

Montgomery County Employers Must Comply with New Ban the Box Law by Jan. 1

By Jessica Summers

Montgomery County's new "ban the box" law goes into effect on January 1, 2015, and does far more than simply banning the box. The law, which was enacted by the Montgomery County Council on October 28, 2014, will place significant limitations on how most employers in the County may inquire about, and use, information related to an applicant's criminal history. **Montgomery County employers would be well advised to review their own policies on the use of criminal histories and to train and educate those employees who are involved in the hiring and promotion processes in order to ensure full compliance with the law.**

The law applies to all private employers with fifteen or more full time employees in Montgomery County and covers both new applicants for employment as well as current employees applying for promotion.

The law places new restrictions on employers during four distinct phases of the application process as follows:

- **Original Application** – The law prohibits employers from requiring applicants to make any disclosures about their arrest or conviction records on the initial employment application (known as "banning the box").
- **Inquiry Stages** – The law prohibits employers from making any inquiry (whether directly to the applicant or by conducting a criminal background search) into an applicant's criminal history before the conclusion of the "initial interview." For the purposes of this restriction, the statute defines an initial interview as the first direct contact, whether in person, on the phone or electronically, between the employer and the applicant in which the position or the applicant's qualifications are discussed. As an exception to this rule, employers may inquire about criminal history before the end of the initial interview if it is voluntarily disclosed by the applicant. Further, the rule does not prohibit employers from asking about an applicant's employment history or resume.
- **Consideration Stage** – After an employer has learned of an applicant's arrest or conviction record, the law requires, that before taking any action, the employer engage in an individualized assessment (much like that set forth in the EEOC's 2012 guidance we wrote about here) to consider whether the offense demonstrates unfitness for the position being applied for.
- **Decision Making** – If an employer decides that it is appropriate to take an adverse action (such as withdrawing a conditional offer or not hiring or promoting) based on an applicant's arrest or conviction record, the new law requires that the employer 1) provide the applicant with a copy of the criminal record being referred to, 2) provide the applicant with notice of the employer's intent to take the adverse action, and 3) delay the adverse action for seven days to give the employee time to review the criminal record and provide notice of any inaccuracies. If an employee comes forward within the seven days to provide notice of an inaccuracy, the employer must continue to delay the adverse action and reconsider the action based on the new information. If the employer ultimately decides to move forward with the adverse action, the law finally requires the employer to provide the applicant with written notice of the final action.

The statute does carve out certain exceptions to the restrictions set forth above. In the context of private employers, the rules do not apply to 1) criminal background inquiries that are required by federal, state or county law, 2) employers "that provide programs, services, or direct care to minors or vulnerable adults" and 3) employers hiring for positions that require security clearance with the federal government.

Employers who violate the law may be subject to civil penalties of up to \$1,000 per violation.

Bottom Line for Montgomery County Employers: Depending on an employer's current practices, the new law may require some employers to make significant changes to how they approach their hiring and

promotion process. As the law also applies to current employees seeking promotions, employers should be sure to confirm that all promotions are being handled properly as promotional decisions tend to be less centralized and less likely to be handled primarily by a human resources professional.