Employers' Hands Tied: New Washington D.C. Law Goes Beyond Ban the Box

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With over a year of debate and some last minute amendments, the District of Columbia's Council passed a ban-the-box law that includes its own unique list of considerations before an employer can withdraw an offer of employment based on criminal history.
Council vote was 12-1; only Chairman Phil Mendelson (D) voted against the bill. In an interview, Mendelson said that he supports the "basic thrust" of the legislation but that late amendments were "troublesome," giving ex-offenders greater rights in the hiring process than other citizens. "This goes way beyond 'ban the box' and into telling businesses how to hire," he said. "How much do we want to regulate how a business wants to hire somebody?"
Exactly. Despite the excellent points made by the Chair, the law was signed by Mayor Vincent Gray and the**projected enactment date is October 21, 2014.**

What is prohibited under the D.C. Law?

In addition to banning the box on job applications,

- The D.C. law makes it illegal to ask an applicant (in an interview or in writing) about criminal convictions until after a conditional offer of employment has been made.

- It also prohibits employers from asking about arrests or accusations that do not result in a conviction.
- After a conditional offer has been made, the employer may only withdraw the conditional offer or take adverse action against the applicant for a "legitimate business reason." The law states that a legitimate business reason must consider the following factors:

  (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 which has 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, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense.

  If these requirements sound familiar, some of them have been cribbed directly from the EEOC Guidelines on the use of criminal records in employment. Number six looks very much like the "individualized assessment" process that the EEOC now requires. The law applies to employers with more than 10 employees (including independent contractors and interns) in the District of Columbia.

Exemptions

Exemptions are allowed for the following:

1. A Federal or District Law or regulation requires the consideration of an applicant's criminal history for the purposes of employment,
2. A position designated by the employer is part of a federal or district government program or obligation that is designed to encourage the employment of those with criminal histories; or
3. A facility or employer provides programs, services, or direct care to minors or vulnerable adults.

Enforcement

The Office of Human Rights is the only entity authorized to investigate violations and to impose penalties. There is no private right of action available in court. Penalties include fines up to $5,000, the amount of which is a sliding scale dependent on the number of employees. Half of the fine is awarded to the complainant.

Much to the dismay of employers struggling to keep up, Washington, D.C. adds one more jurisdiction to the growing list of cities that have enacted their own flavor of ban the box, including Philadelphia, Seattle, Newark, San Francisco, Baltimore, and Rochester.