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KD Alert: Beware The Box - Employers' Use of Criminal History Can Land Them in Hot Water

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Often for good reason, many employers are leery of hiring arrested or convicted individuals, particularly if the crime is related to violence, theft, or fraud, and will ask prospective employees about their criminal history. Employers should exercise caution when doing so because various cities, states, and the federal government have taken action regulating how employers can discover and use this information.

The City and County of San Francisco is the most recent to do so, enacting so-called "ban the box" legislation – named after the check box typically used on a job application asking whether the applicant has ever been convicted of a crime – which becomes effective August 13, 2014. This ordinance prohibits employers that are located entirely or substantially within San Francisco and who employ 20 or more employees (regardless of location) from inquiring about an applicant's criminal history on both job applications and at the beginning of the interview process. The new ordinance also prohibits these employers from inquiring or taking into consideration at any time whether an applicant or employee:

1. *Was ever arrested if the arrest did not lead to a conviction unless the arrest is still the subject of a criminal investigation or trial;*
2. *Participated in or completed a diversion or a deferral of judgment program;*
3. *Had a conviction judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;*
4. *Had a conviction or any other determination or adjudication in the juvenile justice system;*
5. *Had a conviction where the date of sentencing is over seven years old; or*
6. *Been cited for an infraction.*

Employers will now only be allowed to inquire into applicants' and employees' criminal history after the first live interview or after making a conditional offer of employment but only if it directly relates to the job, meaning the underlying conduct has a direct and specific negative bearing on the person's ability to perform the duties of the job in question. If the employer decides to not hire or take some other adverse employment action against the applicant or employee, the employer must provide the individual with notice of the intended adverse action and the information the employer is relying on while giving the individual seven days to present evidence that the information is inaccurate or evidence of rehabilitation or other mitigating factor.

The ordinance also requires employers to post notices informing employees and applicants of their rights, prohibits mentioning that individuals with arrests or conviction will not be considered for employment in job advertisements or solicitations, adds new recordkeeping requirement to allow the Office of Labor Standards Enforcement to monitor compliance, and prohibits retaliation against individuals exercising their rights under the ordinance.

Violations of the ordinance will be costly with employers liable for back pay, benefits, a $50.00 fine for each day the ordinance is violated, and attorney's fees and costs. The ordinance is also applicable to most city contractors and landlords.
It is not just San Francisco employers who should be concerned. Several cities, including Seattle, Washington and Buffalo, New York and states such as Hawaii and Connecticut have also adopted similar laws with other cities, counties, and states considering "ban the box" laws.

More importantly, the United States Equal Employment Opportunity Commission (EEOC) recently issued new enforcement guidance making clear it will also scrutinize employers' use of arrest and conviction records in employment decisions. The EEOC is concerned that because arrest and incarceration are particularly high for African American and Hispanic men, an employer's use of an individual's criminal history will have a disparate impact on these minorities, which the EEOC contends may violate the prohibition against

employment discrimination under Title VII of the Civil Rights Act. This disparate impact will only be defensible if the employer can demonstrate the use of criminal history is job related for the position and consistent with business necessity.

The guidance takes issue with employers using information related to either arrests or convictions when making employment decisions. The EEOC will only allow the use of arrest information when the conduct underlying the arrest makes the individual unfit for the position. For example, the EEOC notes that a school's policy to terminate an assistant principal arrested and charged with several counts of engaging the welfare of children and sexual abuse may have a disparate impact, but is lawful because the conduct at issue makes the assistant principal unfit for the position.

The EEOC believes that employers who want to utilize criminal background checks should develop a targeted screen that considers the nature of the crime, the time elapsed, and the nature of the job. Individuals excluded by the screen should then be given an opportunity for an individualized assessment to determine whether the policy as applied is job related and consistent with business necessity. This analysis is fact-intensive and requires employers to document and justify their use of criminal history when making employment decisions particularly in light of the aggressive stance the EEOC will take.

WHAT TO DO? Given these trends, employers can easily and inadvertently run afoul of the law when trying to ensure a workplace free of criminal elements. To avoid this, employers should either not inquire about or use criminal histories when making employment decisions or seek legal counsel to update or create policies regarding applicants' and employees' criminal histories. If an employer chooses to use one's criminal history for employment related purposes, it must unequivocally demonstrate that the information and use thereof is very much job related.