

EMPLOYER ALERT

Banning the Box From Your Employment Application

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As the New Year approaches, you are expecting better economic times ahead and a more profitable year for your business. Jumpstarting your entrepreneurial endeavors by hiring more help seems like the way to go, so you place job ads and make certain that you have located and printed off copies of your usual job application form – the one you have been using for years. You think you are good to begin the recruiting process, but as you start the process of finding the best and the brightest new hires, are you in compliance with the law? Maybe not.

Effective January 1, 2014, Rhode Island will become another state that has “banned the box” on job applications. A bill passed by the Rhode Island General Assembly at the end of the 2013 legislative session amended the Fair Employment Practices Act, (“*FEPA*”) to prohibit employers from asking on an employment application whether the applicant has ever been convicted of any crime. (FEPA already prohibited employers from asking whether job seekers had ever been arrested or criminally charged.) With this FEPA amendment in place, most employers, including public and private employers who have at least four (4) employees, will no longer be free to weed out job applicants with criminal histories by including on job applications a question about arrests, criminal charges, or convictions, and then tossing into the waste bin the applications received from job seekers who have checked “yes” in response to that question.

The new law does not, however, require employers to make hiring decisions without the benefit of criminal background information. An employer may ask a job candidate about criminal convictions (but not arrests or criminal charges) at the first interview or thereafter. In an interview setting, the candidate has the opportunity to respond truthfully about criminal convictions but also to offer an explanation. (“It was many years ago,” or “It was an unfortunate incident, but there were extenuating circumstances, and I have had no problems with the law since.”) The explanation may well satisfy the employer and pave the way for the candidate to land the job, rather than being turned away on the basis of a checked box on an employment application.

The new law includes a few exceptions to the requirement that employers delete the criminal history box from their employment forms. If a federal or state law or regulation would disqualify a job seeker who has been convicted of a particular offense from working in a regulated industry, then the employer may inquire on the job app about any such convictions. Similarly, if a position is a bonded position (such as a bank teller) and a conviction of certain crimes would render a candidate ineligible to become bonded, then the employer is free to determine this at the outset, via a question on the job application. Finally, the new law does not apply to employers looking to fill law enforcement agency positions or to religiously-affiliated employers, including businesses and schools, leaving these employers free to ask applicants about arrests and criminal charges, as well as convictions.

Employers who continue to use an employment application that includes the banned criminal history questions after January 1st may be deemed to have committed an unlawful employment practice under FEPA. A disgruntled job applicant may file a charge with the Rhode Island Commission for Human Rights (which may be removed to the Superior Court) against both the employer and agents of the employer who may be deemed to be “acting in the interest of the employer,” such as human resource personnel. Remedies for hiring by means of an unlawful job application could include an order requiring the employer to hire the applicant who was turned away after submitting the noncompliant application; an award of back pay that includes the value of all benefits and raises that the job seeker would have received had the employer not committed the illegal job application “crime”; interest on those amounts (presumably at the pre-judgment interest rate of 12%); and attorney’s fees.

In summary, employers should act now to update their employment application forms before the New Year – and a new pool of job applicants – arrives. Employers should also be prepared to inquire effectively during job interviews regarding the circumstances of any convictions ultimately disclosed. The employer who has gathered all of the facts is then positioned to assess the applicant’s criminal history in the context of the employer’s workplace and in relation to the essential functions of the particular job to be filled. This procedure for evaluating a job candidate whose application is marked with a criminal blemish jibes well with the 2012 Enforcement Guidelines of the Equal Employment Opportunity Commission (“EEOC”) on using arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964. According to the EEOC, denying employment based on criminal conduct may disproportionately impact certain groups of individuals protected by Title VII and may violate Title VII if the employer’s use of the criminal history is not job-related and consistent with business necessity.

In summary, if done right, the hiring process can be a win-win for both businesses and job seekers, with employers free to inquire about convictions before the hiring decision is made, and

prospective employees having the opportunity to present their overall qualifications and put their best foot forward, rather than being stymied by a check marked box on an outdated form.

The information contained herein is for general informational purposes only and is not intended to constitute legal advice or legal opinion as to any particular matter. For further information please contact Lori Caron Silveira at (401) 274-7200 or lsilveira@apslaw.com