

## San Francisco's Board of Supervisors Severely Limits Employers' Criminal History Checks and "Bans The Box"

By: Alden J. Parker

The San Francisco's Board of Supervisors has now prohibited the widely used criminal history check box for employment applications. Unless the Mayor vetoes it, the "ban the box" ordinance will become law no later than Thursday, February 13, 2014. In addition to banning the box, the new San Francisco legislation imposes a host of additional new restrictions on the use of criminal history for employment purposes. These restrictions are in addition to those already imposed by the federal Fair Credit Reporting Act (FCRA).

### Ban-the-Box Requirements (Not just San Francisco)

San Francisco's Fair Chance Ordinance (the "Ordinance"), prohibits employers that employ 20 or more employees in San Francisco from inquiring into an applicant's criminal history, i.e., criminal convictions and pending charges, on the employment application or during the first live interview. Many different jurisdictions have similar ban-the-box regulations, although they differ significantly in timing of when questions regarding criminal history can be asked. The most up to date timeline is as follows: (a) the entire State of Massachusetts - any time after the initial application; (b) the City of Seattle - after the initial screening of applicants to eliminate unqualified applicants; (c) the entire State of Minnesota - after the applicant has been selected for an interview; (d) the City of Buffalo and the State of Rhode Island - at the first interview; (e) the Cities of Philadelphia and San Francisco - after the first interview; and (f) the State of Hawaii and the City of Newark - after a conditional offer of employment .

### Requirements and Enforcement

Under the San Francisco Ordinance, employers with 20 or more employees within the city limits, are required to state in job advertisements that they will consider qualified applicants with a criminal history. Also, employers will be required to display a poster regarding the Ordinance in each San Francisco location where applicants or employees visit and send the poster to each labor union that represents employees in the employer's workplace. The poster must provide the following information in English, Spanish and Mandarin: (a) the criminal history information that employers are prohibited from considering; (b) the restrictions on employers' inquiry into criminal history; (c) the individual's right to submit information about rehabilitation and mitigating factors, a list of those factors, and the timeline for providing the information; and (d) contact information for the OLSE to report suspected violations. The OLSE is required to publish this poster within six months after the Ordinance goes into effect.

The consequences of non-compliance are as follows: the City can pursue civil remedies for violation of the Ordinance, including an injunction, reinstatement of the employee, back pay, benefits, \$50 per employee for each day the Ordinance was violated, and attorneys' fees and

costs. Additionally, employers must retain records related to the hiring process (this will include advertisements) for three years and provide them to the OLSE for inspection upon request.

### **Additional Restrictions on use of Criminal History for Employment Purposes**

Even after the first interview in San Francisco, employers are permitted to ask only about misdemeanor and felony convictions that occurred within seven years of the inquiry. The Ordinance prohibits employers from asking about (a) arrests other than those for which charges are still pending, (b) the completion of a diversion program, (c) sealed and juvenile offenses, and (d) infractions that are not felonies or misdemeanors. In addition to the first interview having to have occurred, before making an allowed inquiry, employers must provide the applicant with a notice containing information that is listed in the above described poster.

If an applicant does disclose criminal history, San Francisco employers are still limited in what they can do with the information. The Ordinance provides that the employer can consider the information only if it has “a direct and specific negative bearing on [the applicant’s] ability to perform the duties or responsibilities necessarily related to the employment position.”

The Ordinance does not stop there. If the employer decides to reject an applicant based on criminal history, it must provide a pre-adverse action notice and a final adverse action notice. The pre-adverse action notice requirement varies from the Fair Credit Reporting Act’s (FCRA) pre-adverse action notice requirement in several important respects. First, the notice must be provided regardless of whether the employer obtains the criminal history information through the applicant’s self-disclosure or a background report provided by a consumer reporter agency. Second, the notice must identify the specific criminal history that provides the basis for the adverse decision. Third, the employer must wait at least seven days from the date of the notice before taking final adverse action. Finally, if during the seven-day waiting period the applicant disputes the criminal history or provides information regarding rehabilitation or mitigating factors, the employer must wait a “reasonable time” before taking adverse action.

### **Recommendations for Employers**

To comply with the Ordinance, which likely will go into effect by mid-March, San Francisco employers with more than 20 employees should consider taking the following steps:

1. Revise job advertisements to include required language;
2. Post the required poster after the OLSE publishes it;
3. Review their employment application to remove questions about criminal history;

4. Revise their hiring procedures to delay inquiry about criminal history until after the first live interview;
5. Develop a criminal history questionnaire that (a) limits the inquiry as permitted by the Ordinance, and (b) includes the required notice;
6. Ensure that applicants who likely will be rejected based on criminal history receive a pre-adverse action notice that complies with both the Ordinance and, if the employer received a background report from a background check vendor, the FCRA;
7. Establish a minimum seven-day waiting period before sending a final adverse action notice and an additional waiting period if the applicant submits evidence of rehabilitation or mitigating factors;
8. Retain all documents demonstrating compliance with the Ordinance for at least three years.

Mid-March 2014 is approaching quickly. If you have any questions regarding these new requirements and your hiring process, please contact your Weintraub Tobin attorney immediately.