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RE: New York City Mayor Bill de Blasio signs “Fair Chance Act” into law.

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FROM: Kane Kessler, P.C.
Labor and Employment Law Department

INTRODUCTION

Earlier this week, we reported that the New York City Council passed a bill entitled the Fair Chance Act. On June 29, 2015, Mayor de Blasio signed this bill into law, adding another bill limiting what an Employer can ask a job applicant¹.

The Fair Chance Act bolsters the City’s Human Rights Law by prohibiting employers from inquiring about an applicant’s prior arrests and/or convictions until a conditional offer of employment has been made. This follows a growing trend in states and cities to “ban the box,” i.e., the portion of the job applications that asks the applicant to check the “yes” box if they “have ever been convicted of a crime.”

Once a conditional offer is extended, employers may commence a criminal background check, though any adverse action taken as a result requires a written explanation to the applicant consistent with Article 23-a [of the New York State Correction Law]. After providing the applicant with the written explanation, the employer must keep the position open for three (3) business days to allow the applicant to respond.

The provisions of this law will take effect on October 27, 2015.

¹ Other recent legislation enacted by the New York City Council and signed into law by Mayor De Blasio includes: NYC Administrative Code 8-107(21) (amending the Human Rights Law to prohibit discrimination on the basis of an applicant’s unemployment history); and NYC Administrative Code 8-107(24) (amending the Human Rights Law effective September 3, 2015 to prohibit discrimination on the basis of an applicant’s consumer credit history)

CURRENT NEW YORK STATE LAW

New York State's Corrections Law, Article 23-A, has long prohibited discrimination against job applicants based on prior criminal conviction unless:

- (i) there is a direct relationship between the criminal offense and the job sought; or
- (ii) hiring the applicant would create an unreasonable risk to the safety or welfare of specific individuals, or the general public or to property. In making this assessment, Employers are advised to follow various factors on a case by case basis:
 - a. The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
 - b. The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
 - c. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
 - d. The time which has elapsed since the occurrence of the criminal offense or offenses.
 - e. The age of the person at the time of occurrence of the criminal offense or offenses.
 - f. The seriousness of the offense or offenses.
 - g. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
 - h. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Employers must also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which creates a presumption of rehabilitation in regard to the offense or offenses specified therein.

New York State also prohibits inquiry into or taking an adverse employment action predicated on an arrest.

CHANGES TO NEW YORK CITY LAW

The Fair Chance Act, INT. NO. 318-A, makes numerous revisions to New York City's Administrative Code. Chief among these changes is the prohibition against inquiring about an applicant's prior arrests and/or convictions until a conditional offer of employment has been made. This includes pending criminal proceedings.

Once a conditional offer is extended, Employers may then ask questions related to an applicant's criminal history and may commence a criminal background check. If an Employer takes any adverse action based on the foregoing, the Employer would be required to (i) provide a written copy of the inquiry to the applicant in a manner to be determined by the commission; (ii) perform an analysis pursuant to Article 23-a [of the New York State Correction Law]; and (iii) in a manner

to be determined by the Commission, provide a written copy of the analysis supporting the adverse action.

After providing an applicant with a written copy of the inquiry and analysis described above, the Employer must keep the position open for three (3) business days to allow the applicant to respond.

Though the bill's proposed prohibitions are quite broad, Employers are not required to hire an applicant despite his/her criminal history. These amendments do not apply to police and peace officers, law enforcement agencies, or positions, as determined by the Commissioner of Citywide Administrative Services, that involve law enforcement, are susceptible to bribery or other corruption, or entail the provision of services to or safeguarding people who are vulnerable to abuse, i.e., elderly, disabled, or infirm individuals.

The Act also bans job postings inconsistent with its terms.

RECOMMENDATIONS

Employers should begin modifying their employment application and hiring process. The most obvious change is to remove the "box" from the application. Because of the continuing expansion of the "ban the box" legislation, Employers that operate in multiple jurisdictions should consider making the same modifications.

If you have any questions, please do not hesitate to contact David R. Rothfeld, Judith A. Stoll, Lois M. Traub, Alexander Soric, Robert L. Sacks, or Michael C. Lydakis.