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Connecticut Becomes the Third Jurisdiction in 2016 to "Ban the Box"

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On June 1, 2016, Connecticut Governor Dannel Malloy signed a bill into law that prohibits most employers from requesting criminal history information on an initial employment application. Connecticut's new "ban-the-box" law follows closely on the heels of similar legislation enacted in Vermont and continues the nationwide ban-the-box trend.¹ Indeed, ban-the-box laws have recently been enacted in other jurisdictions, including Austin, Texas; Portland, Oregon; and New York City.² Connecticut's ban-the-box law goes into effect on January 1, 2017.

Like many of these other new laws, Connecticut's ban-the-box law does more than just limit an employer's ability to inquire about criminal history on the employment application. It also establishes important exceptions to the general prohibition on making such inquiries. Consequently, covered employers should take advantage of the brief grace period to consider and, if appropriate, implement the action items set out below. Due to the proliferation of such laws – and related class action litigation – employers also may want to conduct a broader (and privileged) assessment of their pre-employment screening practices to strengthen their compliance with federal, state and local laws, including the federal Fair Credit Reporting Act.³

- 1 See Jennifer Mora, [Vermont Joins the Ranks of Cities and States that "Ban the Box"](#), Littler Insight (May 10, 2016).
- 2 See Philip Gordon and Jennifer Mora, [Austin Becomes the First City in Texas to "Ban the Box"](#), Littler Insight (Mar. 25, 2016); Jennifer Mora and Stephen Fuchs, [Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law](#), Littler Insight (Feb. 25, 2016); Jennifer Warberg and Philip Gordon, [Portland, Oregon Bans the Box](#), Littler Insight (Dec. 3, 2015); Jennifer Mora, David Warner, and Rod Fliegel, [New York City Council Bans the Box](#), Littler Insight (June 12, 2015).
- 3 See Jennifer Mora, [Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements](#), Littler Insight (Jan. 4, 2016); Rod Fliegel, Jennifer Mora, and William Simmons, [The Swelling Tide of Fair Credit Reporting Act \(FCRA\) Class Actions: Practical Risk-Mitigating Measures for Employers](#), Littler Report (Aug. 1, 2014).

Coverage and Exceptions

The law applies to any employer with one or more employees, including the state or any political subdivision of the state. Unlike other ban-the-box laws, Connecticut's statute does not appear to apply to the screening of independent contractors.

The new law prohibits an employer from seeking information about prior arrests, criminal charges, or convictions as part of an initial employment application. This prohibition, however, does not apply in two defined situations: (1) when an employer is obligated pursuant to a federal or state law to ask about such criminal history for the position in question; and (2) when a position requires a security, fidelity, or equivalent bond.

Unlawful Practices

Unless one of these exceptions applies, the new law prohibits employers from requiring any job applicant to complete an initial employment application containing any question related to the applicant's prior arrests, criminal charges, or convictions. Unlike other ban-the-box laws that require employers to wait until a specified point in the application process before inquiring about an applicant's criminal history, such as after the first interview or after a contingent offer of employment, Connecticut's statute appears to permit such an inquiry at any time so long as the inquiry is not made on the initial employment application. The Connecticut law apparently does not even prohibit other types of inquiries into criminal history at the job application stage, such as a criminal background check conducted by a consumer reporting agency.

Notice Requirements Applicable to the Exceptions

If one of the two exceptions noted above applies and an employer is permitted to inquire about criminal history on an employment application, the employer must include certain notices along with the criminal history inquiries. The notices, which must be clear and conspicuous on the application, are that:

- The applicant is not required to disclose the existence of any arrest, criminal charge, or conviction the records of which have been erased pursuant to sections 46b-146, 54-76o or 54-142a of the Connecticut General Statutes;
- Criminal records subject to erasure under state law are those records pertaining to a finding of delinquency or that a child was a member of a family with service needs, an adjudication as a youthful offender, a criminal charge that has been dismissed or dropped, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon; and
- Any person whose criminal records have been erased shall be deemed to have never been arrested and may so swear under oath.

Existing Restrictions on The Use of Certain Criminal History Events

Connecticut's ban-the-box law does not impact several existing prohibitions the State has imposed on employers regarding the use of certain criminal history events, which are: (1) prohibiting an employer from rejecting an applicant or terminating an employee because of erased records (see notice section above); and (2) prohibiting employers from rejecting applicants or terminating employees because of a prior conviction for which the individual has received a provisional pardon or certificate of rehabilitation pursuant to Conn. Gen. Stat. § 54-130a, or a certificate of rehabilitation pursuant to Conn. Gen. Stat. § 54-108f. These prohibitions remain in effect.

As noted above, the substantive limits on what criminal records employers can consider do not apply if disclosure of the record is required by federal or state law.

Enforcement

Connecticut's ban-the-box law provides an aggrieved individual with no private right of action against a covered employer. Instead, an aggrieved individual may file a complaint with the Labor Commissioner. However, the law does not authorize the Labor Commissioner to impose penalties, and does not provide for civil damages.

The law does establish a "Fair Chance Employment Task Force" to "study issues, including, but not limited to, the employment opportunities available to individuals with criminal histories." While this Task Force does not have enforcement power, it may recommend further statutory restrictions on the use of criminal inquiries in the hiring process.

Although the substantive portions of Connecticut's ban-the-box law do not take effect until January 1, 2017, the portion establishing the Task Force is effective immediately.

Recommendations

Employers in Connecticut, at a minimum, should evaluate whether they need to revise their existing employment application. They should also consider whether to undertake a broader (and privileged) assessment to strengthen their compliance with federal, state, and local employment laws that regulate use of an individual's criminal history. Suggested action items for employers with employees in Connecticut and other states having ban-the-box laws are as follows:

- Review job advertisements for impermissible language regarding criminal records;
- Review job applications and related forms for impermissible inquiries regarding criminal records;
- Provide training and FAQs to employees who conduct job interviews and make or influence hiring and personnel decisions to explain permissible and impermissible inquiries into, and uses of, criminal records, and convey the company's policies and procedures for storing such records and documenting related hiring and personnel decisions; and
- Review the hiring process to ensure compliance, including the timing of criminal background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.