

BUFFALO 'BANS THE BOX'

Labor & Employment Alert
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The City of Buffalo has joined numerous other local and state jurisdictions¹ in prohibiting the city, its vendors², and public and private employers within the city that have 15 or more employees from asking whether an applicant has been convicted of a crime, either directly or on an employment application. The legislation, however, will not prevent employers from asking applicants about convictions during the interview stage; employers are only prohibited from asking about convictions prior to an interview. If no interview is conducted, the employer must inform the applicant whether a criminal background check will be performed before employment is to begin.

Although this so-called “ban the box” ordinance was to be immediately effective, the bill’s sponsor, Common Council Member Demone Smith, has filed an amendment to the ordinance delaying the effective date to January 1, 2014. Since Mr. Smith is the sponsor of the bill and its amendment, it is expected that the amendment will be passed by the Common Council in the coming weeks. We will continue to monitor the status of the amendment.

Specific entities exempted from the law are the Police Department, the Fire Department, and any employer hiring for positions such as police officer or peace officer. Public and private schools and providers of direct services to children, young adults, senior citizens, and the physically or mentally disabled are also exempt. In addition, employers hiring for licensed trades or professions, such as physicians and attorneys, including interns and apprentices for such positions, are permitted to ask applicants the same questions asked by the trade or professional licensing body pursuant to New York law.

Similarly, the law does not prohibit employers from inquiring about convictions where certain convictions or violations are a bar to employment under New York or federal law. Examples include certain positions in financial institutions covered by the federal Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (SAFE) or Title 19 of the Federal Deposit Insurance Corporation (FDIC).

Employers who violate this new law may be subject to a civil action or proceeding by an “aggrieved” person for injunctive relief, damages, and other legal or equitable relief. Attorneys’ fees may also be awarded in the court’s discretion. Alternatively, a person or organization, whether or not an aggrieved party, may file a complaint with the Commission on Citizen’s Rights and Community Relations (CCRCR). If a

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certified finding of probable cause is made, the director of the CCRCR may ask the city's corporation counsel to commence an action seeking a penalty of \$500 for the first violation and \$1,000 for each subsequent violation.

In addition to the new law, employers must still comply with Article 23-A of the New York Correction Law and the New York Human Rights Law (N.Y. Exec. Law § 296(15)) when considering an applicant's prior criminal conviction in determining suitability for employment. Specifically, under New York law, employers may not deny employment to any individual by reason of having been convicted of one or more criminal offenses, unless there is a direct relationship between the conviction and the employment sought, or granting or continuing employment would "involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." N.Y. Correction Law § 752(2). Section 753 of the Correction Law lists eight factors that employers must consider in making this determination, including, among others, the specific duties of the position; the bearing, if any, the criminal conviction will have on the person's fitness or ability to perform the job duties; the age of the person at the time of the conviction; the time that has elapsed since the conviction; the seriousness of the offense; and any evidence of rehabilitation. Failure to consider the eight factors may constitute a violation of Article 23-A. Further, under Section 201-f of the N.Y. Labor Law, employers must conspicuously post a copy of Article 23-A in the workplace where employees can have access to it, and under the Section 380-c of the N.Y. General Business Law must provide a copy to any applicant subject to a background check.

The Bottom Line for Covered Employers

- To avoid liability, employment applications should be revised to "ban the box."
- Hiring managers should be instructed not to ask about criminal convictions until the applicant is interviewed.
- When interviews are not conducted, hiring managers should be reminded to inform applicants whether a background check is being ordered.
- Hiring managers should review and be familiar with Article 23-A of the Correction Law and the N.Y. Human Rights Law as they relate to prior criminal convictions.

¹ Approximately 50 cities and counties and nine states have adopted some form of "ban the box" legislation not all of which apply to private employers.

² Vendor is broadly defined as "any vendor, contractor, supplier of goods or services to the City of Buffalo, including vendors located outside the City of Buffalo limits."