San Francisco Joins the Growing Number to Ban The Box

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By The Way (BTW),

It's official—San Francisco has banned the box. Employers in the city or county of San Francisco may no longer inquire about criminal history on employment applications or during interviews. Titled the **The Fair Chance Ordinance, No. 17-14**, the new law goes into effect on August 13, 2014 and prohibits both private and public employers with at least 20 employees from asking about a criminal past on the job application or in an initial interview. The law also restricts asking about criminal history on applications for affordable housing within the city. With respect to employment, the law applies to temporary workers, contract workers, and city contractors and subcontractors.

If an employer wants to **screen for criminal history information**, the ordinance adds some new requirements. In addition to delaying the criminal question until post interview or post-offer, it also requires additional notification prior to any inquiry, notice prior to taking a negative action, and an individualized assessment to give the applicant a chance to ask for reconsideration.

If you read through this summary and it sounds remotely familiar, it should. This law is a mash up of the already required authorization and disclosures of the Fair Credit Reporting Act (FCRA), adverse action requirements of FCRA, and notice requirements under the California Investigative Consumer Reporting Agencies Act (ICRAA). Throw in the EEOC's "individualized assessment" requirements under the guidance for the use of criminal history, shake it all up, and BAM!—you've got Ordinance No. 17-14. Here are the particulars:

Criminal Inquiry Restrictions

With respect to employment decisions, the ordinance prohibits the employer from asking the applicant about or requiring the disclosure of the following until after the first live interview (may be by phone or video conference) or after a conditional offer of employment has been made:

- An Arrest not leading to a Conviction, except under circumstances identified in this Section as an Unresolved Arrest,
- Participation in or completion of a diversion or a deferral of judgment program;
- A Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;

- A Conviction or any other determination or adjudication in the juvenile justice or information regarding a matter considered in or processed through the juvenile justice system;
- A Conviction that is more than seven years old, the date of Conviction being the date of sentencing;
- Information pertaining to an offense other than a felony or misdemeanor such as an infraction.

Prior to asking about the criminal history, an employer must provide the applicant with a copy of a written notice specified in Section 4905 of the ordinance. The employer is also required to post a copy of the proscribed notice in the workplace. This notice appears to be in addition to the authorization and disclosure required under the Fair Credit Reporting Act (FCRA) and (ICRAA).

Individualized Assessment

If an employer wants to base an adverse decision on an applicant's conviction history, and employer has to conduct an individualized assessment. The employer must:

- Consider only Directly-Related Convictions.
- Consider the time that has elapsed since the Conviction or Unresolved Arrest.
- Consider any evidence of inaccuracy
- Consider any evidence of Rehabilitation or Other Mitigating Factors

If an employer decides to reject an applicant because of criminal history, prior to taking the adverse action, the employer must provide notice in writing, including:

- A copy of the background check
- The intended adverse action and
- The items forming the basis for the action

The applicant then has seven days to respond (orally or in writing), and may provide evidence of inaccuracy, evidence of rehabilitation or other mitigating information. The employer must reconsider the adverse action, and respond to the applicant with a final decision, delaying any adverse action "for a reasonable amount of time." Upon reaching a final decision, the employer must "notify" the applicant, but the ordinance does not specify the manner of notification.

Conclusion

This law is bound to cause headaches for employers. The overlap with state and federal laws already on the books will need to be considered carefully. The need to keep applications open and delaying action for "a reasonable amount of time" is bound to cause confusion. The chosen means of notification and the additional record keeping is also up for interpretation. Employers must maintain records of employment, application forms and other relevant records for at least three years.

Violations of the Ordinance are punishable by payment of back pay, benefits and $50 per day for each day the Ordinance is violated, as well as attorneys' fees and costs.

Employers everywhere need to be aware of ban the box laws, as they continue to sweep across the country at both the state and local level. See the related stories here on **Target Corporation** and **other jurisdictions**. And unfortunately, no two jurisdictions are exactly alike. We recommend talking to your legal counsel for advice on how to comply with this and other laws. Your screening provider is a good resource for administrative solutions. Stay tuned for more updates.