State Rules Register Alert

January 10, 2017

Evaluating the Los Angeles Ban-the-Box

Los Angeles has joined the long list of cities that have enacted their own version of Ban-the-Box. The new law goes into effect January 22, 2017. In general, an employer [located or doing business within Los Angeles and has 10 or more employees] cannot inquire into the applicant's criminal history until after a conditional offer of employment has been made. The ordinance defines a conditional offer of employment as: "an Employer's offer of Employment to an Applicant conditioned only on an assessment of the applicant's Criminal History, if any, and the duties and responsibilities of the employment position. In the real world, a conditional offer may be "conditioned" on many factors beyond criminal history. What the Los Angeles ordinance means by "and the duties and responsibilities of the Employment position" is not defined or clear. Does it include a physical examination? Drug testing? Education verification/employment verification? The concern here is whether the law creates a two tier conditional job offer process wherein all other employment screening is done in a phase 1 but only criminal record screening is done in a phase 2 process, along with whatever might fall within the "duties and responsibilities" category. Once again imprecise language creates problems.

The ordinance adopts a similar process as did New York City requiring a "Fair Chance Process" wherein the employer must assess the criminal record history to the job in question. However, Los Angeles desires to out-do New York City as it requires employers to go through this process twice. The first round is after the employer receives the criminal record information. The employer is to consider the criminal record in conjunction with the factors announced by the EEOC when determining of relevance of a criminal record to a job. We assume that these are the eight factors listed in the 2012 EEOC Guidance, but the ordinance does not spell this out. This requires a written assessment of that analysis. At the first stage it is likely that an employer would not have all the information necessary to do such a complete analysis of the 8 factors. Also provided in the ordinance is that the city may in the future add additional or replacement criteria upon which the employer must make its written assessment. There is no form for the assessment provided at this time. Functionally, the first assessment is at the pre-adverse action stage of the FCRA process [include written assessment with Pre-Adverse Action Notice], but these requirements exist whether or not the employer is using a CRA or other third party to obtain criminal record information.

The employer may not take adverse action for 5 business days after the consumer receives the notification they may not be hired due to their criminal record.

After receiving the notification, the consumer can dispute the information, present evidence of rehabilitation or other mitigating information. The employer is to consider the results of the dispute investigation and any information the consumer has provided. After receiving this information, the employer must make a second written assessment and provide that to the consumer. This notification is functionally at the time the adverse action notice would be given

under the FCRA, thus for a Los Angeles employer, not only will they provide an adverse action notice, they will also provide the second written assessment.

There is no special notice of rights that need to be provided to the consumer during the application or assessment/notification process. However, each employer is to post these rights at every one of its work places and in its advertising for jobs.

The employer must maintain all written assessments for 3 years.

These requirements do not apply to the following individuals:

- Those who would be required to possess or use a firearm in the course of their employment.
- Those who are prohibited by a conviction to hold a particular job in question in employers.

These requirements do not apply to the following employers:

- That are required, by law, to obtain criminal record history as part of the hiring processes.
- That are prohibited by law to hire someone who has been convicted of a crime (assume that the "crime" has been identified in the law prohibiting the hiring).

Laws requiring an individual analysis make the use of a hiring matrix nearly impossible. A CRA should be very careful in agreeing to adjudicate criminal records under these laws.

To refresh your recollection, here are the 8 factors announced by the EEOC in their 2012 enforcement guidance:

1. The facts or circumstances surrounding the offense or conduct.
2. The number of offenses for which an individual was convicted.
3. Older age at the time of conviction or release from prison.
4. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
5. The length and consistency of employment history before and after the offense or conduct.
6. Rehabilitation efforts, e.g., education/training.
7. If the landlord takes adverse action on the application, then an adverse action notice must be given. [Editor note: This law does not create any new requirements for the adverse action letter beyond that contained in the FCRA].
8. Employment or character references or any other information regarding fitness for the particular position.
9. Whether the individual is bonded under federal, state or local bonding program.