

Legal Update Article

Hawaii Tightens Ban-the-Box Law, Further Limiting Use of Past Criminal History in Work Decisions

By Richard I. Greenberg,

October 5, 2020

Meet the Authors



Richard I. Greenberg

(Rich)

Principal

(212) 545-4080

Richard.Greenberg@jacksonlewis.com

Related Services

Background Checks

Employment Litigation

Hawaii has narrowed the scope of what employers can consider regarding an individual's conviction history when making employment decisions.

Hawaii employers have long been required to limit their consideration of felony and misdemeanor convictions to a 10-year lookback period, unless they fell within one of the statutory exemptions as part of its longstanding "ban the box" legislation. State law has further required employers to apply a "rational relationship" test before denying a prospective or current employee a position following a background check, which means an employer may only consider those convictions occurring in the permissible time period if there is a "rational relationship" between the convicted crime and the prospective job.

The Hawaii legislature has taken further steps to narrow the scope of what employers can consider regarding an individual's conviction history. The concern was that, without further change, the "rational relationship" test would still be ripe for subjectivity, creating a potential for inconsistent application due to express or unconscious bias, which can result in discrimination against a person who has long since paid their debt to society and who poses little to no risk to the employer or to the public. Consequently, on September 15, 2020, the Governor of Hawaii signed into law [Act 051 \(20\)](#), amending Hawaii Revised Statutes Section 378-2.5 by reducing the "lookback" period and differentiating between felonies and misdemeanors. The intent was to minimize any possible conscious or unconscious bias that arises when an employer views an "old" crime when making employment decisions.

Felonies older than seven years and misdemeanors older than five years are no longer relevant toward job suitability determinations, unless they fall within one of the existing 18 statutory exemptions, *e.g.*, Department of Education employees. Even with these distinctions and limited "lookbacks," employers must still apply the "rational relationship" test when making employment decisions.

Additionally, the suitability determination with respect to relevant criminal history may only occur *after* the applicant has received a conditional job offer.

If an employer has extended a conditional job offer to an applicant or offered a current employee a promotion and the person's background check reveals a criminal history for a Hawaii-based position, seek legal counsel to review any potential exposure, if applicable, arising out of the reduced "lookback" period and application of the "rational relationship" test before denying employment.

For additional guidance on this issue, please contact a Jackson Lewis attorney.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.'s 1000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients' goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.