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CRIMINAL RECORDS

Don't box me in! Delaware lawmakers consider ban-the-box legislation

by Lauren E.M. Russell

The ban-the-box movement has been gaining momentum across the country in recent years. Under ban-the-box laws, employers are generally prohibited from inquiring about arrest and conviction records on job applications. Instead, most laws require that such inquiries be delayed until a candidate is deemed qualified for the position being filled.

The city of Wilmington adopted such a provision through an Executive Order in 2012 for applications for employment with the city. Now the state of Delaware is considering legislation that would impose restrictions on the state, its political subdivisions, and public contractors. Here's what you should know about House Bill (HB) 167, currently pending before the General Assembly.

What does the bill do?

HB 167 proposes to amend two sections of the Delaware Code: the Delaware Discrimination in Employment Act (DDEA) and state procurement law.

Antidiscrimination protections. First, the DDEA would be expanded to create another unlawful employment practice, prohibiting "public employers" from a variety of conduct involving preemployment background checks. HB 167 defines "public employer" to include the state of Delaware, its agencies, and its political subdivisions. There's an exception for any police force, the Delaware Department of Corrections, and jobs for which federal or state law requires or expressly permits

consideration of criminal history (e.g., childcare, healthcare, and school employees).

If enacted, HB 167 would prohibit public employers from considering "the criminal record, criminal history, credit history, or credit score of an applicant for employment" until a conditional offer of employment has been made. Once a conditional offer of employment is made, criminal background checks are limited to (1) felony convictions occurring within the last 10 years or (2) misdemeanor convictions occurring within the last five years.

If a public employer decides to make an employment decision based on any information elicited, it is *required* to consider five factors:

1. The nature of the crime and its relationship to the job duties;
2. The degree of rehabilitation and good conduct the prospective employee demonstrates;
3. Whether the prospective job would provide an opportunity for the commission of a similar offense;
4. Whether the circumstances leading to the offense are likely to recur; and
5. The time elapsed since the offenses.

Only after making a conditional offer of employment, limiting its inquiry, and, in the case of a criminal background check, considering the five mandatory factors may a public employer decide to revoke a conditional offer of employment based on information gathered through a background check.

State procurement requirements. HB 167 also proposes to alter state procurement requirements. State procurement laws apply to the state and its agencies. Generally speaking, an "agency" is any public entity that receives money under any state budget appropriation act.

Under the proposed revisions, the state or its agencies will only do business with contractors that have adopted *written policies* consistent with the provisions of the DDEA outlined above. Before granting contracts, all agencies would be required to review the contractor's background check policies for consistency with the DDEA amendments. Background check policies will become a mandatory performance criterion in evaluating bids.

Of course, as there must be, HB 167 includes an exception for contractors providing services in areas where a criminal background check or credit check is a requirement of state or federal law.

Practical implications

Why should employers be concerned about HB 167? Even if you won't be directly affected by the proposed statute, it's reasonable to conclude that HB 167's provisions could be expanded to apply to private employers at some point in the future. If you are directly affected, there are additional concerns.

We have long warned about the unjustified use of background checks in the hiring process — they have a demonstrably disparate impact on minority groups, including women, Hispanics, and African Americans. Nevertheless, HB 167 goes far beyond the requirements of a traditional disparate impact analysis (i.e., the practice must be job-related and consistent with business necessity). Instead, it requires that employers *conditionally employ* an individual before looking into factors that might have a direct impact on his qualifications and employability.

The bill further limits the scope of inquiry, prohibiting employers from even considering arrest records. Imagine a scenario in which an individual is the subject of a well-publicized arrest, but the charges eventually are dismissed on a technicality. Under the background check guidelines published by the Equal Employment Opportunity Commission (EEOC), an employer could consider the arrest if it conducted an independent inquiry into the veracity of the allegations. That's not the case under HB 167.

Bottom line

If HB 167 passes the General Assembly and is signed into law by Governor Jack Markell, public employers and state contractors will be subject to significant additional hiring obligations. Employers that will be covered by HB 167 should consider reaching out to their assemblymen to express any concerns about the proposed legislation.

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