

## Alerts and Updates

### **PHILADELPHIA "BANS THE BOX": EMPLOYERS CANNOT ASK ABOUT CRIMINAL CONVICTIONS ON EMPLOYMENT APPLICATIONS**

April 19, 2011

On April 13, 2011, the Philadelphia Mayor Michael Nutter signed an ordinance titled "[Fair Criminal Record Screening Standards](#)," which establishes requirements for the screening of criminal records by certain employers within the City of Philadelphia and limits an employer's ability to consider arrests and convictions of job applicants. The stated purpose of the legislation is to "give the individual with a criminal record an opportunity to be judged on his or her own merit during the submission of the application and at least until the completion of an interview." This local ordinance is not the first of its kind, but is indicative of a growing trend toward limitations on employers' abilities to consider arrests and convictions of applicants.

The Philadelphia ordinance limits the ability of an employer to consider even criminal convictions as part of the early stages of the application process. The ordinance makes it unlawful for city agencies and private employers of 10 or more people in the City of Philadelphia to:

- Make any inquiry about or require a person to disclose any criminal convictions during the application process, which begins when an applicant inquires about employment and ends when an employer has accepted an employment application.
- Make any inquiry about or require a person to disclose or reveal any criminal convictions before and during the first interview. However, if the applicant voluntarily discloses any information regarding a criminal conviction at the interview, the employer may discuss the criminal conviction.

- Make any inquiry about or require a person to disclose or reveal any arrest or criminal accusation, not then pending, which did *not* result in a conviction.
- Take any adverse action against a person on the basis of any arrest or criminal accusation, not then pending, which did *not* result in a conviction.

The Philadelphia ordinance provides limited exemptions, including instances in which inquiries or adverse actions otherwise prohibited by the ordinance are specifically authorized by other applicable law. For example, criminal background checks are required for certain healthcare workers.

The ordinance becomes effective on July 13, 2011. Each violation of the ordinance will carry a fine of up to \$2,000. Further, it is likely that violations of the ordinance will be argued as the basis for wrongful-failure-to-hire claims.

### **What This Means for Employers**

Employers in Philadelphia should remove from their applications for employment any questions about criminal convictions (except where required by another law, in which case a separate application with an appropriate question consistent with the legal requirement must be developed only for such applicants).

Employers in Philadelphia who wish to inquire about criminal convictions may develop a criminal conviction inquiry form—focusing only on convictions—to give to applicants who have completed their first interview and to whom they wish to extend either a second interview or a job offer.

Employers in Philadelphia should consider not only the Fair Criminal Record Screening Standards ordinance, but also the Pennsylvania Criminal History Records Information Act, which restricts when Pennsylvania employers can consider criminal convictions and includes notice requirements.

Further, both the U.S. Equal Employment Opportunity Commission and the Pennsylvania Human Relations Commission have released guidance stating that disqualifying applicants due to arrest or conviction records may have a disparate impact

on certain racial and ethnic groups, and therefore, have suggested different (but similar) factors that should be considered before making any adverse employment decision based upon a criminal record.

Employers should be particularly careful of per se rules (for example, disqualifying from all jobs individuals with certain felonies). These rules maximize consistency but also may serve as the basis for class actions alleging disparate impact.

### **For Further Information**

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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