



LABOR & EMPLOYMENT DEPARTMENT

ALERT

BAN THE BOX: NO CRIMINAL RECORDS INQUIRIES DURING THE APPLICATION PROCESS

By Erin T. Fitzgerald

On April 13, 2011, Philadelphia Mayor Michael Nutter signed an ordinance that will prohibit private employers with 10 or more employees in Philadelphia from inquiring about or requiring an applicant to disclose any criminal convictions during the application process and during an initial interview. The purpose of the ordinance is to minimize discrimination against applicants based on past convictions and to give applicants with past convictions an opportunity to be judged on their own merit. Practically, it delays the time that an employer can begin an inquiry into an applicant's criminal history.

Prohibitions

The ordinance prohibits employers from inquiring about or requiring an individual to disclose any criminal convictions during the "application process." The application process begins when the applicant inquires about employment and ends when the employer has accepted an employment application. Unfortunately, the ordinance does not define the term "employment application."

The ordinance also prohibits employers from inquiring about or requiring an applicant to disclose any criminal conviction before or during the first interview. An interview is defined as any direct contact by the employer with the applicant, whether in person or by telephone, to discuss the employment being sought or the applicant's qualifications. If no interview is conducted, then an employer cannot make any inquiry or gather any information about the applicant's criminal convictions. However, if an applicant voluntarily discloses information about a criminal conviction during an interview, the employer may discuss that criminal conviction disclosed by the applicant.

The ordinance also prohibits employers from knowingly inquiring about, requiring an individual to disclose or taking any adverse action against an individual on the basis of any arrest or criminal accusation that is not then pending and did not result in a criminal conviction.

The bottom line is that the first time an employer may inquire about criminal convictions is after the applicant has submitted a completed application that does not request criminal conviction information and after the employer has conducted an initial interview of the applicant.

Exemptions

There are several exemptions from the prohibitions in the ordinance. First, the prohibitions in the ordinance do not apply if the inquiries or adverse actions are specifically authorized by any other applicable law. For instance, the Pennsylvania Child Protective Services Law requires certain employers to have applicants submit criminal history information with their applications. Therefore, the requirements of the Child Protective Services Law trump the Philadelphia ordinance. Second, the prohibitions do not apply to a Criminal Justice Agency. And, third, the ordinance does not modify or waive the requirements on the use of criminal records in Pennsylvania pursuant to 18 Pa. C.S. 9125. In other words, employers may still consider felony and misdemeanor convictions to the extent they relate to an applicant's suitability for employment in the position for which he or she applied.

Take Away for Employers

Employers should consult with an attorney when reviewing and changing their application procedures and

criminal background procedures. Employers should also consider taking the following steps:

- **Use employment application forms rather than merely accepting resumes.** The ordinance's prohibition against inquiries into criminal convictions before the employer has received an employment application and its failure to define employment application strongly suggest the use of employment application forms.
- **Determine if an exemption applies.** Remember that the exemptions could apply to some positions and not others within your organization.
- **Conduct interviews.** If you want to inquire about applicants' criminal convictions and you are not covered by an exemption, you will need to conduct an interview in order to inquire about or gather information about the applicant's criminal convictions.
- **Revise employment application forms.** For employers with some employees based in Philadelphia and some based outside of Philadelphia, or only some of whom fall within an exemption to the ordinance, consider the use of two application forms. One form of application will not include the questions about criminal convictions (you will ask that later in the process). The other form of application, or supplemental page, will ask about convictions if the applicant is not covered by, or is exempt from, the ordinance.
- **Train your human resources employees on the ordinance.** Inform those individuals who are involved

in the application process that inquiries about criminal convictions cannot be discussed until after an employment application has been accepted and an interview has taken place. Inform them about the specific exemptions if any apply. And train them on which application (or supplement) to provide to which applicant.

- **Obtain authorization for a consumer report after the applicant has submitted a completed application and an initial interview has been conducted.** The authorization form that employers provide to an applicant in order to obtain a consumer report is arguably not an inquiry regarding an applicant's criminal history. However, the conservative approach would be to wait until after the employer has received a completed application and an interview has been conducted to request that an applicant sign the authorization for a consumer report, the results of which may contain criminal history information.

The ordinance will become effective on July 12, 2011. Be proactive and modify your application procedures so that you are compliant once the ordinance becomes effective.

For more information about the information in this alert, if you have any questions or concerns about your current application procedures or if you have questions about implementing procedures to comply with the ordinance, please contact Erin T. Fitzgerald at 215.299.3832 or efitzgerald@foxrothschild.com or any member of Fox Rothschild's [Labor & Employment Department](#).



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