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"BAN THE BOX" LAW A TRICKY NEW ISSUE FOR EMPLOYER

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On November 4, 2014, a significant change in employment law, commonly known as "Ban the Box," went into effect. As of now, this law applies only to public employers, which means the State of Delaware, its agencies, or political subdivisions. For all practical purposes, however, this law excludes any state, county or municipal police force, the Department of Correction, the Department of Justice, the Public Defender's Office, the courts, or any position where federal or state statute requires or expressly permits the consideration of an applicant's criminal history.

The private sector should be watching this issue carefully, because there is a movement to have this law expanded to cover them as well. Indeed, along with this new law, additional, accompanying law was created that encourages companies that contract with the state to adopt policy similar to the new Ban the Box law. The bill initially even proposed law that would have stated a new policy that the State does business only with contractors that have adopted policies, practices, and standards consistent with the new Ban the Box law.

Under this new law, public employers are prohibited not only from considering but also inquiring into a criminal record, criminal history, or credit history or score of an applicant during the initial application process, up to and including the first interview. This law does not clarify what restrictions, if any, apply,

after the initial application process, as to anything other than criminal history. Indeed, the law merely states that, "[i]f an applicant is otherwise qualified, a public employer may inquire into or consider an applicant's criminal record, criminal history, credit history or credit score after the completion of the first interview."

As for criminal history (but apparently not criminal record, credit history or credit score), after inquiry and consideration is permissible, the new law implies, but it does not clearly state, that disqualification for criminal history is unlawful unless it is "job related for the position in question and consistent with business necessity." The law further states that public employers "shall consider the following factors in its hiring decision:" (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or the completion of the sentence; and (3) the nature of the job held or sought. The law does not state in what way(s) such factors must be considered in making hiring decisions.

The "job related and consistent with business necessity" standard has been around for years – in a different context, under what typically is called "adverse impact" analysis, which provides that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination. As an example, an employer might have a facially-neutral employment policy of requiring all applicants (regardless of their demographic) to run a certain speed or lift a certain amount (or any other criterion). An applicant not selected based on failing to meet the established threshold for the requirement might claim that the criterion results in a disproportionately negative impact on that applicant's sex, race, or other qualifying protected status—hence an "adverse impact." Even where there is no evidence of an improper intent behind imposition of the criterion, an employee who is able to establish an adverse impact can establish legal liability for an employer unless the employer can prove (not merely a burden of production but an actual burden of proof) that the requirement is job related and consistent with business necessity.

Thankfully, for private employers, the law does not typically require private employers, prior to having an employee establish a legally-cognizable adverse employment action, to establish the job relatedness and business necessity of every criterion used to make employment decisions. Moreover, adverse impact claims are complex enough that many plaintiffs' lawyers do not even explore the viability of such claims. Thus, most employers have had little reason to spend time, money, and energy learning of challenges that exist in establishing the job relatedness and business necessity of each criterion used in an employment selection process. Instead, the bulk of legal compliance efforts have focused on assuring that illegal intent does not infect selection decisions.

Now, however, with Delaware law apparently prohibiting public employers from excluding an employee based on criminal history unless it is job related and consistent with business necessity, at least public employers will need to develop a much more proactive approach to grappling with this standard. Indeed, because time could be of the essence in making personnel selection decisions (e.g., because alternative candidates might take other opportunities if employers do not act quickly), public employers planning to use criminal history in their employee-selection process would be wise to put into place a methodology to establish the requisite standard so that they do not find themselves inventing an analytical process from scratch if/when it is determined that there might be a desire to disqualify a primary candidate based on criminal history.

Interested advocacy groups such as the DSCC Employer Advocacy Subcommittee make an effort both to pay attention to pending legislation that intentionally or unintentionally can impact private employers and to notify employers of such bills before they become law. However, private employers should do all that they can to be independently vigilant and to be involved in dialogue regarding bills that burden their business. Certainly all employers are invited to notify the EAS if there is concern about pending legislation, as early in the process as possible, so that DSCC might take a position to ease the growing burden on private businesses.

After all, while interesting and reasonable arguments involving important societal values exist on both sides of the "ban the box" debate, a robust debate is only possible if those with a voice—including businesses—pay attention and participate in the debate.

Tim is Co-Chair of DSCC's Employer Advocacy Subcommittee and partner in the labor and employment group of Connolly Gallagher LLP. Employers having questions about these issues or other employment law issues are welcome to contact Tim at (302) 252-4217. Employers wishing to be part of DSCC's EAC may contact James DeChene at (302) 576-6560.