KAUFMAN | DOLOWICH

Mansfield Rule Certified 2022-2023

KD Employment Alert: New York City Businesses Face New Restrictions On Pre-Employment Criminal Background Checks

By Keith J. Gutstein, David A. Tauster & Aaron Solomon

June 26, 2015

On June 10, 2015, the New York City Council passed legislation that will drastically limit employers from performing pre-employment criminal background checks on prospective hires. Commonly known as the "Fair Chance Act," this bill mirrors similar "Ban the Box" legislation which has been recently adopted in a number of large cities, including Washington D.C. and San Francisco. The Act applies to New York City based employers, or businesses with workplaces in New York City, that employ four or more individuals.

The Act makes it an unlawful discriminatory practice to inquire about an applicant's pending arrests or conviction record until ***after the employer has deemed the applicant otherwise qualified*** *and has decided to extend a conditional offer of employment. The Act would define such an inquiry broadly, such that it will prohibit inquiries in any form, including searches of publicly available records and obtaining consumer reports that contain criminal conviction, arrest, or accusation information. The Fair Chance Act would not apply, however, to those occupations where a pre-employment criminal background check is already required by law or those which bar employment based on criminal history –e.g., health care workers.*

For employers who wish to rescind an offer of employment based on a post-offer inquiry, the Act prescribes a specific procedure. First, the employer must provide a written copy of the results of the employer's inquiry to the applicant. Second, the employer must engage in the multifactor analysis set forth in Article 23-A of New York State's Correction Law to determine whether there is a direct relationship between the job and the prior criminal activity to warrant disqualification. These factors include the time which has passed since the conviction, the age of the individual at the time of the offense, and the seriousness of the offense. This analysis must also be reduced to writing and provided to the applicant. Finally, the employer must allow the applicant at least three business days to respond to the results of the inquiry and analysis. During this period, the employer is obligated to hold the position open for the applicant. Importantly, applicants are not required to respond to inquiries that violate the Act, and any refusal to respond to any such impermissible inquiry cannot be used to disqualify an applicant from employment.

The Act also prohibits employers from circulating any solicitation, advertisement, or publication which directly or indirectly expresses any limitation or specification in employment based on a person's arrest or criminal conviction. In addition, the Act prohibits employers from denying employment to an applicant or acting adversely toward any employee on the basis of criminal convictions if such actions violate Correction Law Article 23-A. Notably, however, even for existing employees, Article 23-A only bars adverse actions based upon criminal convictions that occurred prior to employment.

As the Act will go into effect 120 days after it is signed by the Mayor, employers are advised to review their hiring practices and employment applications now to ensure that they are in compliance with the Fair Chance Act, as well as federal statutes regulating background checks.

© 2024 Kaufman Dolowich. All Rights Reserved. | www.kaufmandolowich.com