

By Suzanne J. Thomas

In what many employers believe is well intended but inappropriate interference by the Seattle City Council with hiring decisions, a new "[ban the box](#)" ordinance¹ has been unanimously adopted in Seattle that will give criminal offenders special rights in job application processes and allow the City to second guess employment decisions. The stated rationale for imposing these significant new burdens on employers is to increase public safety and decrease criminal recidivism rates by providing offenders with increased employment opportunities.

The Ordinance Imposes Additional Complex Regulations on Employers' Hiring Decisions

As of November 1, 2013, employers will be prohibited from making any inquiry on a job application about a prospective employee's criminal history and from any advertising to the effect of "ex-offenders need not apply." With limited exceptions, an "employee" is any individual who performs any services for an employer with one or more employees when the physical location of such services is at least 50% of the time within the City of Seattle.² An employer may perform a criminal background check on a job applicant or require an applicant to provide criminal history information only after the employer has completed an initial screening to eliminate unqualified applicants.

The legislation goes much further than just "banning the box" – in order to disqualify offenders from employment solely based on their criminal history, an employer must also:

- have a "legitimate business reason" to exclude an offender based on criminal history;
- identify to the offender the record(s) or information on which the employer is relying; and
- provide the offender with a "reasonable opportunity" to respond, correct or explain the criminal history and hold the position open for at least two business days for this purpose.

A "legitimate business reason" exists where, based on information known to the employer at the time the employment decision is made:

¹ "Ban the Box" legislation generally prohibits an employer from requiring applicants to disclose criminal history on an initial job application.

² Excluded from this definition are those positions with job duties (or prospective job duties) involving law enforcement, policing, crime prevention, security, criminal justice, private investigation services or potential unsupervised access to children under sixteen years of age, developmentally disabled persons, or vulnerable adults.

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- the employer believes in good faith that the nature of the criminal conduct underlying the conviction or the pending criminal charge either will have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held, or will harm or cause injury to people, property, business reputation, or business assets; and
- the employer has considered required factors including: the seriousness of the underlying criminal conviction or pending criminal charge; the number and types of convictions or pending criminal charges; the time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration; any verifiable information related to the individual's rehabilitation or good conduct provided by the individual; the specific duties and responsibilities of the position sought or held; and the place and manner in which the position will be performed.

The legislation also includes anti-retaliation provisions.

The Seattle Office of Civil Rights ("SOCR") is empowered to investigate and second guess employers' decisions regarding whether a criminal history should disqualify an offender from a specific position. If SOCR disagrees with an employer's decision, it can require an expensive hearing and appeal process and levy fines *and* the City's attorneys' fees against the employer.³ Beginning in July, SOCR will also develop rules implementing the ordinance with input from a "panel of stakeholders with a balance of perspectives."

The legislation imposes additional complexity in an already highly regulated area.⁴ It also increases employer exposure to lawsuits if an employer hires, supervises or retains an offender with a known criminal history who then harms a co-worker, customer or others. The City cannot limit that state common law exposure. An employer will now have to choose between disqualifying an offender for reasons that will be second guessed by the City and facing increased potential liability for knowingly hiring someone with a criminal history.

The ordinance provides special rights to offender applicants that are not available to non-offenders. Because Washington is an "employment at-will" state, employers may decline to hire an applicant or discharge an employee for any or no reason unless doing so violates contractual or legal requirements; the ordinance changes that at-will employee status for offenders. Additionally, only offenders will have a job held for them as they try to convince an employer to hire them despite their criminal history.

3 Thanks in part to the education offered to the City by K&L Gates employment lawyer Suzanne Thomas and others within the business community, unlike prior drafts of the ordinance, the final legislation does not: (i) designate "civil rights" or "protected" status on offenders; (ii) allow for a private right of action that would allow a denied job applicant to go through the City's hearing process or file private litigation for lost wages, unlimited emotional distress damages, injunctive relief (such as being placed in the job), and attorneys' fees; or (iii) require accommodations to offenders similar to those required under other laws or policies, such as disability accommodation obligations.

4 For example, long-standing federal and state laws and regulations already restrict consideration of criminal history for racial minorities due to the disparate impact on such applicants of higher rates of arrests, prosecutions and convictions versus Caucasians. Job applicants in Seattle who believe that they have been a subject of such disparate impact already have recourse under the City's civil rights/non-discrimination ordinance, and likely under federal or state law. Federal and state Fair Credit Reporting Acts also place restrictions on obtaining and use of criminal history information. Other state regulations restrict certain pre-employment inquiries based on criminal history.

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Employers Should Promptly Evaluate Hiring Practices to Prepare for Compliance

Employers will be required to evaluate and likely alter their application and hiring practices, and will still be subject to the City's substituted business judgment. Because of the complexities of compliance with the legislation, consultation with experienced employment counsel in preparation for the November 1 effective date is important. K&L Gates will host a timely breakfast briefing/webinar about the intricacies of compliance with the ordinance.

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