

Philadelphia's Fair Criminal Records Screening Standards or "Ban the Box" ordinance, which restricts employment-related inquiries into criminal history, was amended this week. The amendment, which is to take effect March 15, 2016 (90 days from December 15, 2015) greatly expands the impact of the ordinance.

First, the amended ordinance will restrict even further an employer's ability to make inquiries into criminal convictions during the application/interview process. Previously, employers were prohibited from asking applicants about criminal convictions on an application or otherwise before an initial interview. Under the amended ordinance, employers will be prohibited from asking applicants about criminal convictions at any time during the "application process," which is defined to begin with an applicant's inquiry about a position and to end with a conditional offer of employment. The amended ordinance defines "conditional offer of employment" as follows:

An offer by an employer to hire an applicant, which may be withdrawn only if the employer subsequently determines that the applicant (i) has a conviction record which, based on an individualized assessment . . . would reasonably lead an employer to conclude that the applicant would pose an unacceptable risk in the position applied for; or (ii) does not meet other legal or physical requirements of the job.

Second, the amended ordinance will prohibit an employer from asking applicants about their "willingness to submit to a background check" during the application process (as defined above). An employer will be permitted, however, to give notice to applicants (or prospective applicants) "of its intent to conduct a criminal background check after any conditional offer is made, provided that such notice shall be concise, accurate, made in good faith, and shall state that any consideration of the background check will be tailored to the requirements of the job." Much as before, an employer will also be permitted to discuss at any time during the application process information voluntarily disclosed by an applicant.

Third, the amended ordinance will apply to more employers. Previously, the ordinance applied to private employers of 10 or more persons in the City of Philadelphia. The amended ordinance will apply to private employers of 1 or more persons in the City of Philadelphia; however, another provision in the ordinance will exclude from covered employment "domestic services in or about the private home in which the employer resides." Employment with a law enforcement agency is excluded from covered employment under the original ordinance and will remain excluded under the amended ordinance. Apart from these two exceptions, "employment" will remain quite broadly defined, covering (among other things) contract work, temporary and seasonal work, and vocational and educational training.

Fourth, under the amended ordinance, it will be an unlawful discriminatory practice to use an application form that contains a question about criminal convictions even if certain applicants are told they do not need to answer the question. Accordingly, an employer with multiple locations may no longer use a "universal" application form that contains a question about criminal convictions even if the question is coupled with an instruction to applicants in Philadelphia to disregard it.

Fifth, the amended ordinance will impose a specific test for the lawful exclusion of an applicant on the basis of a criminal conviction. To start, as indicated by the definition of a "conditional offer of employment" above, an employer must undertake an "individualized assessment of the risk presented"

by an applicant, which assessment “shall include” consideration of (1) the nature of the offense, (2) the time passed since the offense, (3) the applicant’s employment history before and after the offense and any period of incarceration, (4) the “particular duties” of the job sought, (5) any character or employment references provided by the applicant, and (6) any evidence of the applicant’s rehabilitation since the conviction. Based on that individualized assessment, an employer may withdraw a conditional offer of employment only if it reasonably concludes that an applicant’s conviction “bears such a relationship to the employment sought 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.”

Sixth, the amended ordinance will impose a cut-off on the “look back” period for criminal conviction history. Employers will only be allowed to consider convictions that occurred “fewer than seven (7) years from the date of the inquiry,” although this standard is subject to modification if an individual was incarcerated for some or all of the relevant time period.

Seventh, the amended ordinance will require that an employer who rejects an applicant based “in whole or in part” on criminal record information notify the applicant in writing of the decision “and its basis” and provide the applicant with a copy of the criminal history report relied upon. Such an employer will also be required to allow the applicant 10 business days to provide evidence of inaccuracy of the information or other explanation.

Eighth, under the amended ordinance, a subject employer will be required to post a form of notice (to be supplied by the PCHR) “in a conspicuous place on [its] website and premises, where applicants and employees will be most likely to notice and read it.”

Ninth, the amended ordinance will have new enforcement mechanisms, including a limited private right of action. The Philadelphia Commission on Human Relations (“PCHR”) has now been expressly designated as the agency charged with accepting complaints and enforcing the amended ordinance and delegated the power to issue regulations “in furtherance of its administration and enforcement authority.” The PCHR, as the enforcing agency, has the power to impose fines for violations of the ordinance; to issue cease and desist orders and other injunctive or equitable relief; and to order payment of compensatory damages, punitive damages (not to exceed \$2,000 per violation), and reasonable attorneys’ fees. The amended ordinance will give the PCHR a year in which to conclude an investigation, either by way of dismissal for lack of evidence or a conciliation agreement. If it has not done so by that time, it must close the case and notify the complainant. In that event, the complainant then has two years to pursue a private right of action. A court of competent jurisdiction entertaining such a claim is authorized to award “any relief it deems appropriate” for each violation of the ordinance by an employer, including compensatory and punitive damages, reasonable attorneys’ fees, and court costs. Injunctive relief is also authorized.

Similar to before, the amended ordinance will exempt criminal record inquiries authorized or mandated by another applicable law or regulation. In light of the other sweeping changes in the ordinance, however, most Philadelphia employers will need to promptly re-examine their hiring practices and adjust them as needed before the amended ordinance takes effect on March 15, 2016.