Cooley

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Starting August 13, 2014, San Francisco's "Ban the Box" ordinance (the Fair Chance Ordinance) imposes strict rules on certain private employers regarding applicants' and employees' arrest and conviction records and related information.

Coverage

The Ordinance covers employers who are located or doing business in San Francisco and have 20 or more employees (regardless of the employees' locations).

The Ordinance covers applicants and employees who would be or are performing work, in whole or in substantial part, in the city and county of San Francisco (including temporary, seasonal and part-time work, as well as work performed through the services of a temp or other employment agency).

Limits on Criminal History Inquiries

The Ordinance prohibits employers from inquiring into an applicant's criminal history in an employment application or during the first live interview (whether it be in person or by phone, video conference, or other form of technology). Employers may only make criminal history inquiries *after* the first live interview or conditional offer of employment. There are certain categories of information that employers may *never* inquire about or consider:

- Arrests not leading to conviction (other than current pending arrests);
- Participation in or completion of a diversion or a deferral of judgment program;
- Convictions that have been judicially dismissed, expunged or otherwise rendered inoperative;
- Juvenile convictions or other determinations/adjudications in the juvenile justice system;
- Convictions that are more than 7 years old from the date of sentencing; and
- Information pertaining to an offense other than a felony or misdemeanor (e.g., an infraction).

The Ordinance defines "inquire" as requesting or running a background check, which suggests that employers should instruct their background check vendor(s) not to report on any of the above-listed categories.

Job Posting Modifications

Employers must modify all job postings for employees that are reasonably likely to reach persons seeking employment in San Francisco to state that the employer will consider qualified applicants with criminal histories in a manner consistent with the San Francisco Fair Chance Ordinance.

Notice Requirements

Employers must post a notice regarding the Ordinance in a conspicuous place at every workplace, job site or other location under its control that is frequently visited by applicants and employees. The notice must be posted in English, Spanish, Chinese, and any language spoken by at least 5 percent of the employees at that specific location. Notices are available at http://sfgsa.org/index.aspx?page=6615. Further, prior to any criminal history inquiry (including an interview or running a background check), employers must provide a copy of the notice to an applicant or employee.

Adverse Action; Anti-Retaliation

The Ordinance requires certain actions prior to an employer taking any adverse action based on criminal history information, including but not limited to conducting an individualized assessment (which involves determining whether the criminal history information is directly related to the employment position).

The Ordinance also includes an anti-retaliation provision, which provides that employers may not take an adverse action against an applicant or employee for exercising his/her rights under the Ordinance or cooperating with the San Francisco Office of Labor Standards Enforcement ("OLSE"), which is tasked with enforcing the Ordinance. A rebuttable presumption of retaliation is created if the adverse action is taken within 90 days of the applicant/employee's exercise of a right under the Ordinance.

Enforcement; Record Retention

Importantly, the OLSE does *not* have authority to second-guess an employer's decision regarding whether or not a conviction is directly related to a job position, but the OLSE does have the authority to determine whether employers are complying with the Ordinance's procedural, posting, documentation and anti-retaliation provisions. Accordingly, employers must carefully document their compliance efforts, including individualized assessments. Employers must also retain pertinent records (e.g., job applications, interview notes, background check reports, individualized assessment documentation, and adverse action documentation) for a period of 3 years.

To discuss these issues further or pose questions about this *Alert*, please contact one of the attorneys listed above.

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