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Maryland Adds to Its Patchwork of Ban the Box Laws

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During the 2019 legislative session, the Maryland House and Senate voted to enact the Criminal Record Screening Practices Act (Ban the Box) (the Act). The Governor, however, vetoed the Act. At the start of the 2020 session, the legislature overrode the Governor's veto making the Act effective on February 29, 2020. The Act adds to the patchwork of local laws existing in Maryland: Baltimore City, Montgomery County and Prince George's County all have ban the box laws. Notably, those local laws provide greater rights to applicants and employees than does the state Act. For employers who also must comply with the District of Columbia ban the box laws and/or other state and local jurisdictions' laws, the ability to comply is becoming increasingly complex.

Coverage and Requirements of the Maryland Act

Employers who employ 15 or more full-time employees are covered by the Act. Employment includes not only traditional work for compensation, but also any form of vocational or educational training, with or without pay; contractual, temporary, seasonal, or contingent work; and work through the services of a temporary or other employment agency.

Under the Act, employers may not make any inquiry into an applicant's "criminal record" until during the first *in-person* interview. The Act defines "criminal record" to include:

- An arrest;
- A plea or verdict of guilty;
- A plea of nolo contendere;
- The marking of a charge "STET" on the docket;
- A disposition of probation before judgment; or
- A disposition of criminally responsible.

The Act does not, however, prohibit employers from making criminal record inquiries if the employer is *expressly* authorized to do so by another applicable federal or state law. Further, the Act does not apply to an employer that provides programs, services or direct care to minors or to vulnerable adults.

Notably, the Act makes clear that it does *not* preempt a local jurisdiction in Maryland from enacting or enforcing a similar law that is more restrictive, which means that employers must continue to comply with Baltimore City's, and Montgomery and Prince George's Counties' ban the box laws. Employers also are prohibited from retaliating against an applicant or employee for complaining about a violation of the Act.

Enforcement of the Act

If the Maryland Department of Labor (MD DOL) determines that an employer has violated the Act, it will first issue an order compelling compliance, and for any subsequent violation of the Act, the MD DOL may, at its discretion, assess a civil penalty of up to \$300 for each applicant that was affected by the employer's violation.

Key Takeaways

Covered employers in Maryland must remove the criminal inquiry question from their employment application forms before February 29, 2020 and review their policies and practices to ensure compliance with the Act. Employers also should educate their HR and management staff who conduct interviews that they may not make any inquiries about an applicant's criminal record until the first in-person interview, including inquiries of applicants for paid or unpaid educational or vocational training programs, such as internships. Of course, although the Act allows for an inquiry during the first in-person interview, a best practice is to make conditional offers of employment to applicants in writing and make clear the offer is conditioned on an inquiry into an applicant's criminal record and any other contingencies that may be applicable. Consider that allowing managers to make inquiries during the first in-person interview could lead to unintended consequences and liability for employers. Employers must also make certain that any temporary agency, recruiting firm, or other similar agency from which an employer obtains applicants or temporary workers complies with the Act.

Importantly, as with most ban the box laws, the Act does not preclude an employer from making an employment decision based on an applicant's criminal record. Because of the Equal Employment Opportunity Commission's recent attention regarding criminal background checks and because of applicable laws governing background checks other than Acts, such as the Maryland Job Applicant Fairness Act and the federal Fair Credit Reporting Act and similar state laws, this is also an opportunity for employers to review their hiring practices to ensure that they align with those applicable laws.