New York City Adopts New 'Ban the Box' Regulations, Continues Expansion of Employee Rights

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Although New York City's "ban the box" law, the Fair Chance Act ("FCA"), went into effect close to two years ago, the New York City Commission on Human Rights' final regulations became effective on August 5, 2017. These regulations expand on the previously issued Enforcement Guidance (New York City Issues Enforcement Guidance Related to City's Fair Chance Act) and both clarify and impose additional obligations on employers in screening applicants and existing employees for promotions.

Through these final rules, the Commission significantly expands on *per se* violations, creates a discretionary mechanism to resolve *per se* violations by sending employers an Early Resolution Notice, and, most important, confirms that, while restrictions related to timing of statements and inquiries apply, employers are not required to engage in the FCA review process on arrests currently pending.

Following are some significant changes employers should note in ensuring compliance with the FCA.

- It is a *per se* violation to use a standard boilerplate job application across multiple jurisdictions that requests or refers to criminal history, even with a New York City disclaimer;
- When engaging in the Fair Chance Process (the process by which an employer evaluates whether it wishes to withdraw a conditional offer of employment after learning of an applicant's or employee's conviction history), the employer must affirmatively request information concerning clarification, rehabilitation, or good conduct to rely upon in making its determination. The employer also must provide the applicant or employee with a complete and accurate copy of each and every piece of information relied on to determine that the individual has a conviction history (this includes, but is not limited to, background check reports, internet print outs, public records, and written summaries of oral conversations);
- Employers can be liable for a *per se* violation for inquiring about a pending criminal case *before* a conditional offer of employment is made;
- The regulations do not require employers to engage in the Fair Chance Process *after* making a conditional offer of employment if they learn the employee or applicant has a currently pending criminal case and the potential withdrawal of the offer is based solely on the pending criminal case and not the employee's or applicant's conviction history;
- While employers who seek to claim a Work Opportunity Tax Credit ("WOTC") are not exempt from the FCA, such employers may require an applicant to complete IRS Form 8850 (Pre-Screening Notice and Certification Request for Work Opportunity Credit) and U.S. Department of Labor Form 9061 (Individual Characteristics Form) before a conditional offer as long as the information gathered is used solely for purposes of applying for the WOTC.
- While the regulations only require employers to undergo the Fair Chance Process when withdrawing an offer based on an employee's or applicant's conviction history (and not merely an employee's or applicant's criminal history), the regulations are inconsistent in that they *do* create a rebuttable presumption that an employer was motivated by an applicant's criminal history if it revokes a conditional offer without following the Fair Chance Process.

These developments are hardly the first in a long line of actions taken by the New York City Council expanding rights to employees and workers in New York City. Starting October 31, 2017, employers will no longer be able to inquire regarding an employee's or applicant's salary history through all stages of the employment process. In addition, the "Freelance Isn't Free Act" went into effect on May 15, 2017, establishing enhanced legal remedies for freelance workers in New York City and requiring written contracts for freelance services of at least $800. The New York City Department of Consumer Affairs recently issued rules on the Freelance Isn't Free Act (went into effect on July 24, 2017), which most notably prohibit class action waivers in freelance contracts.

Other recent developments include the Fair Work Week legislative package of five bills reforming

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legislation governing employee scheduling in the fast food and retail industry. These laws go into effect on November 26, 2017, and will require employers to take a closer look at on-call scheduling, shift changes, and the hours each employee is assigned to work a week.

To ensure compliance with these new developments, employers should review their existing forms and procedures for hiring and scheduling.

Please contact Jackson Lewis with any questions about these developments, compliance, or government relations.

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