D.C. Enacts New “Ban the Box” Legislation

?By former Associate Jack Blum

On July 14, 2014, the District of Columbia took another step towards limiting an employer’s ability to inquire into the criminal history of job applicants as part of the nationwide “ban the box” movement. The D.C. City Council unanimously passed the Fair Criminal Record Screening Amendment Act of 2014, which will now proceed to Mayor Vincent Gray and then the United States Congress for review. Mayor Gray indicated to the Council on June 3, 2014 that he supported the measure, so its final enactment appears likely.

The new law forbids employers from asking job applicants about, or requiring the applicants to disclose, any information about the applicant’s criminal history until the employer has made a conditional offer of employment to the applicant. Even at that point, employers are still prohibited from inquiring into, or requiring applicants to disclose, any arrests or other criminal accusations or charges that are not pending and did not result in the applicant’s conviction. The law also forbids employers from undertaking any independent background check or investigation to obtain this information from sources other than the applicant.

If after making a conditional offer of employment the employer discovers a conviction that gives rise to second thoughts about the applicant, the employer must document a “legitimate business reason” for withdrawing the applicant’s conditional offer. The new law requires the legitimate business reason to be “reasonable” in light of several enumerated factors, which are:

- The specific duties and responsibilities necessarily related to the employment sought by the applicant;
- The bearing of the criminal offense(s) for which the applicant was convicted on the applicant’s fitness or ability to perform those duties and responsibilities;
- How much time has elapsed since the occurrence of the criminal offense;
- The applicant’s age at the time of the criminal offense(s);
- The frequency and seriousness of the criminal offense(s);
- Any information produced by or on behalf of the applicant regarding the applicant’s rehabilitation and good conduct; and
- The public policy that it is generally beneficial for ex-offenders to obtain employment.

An applicant whose offer is withdrawn because of a conviction can request that the employer provide all of the records considered by the employer as well as a written Statement of Denial specifically demonstrating the employer’s consideration of each of the factors listed above. If an employer fails to provide the Statement of Denial within 30 days of the request, the D.C. Office of Human Rights will presume that the employer had no legitimate business reason for withdrawing the applicant’s conditional offer. If the Office of Human Rights determines that an employer did not have a legitimate business reason for withdrawing a conditional offer, then it may impose a fine of up to $5,000 on the employer.

This clearly imposes a considerable new obligation on employers making hiring decisions. Employers should be sure to carefully consider and document any decision to withdraw a conditional offer, and should also retain all of the records that the employer reviewed and relied upon in deciding to withdraw the offer. This will ensure that the employer’s legitimate business reason is not developed for the first time in the final days before a Statement of Denial must be provided. In addition, employers using application forms that request or require applicants to disclose arrests, convictions, or other information about criminal proceedings need to immediately remove such requests from their application; as such forms violate the new law.

