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To Ban the Box or Not?

Should Michigan employers "Ban the Box" and remove the criminal conviction history question from job applications?

Elizabeth Rae-O'Donnell

On November 2, 2015, President Barack Obama announced a new executive order to "Ban the Box," which is a check off on federal job applications that requires job applicants to disclose their criminal conviction history on the face of the application. This initial disclosure often causes employers to eliminate applicants before ever considering their qualifications. Background investigations will still occur, but at the federal level, agencies will delay inquiries into criminal histories until later in the hiring process, perhaps after a conditional offer of employment has been made.

The National Employment Law Project (NELP) reports that 19 states have adopted "ban the box" policies. Seven of those same states have also removed the conviction history question on job applications for private employers. In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) endorsed removing the conviction question from job applications as a best practice indicating that federal civil rights laws regulate employment decisions based on arrests and convictions and that an automatic exclusion of an applicant based upon a prior criminal conviction may introduce discriminatory bias for workplace hiring decisions. Additionally, more than 100 Michigan counties and cities, including Genesee County, Saginaw County, Muskegon County, Detroit, Kalamazoo, Ann Arbor, and East Lansing have adopted "ban the box" policies. Private companies such as Target and Home Depot have also instituted ban the box policies for their organizations.

All of the 2016 Democratic presidential candidates have endorsed banning the box on applications and Republican presidential candidate Chris Christie signed a "ban the box" bill into law in 2014. In 2013, Michigan Representative Fred Durhal, Jr. (D-Detroit) proposed legislation (HB4366) to remove the criminal conviction request on employment applications, but this bill was not enacted into legislation.

Given what appears to be a growing national movement, the question remains as to what are the best employment practices for Michigan employers? Michigan employers must understand that both the Michigan Elliott-Larsen Civil Rights Act and Title VII of the Civil Rights Act of 1964 govern their employment practices. Although potential applicants with criminal convictions do not fit within a protected category, they could still claim unlawful discrimination based upon a negative disparate impact. Disparate impact is a theory of liability regarding a facially neutral employment practice (reporting criminal convictions upfront) that does not appear to be discriminatory on its face, but is discriminatory in its application or effect. Advocates for the removal of the conviction check on the face of the application argue that minority candidates are disproportionately excluded from consideration for employment. The 2012 EEOC Enforcement Guidance recommends that employers, after learning of criminal convictions, should assess whether an exclusion from employment consideration is consistent with business necessity by looking at the following factors: (1) nature and gravity of the offense or conviction; (2) how much time has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought. The EEOC also suggests that if an application has been initially screened out because of a criminal conviction, an "individualized assessment" should be performed that would include re-notice to the applicant, an opportunity for the individual to demonstrate that the exclusion should not be applied due to his/her particular circumstances, and consideration by the employer as to whether additional information provided by the applicant warrants an exception to the exclusion. The EEOC also recommends that employers develop narrowly tailored written policies and procedures for examining applicants and employees for

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criminal conduct which could include identifying essential job requirements, determining specific instances that may demonstrate unfitness for performing certain jobs, and recording justifications for the policy and procedures utilized.

While states and local jurisdictions may have laws and/or regulations restricting or prohibiting the employment of individuals with records of certain conduct, for example daycare providers, school teachers, nonteaching school employees, and caregivers in residential facilities, if the exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation may not shield an employer from Title VII liability. CMDA will continue to monitor this issue to see if there is any forthcoming legislation that will impact Michigan employers.

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Michigan Legislation Update

Recently Enacted Michigan Laws

Karen M. Daley

Governor Rick Snyder recently signed several bills into law affecting local municipalities. The bills are aimed at clarifying the operations of local municipalities and should make it easier for counties, cities, townships, and villages to file documents and save money at the local government level.

E-Signatures Accepted at Register of Deeds

Generally, an instrument conveying real property must meet certain requirements to be recorded, including a requirement that it contain the original signature of each person executing the instrument. Senate Bill 62 updates the statute to recognize the modern use of electronically affixed signatures by allowing county deed offices to accept electronic signatures for property documents being filed. The bill also provides that a "certified copy" of a death certificate is the same as an original. It is now Public Act 131 of 2015.

Pharmacy Technician Licensure

After tainted drugs led to a nationwide outbreak of meningitis that resulted in 64 documented deaths, including 19 in Michigan, the Michigan legislature enacted a law that requires compounding pharmacies to be accredited through a national accrediting organization approved by the Michigan Board of Pharmacy. In addition, the legislature enacted a law to license pharmacy technicians, because Michigan was then one of only six states that failed to require licensure or certification. The new law set minimum educational requirements at a high school degree or GED equivalent.

The Governor recently signed Senate Bill 468, which adjusts these pharmacy technician licensure requirements. The new law 1) makes an exception to the requirement that a pharmacy tech have graduated from high school; 2) increases from 210 days to one-year the duration of a temporary license; 3) allows a pharmacy technician employed at a multi-site pharmacy to work at any of the pharmacy's in-state locations; and 4) delays for one-year the deadline for a licensed compounding pharmacy to be accredited. It is now Public Act 133.

Incompatible Office Exceptions

Currently, a public officer is prohibited from holding incompatible offices. House Bill 4070 modifies this rule by allowing employees of municipalities with less than 40,000 residents to serve in dual roles, so long as they are not in charge of negotiating collective bargaining agreements. Specifically, the new law allows a public officer or public employee of a city, village, township or county with a population under 40,000 to serve as a firefighter, police chief, fire chief, police officer or public safety officer, with or without compensation, as long as he or she was not a person who negotiated a collective bargaining agreement on behalf of firefighters, police chiefs, fire chiefs, police officers or public safety officers. This form of consolidation has the potential to save smaller municipalities several unnecessary costs. It is now Public Act 134 of 2015.

Electronic Proof of Insurance

Under the Insurance Code, auto insurance coverage is mandatory for the operation of a motor vehicle. Under the Vehicle Code, drivers must show proof of insurance at the request of a police officer. House Bill 4193 amends the Vehicle Code by allowing a driver to show an electronic copy of their certificate of insurance to a police officer by using a cell phone or tablet. In order to address concerns of officers regarding handling cell phones during traffic stops, the new law allows a police officer to require a driver to e-mail the information from the electronic device to a site designated by the officer (such as a computer in the police car), where the officer could view and verify it. It is now Public Act 135.

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Strategies to Minimize Joint Employer Liability


Gerald C. Davis

Employers should re-evaluate the creation of indemnity with clients where workers are placed at client work sites and also analyze any existing indemnity provisions of contracts with others where either has agreed to provide indemnity.

The National Labor Relations Board (NLRB) reversed more than 30 years of precedent in the recent case of *Browning-Ferris Industries of California, Inc.*, which effectively changed the rules regarding protection for previously protected employers.

Most employers found comfort that the NLRB would not likely consider them to be joint employers with other entities, such as franchisees, staffing agencies, and contractors/sub-contractors, unless they exercised "control" over those entities' employees. This case, however, reaches beyond the NLRB and, if upheld through the appellate system, constitutes precedent for the proposition that more than one employer may be considered an employer, and hence responsible for whatever the other does, such as an improper firing, racial discrimination, sexual harassment, and so forth.

In the *Browning-Ferris* case, it was argued that both Browning-Ferris and Lead Point were joint employers because both entities could exercise "immediate and direct control over the terms and conditions of workers' employment," with the NLRB coming down on the side of the new test. In reaching its decision, the NLRB did not accept the contention that an entity should only be considered a joint employer if "industrial realities" made the entity "essential to meaningful bargaining." Therefore, two entities may be considered joint employers of a single work force if they are both employers within the meaning of the common law and if they share or co-determine those matters governing the essential terms and conditions of employment. In evaluating the allocation and exercise of control in the workplace, consideration is given to the various ways in which joint employers may "share" control over terms and conditions of employment or "co-determine" decisions. The decision notes that a joint employer relationship will not be found based on a company's "bare rights to dictate the results of a contracted service or to control or protect its own property." Instead, the NLRB stated they will evaluate the evidence to determine whether a user employer affects the means or manner of an employee's work and terms of employment whether directly or through an intermediary. In other words, the NLRB will no longer require that a joint employer not only *possess* the authority to control an employees' terms and conditions of employment, but also *exercises* that authority. Therefore, reserved authority to control the terms and conditions of employment, even if not exercised, is clearly relevant to the joint employment inquiry. In this case, the client supervisor's detailed directives concerning employee performance, set conditions of hiring that the client was contractually bound to follow and had the authority to discontinue the use of any given employee, control the speed at which the workers were to perform their service, and other productivity standards. The contract between the entities gave the employer the right to control other terms and conditions, such as the right to enforce its safety policies against the employees supplied by the other entity.

This decision leaves employers guessing as to how much indirect control they must have over another entity's employees to be deemed a joint employer. It is unclear what one must do to "affect the means and manner" of the employee's work and terms of employment and what it means to "share or co-determine those matters governing the essential terms and conditions of employment." Therefore, to avoid joint employer status under the new test, an entity must take a more hands-off approach than ever before to the employees of the sourcing entity.

Some general rules can be established. All contracts must be reviewed with staffing agencies and other contractors to ensure that both entities are not performing management function. The new test takes into consideration whether the potential to control employees exists so all contracts should include language making clear that all such control tests and control rests with one entity. While a bulletproof contract can be helpful evidence, what ultimately matters is whether the parties conducted themselves in accordance with the language of the contract.

When communicating expectations, allow the client to set the goal and to define the means of achieving that goal. Once management is delegated to another entity, a joint employer relationship will evolve. Alternatively, if one entity is to be the sole employer, all decisions regarding firing, hiring, and the way work is done has to be left to that entity. The contractual language must decide whether the employer indemnifies the client or the client indemnifies the employer and the resulting pricing and profit margin have to be calculated to accommodate this dedicated risk. If the client understands there is a transference of risk included in the cost of doing business, a meaningful arrangement can be created, with the division of risks and resulting exposure to the various wage and hour laws, employment laws, civil rights laws, and unemployment compensation laws being dedicated to a single entity rather than two entities. The result would be to make the employer an integral part of the client management team. The client could avoid the secondary exposure by having the employer make these decisions. This effort requires confidence, a substantial expenditure of time, and careful contract draftsmanship, but can result in long-term relationships where the employer is not simply another vendor to the client, but an integral part of the management and decision process.

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To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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