

## **Los Angeles Enacts “Ban-the-Box” Legislation**

On December 9, 2016, Los Angeles Mayor Eric Garcetti signed into law the Los Angeles Fair Chance Initiative for Hiring ("Ordinance"). This ordinance is the latest of the so-called "Ban-the-Box" laws, which aim to restrict the use of criminal background histories for employment applications. The law goes into effect on January 22, 2017.

### **Q. Why Can't I Ask about Applicants' Criminal Histories?**

A. Over the past few years, the use of criminal background histories during the employment application process has come under attack. Opponents of their use argue that criminal background checks prevent qualified applicants from obtaining work, lead to recidivism, and disparately impact minority groups. In 2014, Governor Brown signed legislation imposing limitations on their use by state and local governments, and in 2015, President Obama announced that the federal government would not consider criminal backgrounds in its initial hiring processes. Now, with passage of its own "Ban-the-Box" Ordinance, Los Angeles has joined a growing list of municipalities extending similar limitations to private employers.

### **Q. Does the Law Apply to My Company?**

A. Most private employers with 10 or more employees are covered by the new law. Employees that count against this number are those who average at least two hours of work within the geographical bounds of Los Angeles and who qualify as an "employee" under state minimum wage laws (this includes owners and management). There are four important exceptions, however, that allow otherwise covered employers to use criminal background histories in the application process:

1. If the employer is required by law to obtain information regarding an applicant's convictions;
2. If the applicant would be required to use a firearm;
3. If an individual is prohibited by law from holding the position sought because of a criminal conviction; and
4. If the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

### **Q. Am I Completely Prohibited from Asking about an Applicant's Criminal History?**

A. During the initial stages of the application process, employers may not inquire into an applicant's criminal background. This prohibition is fairly broad. For example, a written job application cannot ask any questions about an applicant's criminal background. During the interview process, the employer cannot ask questions or require the applicant to disclose his or her criminal record. Also during the initial application process, the employer cannot independently seek information about the



applicant's criminal background, either on its own or through third parties.

Things change, however, once an employer gives the applicant a conditional offer of employment. The employer is then free to inquire into the applicant's criminal history, including directly questioning the applicant or obtaining a criminal history report. To qualify as a "conditional offer of employment," the only condition the employer may impose is assessment of the applicant's criminal history. The law does not mention other types of common and permissible pre-employment screening, so it is unclear whether other pre-employment inquiries are affected.

**Q. After Providing an Applicant a Conditional Offer, a Background Search Revealed a Criminal Conviction - What Can I Do?**

A. An employer cannot automatically disqualify an applicant with a criminal history. Instead, the employer must perform a written assessment that links the applicant's criminal history with risks inherent to the duties and responsibilities of the job. In making this assessment, the law requires employers minimally to consider such factors as:

1. The nature and gravity of the offense or conduct;
2. The time that has passed since the offense, conduct and/or completion of the sentence; and
3. The nature of the job held or sought.

Prior to taking any adverse action against the applicant (e.g., withdrawal of a conditional offer of employment), the employer must notify the applicant and provide him or her at least 5 days to provide information or documentation regarding such things as the accuracy of a criminal history report, evidence of rehabilitation, or other mitigating circumstances. The employer must consider any information and documentation provided and then perform a written "reassessment" before it can take any adverse action against the applicant.

If the employer decides to withdraw the conditional offer of employment, it must notify the applicant and provide a copy of the reassessment.

**Q. Are There Any Notice or Posting Requirements?**

A. Yes. Employers are required to state in all advertisements and solicitations that they will consider applicants with criminal histories "in a manner consistent with the requirements" of the law. Employers must also post a notice about the provisions of the law in a conspicuous location at each workplace or jobsite where applicants may visit. They must also send a copy of this notice to each labor union or worker representative with whom they have a collective bargaining agreement.

**Q. What about Recordkeeping Requirements?**

A. Employers are required to retain records relating to employment applications, written assessments, and written reassessments for three years from receipt of an individual's application. In any administrative enforcement action, these records must be made available to the Department of

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Public Works, Bureau of Contract Administration (a.k.a. the "Designated Administrative Agency, or "DAA") - the agency tasked with enforcing the law.

## **Q. What Are the Penalties for Noncompliance?**

A. In addition to prohibited practices during the application process, employers may not retaliate against employees who complain about an employer's noncompliance with the law, who oppose any prohibited practice, or who participate in any enforcement proceedings.

The law provides both administrative remedies and the right for applicants to file a civil action. Within a year of the alleged violation, an applicant must first file a complaint with the DAA, and the DAA will investigate and prosecute the applicant's complaint. If the DAA determines a violation, it must notify the employer and require the employer to cure the violation, and it may impose civil penalties as well. After completion of the DAA's enforcement process, the applicant then has one year to file a civil action.

Penalties and fines for recordkeeping and notice requirement violations are \$500 per violation. Violations for prohibited practices are up to \$500 for the first violation, \$1,000 for the second, and \$2,000 for the third and subsequent violations. Amounts are determined by the DAA and are based on the employer's "willfulness" and other factors.

## **Q. When Does the Law Go into Effect?**

A. The law becomes effective on January 22, 2017. However, the DAA will not begin issuing penalties until July 1, 2017. Before that date, the DAA will only issue written warnings.

## **Q. What Can I Do to Protect My Company?**

A. Employers in Los Angeles should review their application and job advertisement materials to make sure they are in compliance with the Law. Employers should also develop a carefully crafted written policy for using criminal histories in the application process, consistent with the Law. Lastly, employers should train managers, hiring staff, and other decision makers on the requirements of the Law and how best to implement compliant policies and procedures.