

An Update on Minnesota's "Ban the Box" Law

Last fall, we published an article describing Minnesota's "Ban the Box" law (Minn. Stat. 364.021) which became effective January 1, 2014. In essence, this law requires private employers to wait until a job applicant has been selected for an interview or a conditional offer has been made before questioning an applicant about criminal records or history.

The Minnesota Department of Human Rights has recently issued a Technical Guidance Report that, although not binding on courts, may be instructive for employers.

It should be noted that the "Ban the Box" law does not require an employer to either interview or hire someone with a criminal record. Furthermore, the law does not prohibit criminal background checks; it merely changes the timing that such a check may be conducted.

Employers must be aware that compliance with the "Ban the Box" law does not preclude a discrimination suit against them. Such a suit may still be brought if the employer uses criminal background information in a discriminatory manner that has a disproportionate impact on a protected class of individuals, the employer does not use a targeted screen, and the employer fails to provide the applicant with an opportunity to respond to the information obtained.

There is an exemption from the law for certain private employers. Specifically, private employers are exempt under the new law if the employer is specifically required by statute to conduct a criminal history background check or the employer is directed to gather information so that a criminal history background check can be conducted by a licensing authority.

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In order to protect themselves, employers may wish to take the following steps:

- Review the application forms used to ensure that none of its questions could lead to the disclosure of criminal information.

- If the employer does not use an application form, the employer should review its initial interview script with applicant to ensure that it contains no questions that could lead to the disclosure of criminal information;

- If the employer is in multiple states and utilizes an electronic application, the employer should clearly state, in bold and in a different font, that applicants applying for positions in Minnesota do not need to answer questions inquiring into criminal history under Minnesota law. If an applicant does answer this question despite the disclaimer, the employer should not track or in any way use this information.

- If the decision of an employer as to who is eligible to be hired is regulated by a licensing authority such as the Minnesota Department of Human Services, the employer should ensure that applicants are not excluded beyond the time period identified by the regulating licensing authority.

- Develop a narrowly-tailored written policy for screening applicants and employees for criminal conduct.