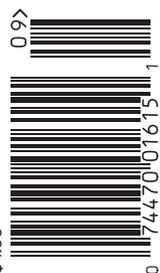


Oregon Business

September 2016 | OregonBusiness.com

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The Hiring Process: New Restrictions in Oregon

BY **BEN O'GLASSER**, ATTORNEY AT
BULLARD LAW, PC

OREGON HAS RECENTLY ENACTED A “BAN the box” law and the City of Portland has recently enacted a “ban the box” ordinance that impose restrictions on how employers administer their hiring process. Oregon employers should take note of the new restrictions and consider their impact on when and how applicants are vetted.

“Ban the box” is a national campaign that seeks to ensure that potential employers will consider a job applicant’s qualifications first, prior to consideration of any criminal history. In the past, many employers have used initial employment applications that inquire whether the applicant has ever been convicted of a crime. The campaign seeks to remove such inquiry from employment applications.

The Oregon legislature enacted ORS 659A.360, which went into effect on January 1, 2016. The Oregon Law prohibits employer inquiries into an applicant’s criminal history at the initial stage of an application. An employer commits an unlawful practice if it requires disclosure of criminal history and excludes an applicant from an initial interview. The law does not limit an employer’s ability to fully explore an applicant’s criminal history during an employment interview or any subsequent stage of the application process and does not impact an employer’s decision-making process.

The Oregon Law does not pre-empt local laws. The City of Portland enacted, effective July 1, 2016, an ordinance that imposes additional restrictions on employers. The Portland Ordinance applies to employers of six or more employees who seek to fill a position being performed a majority of the time within the City of Portland. The City has contracted with the Oregon Bureau of Labor and Industries (“BOLI”) for enforcement.

The Portland Ordinance applies to all preliminary stages of the hiring process and until an employer extends a conditional offer of employment. A Portland employer violates the ordinance if it “gathers, obtains, or uses an Applicant’s Criminal History” before making a conditional offer of employment. Prior to such an offer, an employer cannot gather or otherwise obtain any criminal history information and must disregard any criminal history information that an applicant self-discloses. If an employer extends and rescinds an offer they must comply with and follow notification requirements, which include informing the applicant of the information that resulted in revocation of the offer and the source of that information.

The Portland Ordinance also impacts how

employers make their decisions on applicants. If an employer learns about an applicant’s criminal history after a conditional offer is made, it must then undertake an “individualized assessment.” Such an assessment must include consideration of the “nature and gravity” of the offense or conduct, whether the offense or conduct was recent, and the nature of the position for which the applicant has applied. Neither Portland’s ordinance nor the associated administrative rules offer clarification or guidance on the mechanics of an employer’s assessment. The City has confirmed that it sourced the individualized assessment language from the federal Equal Employment Opportunity Commission guidance, but it has declined to confirm or reject whether BOLI will accept that guidance as precedent.

Both laws are subject to the enforcement provisions of ORS Chapter 659A. Both laws also contain several exemptions.

The state law exempts employers seeking volunteers, law enforcement agencies and employers in the criminal justice system, and employers filling positions for which federal, state, or local law requires consideration of criminal history.

Portland’s ordinance exempts federal, state and local governments (other than the City of Portland itself), as well as bodies or agencies created by a government. In addition, Portland employers filling some sensitive positions are permitted to consider criminal history at any stage of the application process. Sensitive positions include those where the employee interfaces with vulnerable persons or has certain duties, such as driving or access to sensitive information. For some sensitive positions, employers are relieved from the “individualized assessment” requirement and can use a criminal history matrix and conviction list to exclude certain applicants from consideration outright. However, even if such an exception applies, the employer still must comply with the Oregon state law.

As a result of these laws, Oregon employers should review their initial employment application forms and their pre-interview procedures to ensure that they do not make prohibited inquiries. In addition, Portland employers should evaluate their existing job descriptions and consider the impacts of the ordinance on their hiring. At a minimum, employers must thoroughly evaluate the job duties of the position prior to any posting to identify the essential functions of the position and to determine whether the job is a “sensitive position” under the ordinance. ■



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