



Montgomery County Employers Must Reexamine Use of Criminal Background Checks in Hiring Process

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By: [Michael J. Neary](#)



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Employment & Labor Legal Update

Starting January 1st, most private businesses in Montgomery County with 15 or more full-time employees must comply with a new county law prohibiting any inquiry into an applicant's criminal history until after an initial interview. The new Fair Criminal Record Screening Standards define an "interview" as any direct contact between the employer and the applicant – whether in person or over the phone/Internet – to discuss the job being sought or the applicant's qualifications. An interview includes no written correspondence about the position or conversations held to set up an initial interview. The prohibition applies equally to new applicants and current employees applying for a promotion.

This ban means that most private employers in Montgomery County can no longer ask questions on an initial job application about the applicant's criminal history. During an initial interview, employers can inquire about a conviction or arrest record only when the applicant voluntarily discloses such criminal history without prompting. An employer does not violate the act by asking about an applicant's employment history on the application or resume even if such a question prompts a disclosure of the applicant's criminal history. For instance, questions during the initial interview about gaps in employment that disclose a period of incarceration would not violate the act.

How a Background Check Can Be Used

An employer can run a criminal background check on an applicant after an initial interview. But, the act requires employers to follow certain steps if they want to use information discovered in such a background check in withdrawing a conditional job offer. Specifically, the act mandates that an employer give notice to an applicant if he or she intends to withdraw a conditional offer of employment because of information in the applicant's criminal record. The notification provided must include a copy of the criminal record report relied on and list the items in the report that caused the employer to rescind the conditional offer. The employer must delay rescinding the conditional offer for seven days to permit the applicant to challenge the accuracy of an item in the criminal record report. At the conclusion of this seven day period, if the employer moves forward rescinding the conditional offer it must notify the applicant in writing.

The act does not apply to any inquiry required by a federal, state, or county law or regulation; to the county police, fire, and corrections agencies; to an employer that provides programs, services, or direct care to minors, or vulnerable adults; or to an employer hiring for a position that requires a federal government security clearance.

Aggrieved applicants can file a charge with the County Office of Human Rights. The county can assess a fine of up to \$1,000 for each violation. The act also prohibits employers from retaliating against any person that seeks to lawfully vindicate their rights under the new law.

Where To Go From Here

The act is part of a broader national trend toward "ban-the-box" legislation. Locally, Prince George's County, Baltimore, and the District of Columbia have enacted similar laws. Nationally, other states and localities are moving in the same direction, and the EEOC issued guidance on criminal background checks during the hiring process in mid-2012. All government attention to this issue suggests enforcement in this area will continue to ramp up to encourage the reintegration of applicants with criminal histories into the workforce.

Given the increased attention, employers should review their current use of criminal history information in the hiring process to ensure full compliance with applicable federal, state, and local laws. For most Montgomery County private employers, at a bare minimum, questions about criminal history on the initial employment application must be removed, and hiring managers must be trained not to ask about an applicant's criminal history during the initial interview.

[Michael Neary](#) is an attorney who practices in Lerch Early's employment and litigation groups. For more information about the Fair Criminal Record Screening Standards, contact Michael at (301) 657-0740 or mneary@lerchearly.com. This content is for your information only and is not intended to constitute legal advice. Please consult your attorney before acting on any information contained here.