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Philadelphia Overhauls Employment Background Check Law

The City of Philadelphia has been at the forefront of the trend toward restricting employer access to and use of applicant criminal history. Three years ago (see <http://www.metrocorpocounsel.com/pdf/2011/June/34A.pdf>) Philadelphia began prohibiting employers from inquiring about criminal history early in the application process as part of the Philadelphia Fair Criminal Records Screening Standards Ordinance. Now Philadelphia has enacted a sweeping overhaul to the ordinance, expanding its scope, adding new restrictions and enhancing enforcement provisions.

Effective March 14, 2016, the amended ordinance imposes the following restrictions:

- Until the employer makes a conditional offer of employment, the employer cannot: (i) inquire about the applicant's criminal history; or (ii) inquire whether the applicant is willing to submit to a background check. Employers may notify prospective applicants of an intent to conduct a background check, but only if such notice is "concise, accurate, made in good faith" and states that "any consideration of the background check will be tailored to the requirements of the job."
- Inclusion of a criminal history inquiry on an employment application, even if applicants are instructed they do not have to answer, now specifically violates the ordinance. Employers operating in multiple states should review their form application carefully in light of this new provision.
- Only convictions occurring fewer than seven years from the date of the background check, excluding periods of incarceration, may be considered for employment purposes.
- Automatic exclusions from employment due to criminal conviction are prohibited, unless specifically authorized or mandated by another law or regulation. Similar to the position of the Equal Employment Opportunity Commission (see http://www.stradley.com/insights/publications/2014/01/employment-newsflash-january-2014the-employee-ba__), Philadelphia now requires employers to conduct an individualized assessment of the risk presented by the conviction. Such assessment "shall" include: (i) the nature of the offense; (ii) the time passed since the offense; (iii) employment history before and after the offense and any period of incarceration; (iv) the particular duties of the job being sought; (v) any character or employment references provided; and (vi) any evidence of rehabilitation since the conviction.

- A conviction disqualifies an applicant from employment only if the conviction “bears such relationship to the employment sought that the employer may reasonably conclude that the applicant would present an unacceptable risk to the operation of the business or to co-workers or customers, and that exclusion of the applicant is compelled by business necessity.”
- Employers rejecting an applicant based in whole or in part on a criminal record must notify the applicant in writing of the decision and its basis, provide the applicant a copy of the criminal history report, and allow the applicant ten business days to provide evidence of the inaccuracy of the information or to provide an explanation. For employers relying on third parties to provide background check reports, the ordinance’s notice requirement will be in addition to the notice obligation under the federal Fair Credit Reporting Act.
- Employers of one or more persons within Philadelphia must now comply with the ordinance. Previously the ordinance only applied to employers of ten or more within Philadelphia.

- Employers must post a notice of the ordinance, in a form to be published by the City.

Notably, the ordinance continues to exempt from its coverage inquiries or adverse actions specifically authorized or mandated by any other applicable law or regulation. If an applicant voluntarily discloses a criminal conviction during the application process, the employer may discuss the criminal conviction, although the employer should tread carefully in such discussions.

The amended ordinance now authorizes individuals to bring a lawsuit arising from violation of the ordinance to recover compensatory damages, punitive damages of up to \$2,000 per violation, and attorneys’ fees, in addition to injunctive or other equitable relief. Philadelphia’s Commission on Human Relations will now enforce the ordinance, and applicants will have 300 days from the alleged unlawful act to file a complaint with the Commission.

Employers should consult with human resources personnel and legal counsel to revise appropriate forms and background check procedures prior to the ordinance’s March 14, 2016 effective date.

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