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# Newark Restricts Employers' Ability to Conduct Criminal Background Checks

On September 19, 2012, the Newark Municipal Council passed Ordinance 12-1630, which limits employers' ability to conduct criminal background checks. The ordinance, which goes into effect November 18, is the latest effort in a recent trend attempting to curb employers' inquiries into the criminal history of applicants.

Ordinance 12-1630 prevents employers with five or more employees who do business, employ persons or take applications for employment in the City of Newark, from asking applicants about their criminal history. If an applicant voluntarily discloses this information, the ordinance does not prevent the employer from discussing the information disclosed. The ordinance also provides that employers may not produce or disseminate any advertisement that in any way limits eligibility for employment based on an applicant's criminal history.

Once a conditional offer of employment is made, employers may make certain criminal history inquiries, such as:

- Inquiries into indictable offense convictions (generally, crimes that would be considered felonies), for up to eight years after sentencing;
- Disorderly persons convictions or municipal violations (generally, crimes that would be considered misdemeanors), for up to five years after sentencing;
- Pending criminal charges, until the case is dismissed; and
- Convictions for murder, voluntary manslaughter, and certain sex offenses requiring registration that are punishable by a term of incarceration in state prison, regardless of how much time has passed since the conviction.

Employers may not, however, inquire about, require any applicant or employee to disclose, or take any adverse action against an applicant or employee based on any arrest not then pending and which did not result in a conviction; on any records that have been erased, expunged, pardoned, or nullified; or on any juvenile adjudications of delinquency (generally, crimes committed as a juvenile) or any records that have been sealed. Employers may still make inquiries where any federal or state law requires the consideration of an applicant's or an employee's criminal history for the purposes of employment, provided this exemption is limited to those offenses the federal or state law requires the employer to consider.

Employers may not make criminal history inquiries unless they make a good-faith determination that the position in question is of such a sensitive nature that a criminal background check is required. In such cases, employers must notify applicants that a criminal background check is being conducted and obtain written consent authorizing the specific inquiry.

When evaluating criminal information, employers must consider several relevant factors, including the nature of the crime and its relationship to the duties of the position sought, any information pertaining to the applicant's or employee's degree of rehabilitation and good conduct, whether the prospective job provides an opportunity for the commission of a similar offense, whether the circumstances leading to the offense are likely to reoccur, how much time has elapsed since the offense, and whether any certificate of rehabilitation has been issued by any federal or state agency. Employers must document their consideration in an Applicant Criminal Record Consideration form and provide this form to any applicant who has a conditional offer revoked because of his or her criminal history. Employers must also provide applicants with the relevant portions of the ordinance at this time and must notify applicants of their opportunity for review of the accuracy and or relevance of the results of the inquiry.

The ordinance also addresses the procedures employers must take when an adverse employment action is taken against a current employee. In such cases, as with denials of applications, employers must notify the employee of the adverse employment decision, provide a copy of the results of the inquiry and a written notice of the decision explaining the reasons for the decision, and again advise the employee of the opportunity for review.

Fines for violations of the ordinance can be as high as $1,000 for each occurrence. To avoid these fines, employers should consider altering their application forms to remove inquiries about criminal history, training hiring managers and human resource representatives about the provisions of the ordinance, and carefully evaluating the circumstances of each application for employment to determine whether to go forward with criminal background inquiries. Additionally, employers should remain aware of various other federal and state restrictions addressing these practices, including the EEOC's recent guidance, the federal Fair Credit Reporting Act and its New Jersey equivalent, as well as a pending New Jersey bill to similarly restrict such inquiries.