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Impact of “Ban the Box” Legislation on FINRA Broker-Dealers

Oregon has joined California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, Rhode Island, Vermont, Virginia and Washington, D.C. in the “Ban the Box” initiative, a National Employment Law Project. The Ban the Box initiative is named for the checkbox on applications asking about a job applicant’s criminal background, and is intended to provide applicants a fair chance at getting a job by removing criminal conviction history from job applications and delaying the background check inquiry until later in the hiring process.

Oregon House Bill 3025 is effective January 1, 2016, and generally prohibits employers from inquiring during initial applicant stages whether an applicant has a criminal conviction history, delaying background checks and questions, until later in the hiring process. House Bill 3025 specifically makes it an unlawful practice for an employer to exclude an applicant from an initial interview solely because of a past criminal conviction. An employer violates the Act if an applicant is excluded from an initial interview where an employer:

- requires an applicant to disclose, on an employment application, a criminal conviction
- requires an applicant to disclose, prior to an initial interview, a criminal conviction
- if no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.

Except as prohibited above, Oregon’s new law does not prevent an employer from considering an applicant’s conviction history when making a hiring decision. However, while many of the laws seek to delay employers from asking about criminal history until after an interview or conditional job offer has been extended, other laws go further than merely delaying consideration. Some laws and ordinances restrict the employer’s ability to consider certain types of criminal history at all, or they specify conditions of how and when criminal history may be considered, or they impose added regulatory steps in the hiring process.

In the alternative, FINRA Rule 3110(e), which became effective on July 1, 2015, requires that each member firm ascertain, by investigation, the good character, business reputation, qualifications and experience of an applicant, before the firm applies to register that applicant with FINRA, and before making a representation to that effect on the application for registration. In Regulatory Notice 15-05, FINRA stated that this is a principle-based requirement, and firms are required to complete the investigation process prior to filing the Form U4. Further, FINRA does not place any limits on the scope of such a background investigation, but a firm must obtain all the necessary information to make an evaluation including a national private background checks, credit reports and reference letters for this purpose. To that end, a firm could comply with the requirement to conduct a national search by:

(1) reviewing a credit report from a major national credit reporting agency that contains public record information (such as bankruptcies, judgments and liens) and the applicant's fingerprint results; (2) searching a reputable national public records database, such as LexisNexis, a division of Reed Elsevier, Inc., and reviewing the applicant's fingerprint results; or (3) reviewing a consolidated report from a specialized provider, such as Business Information Group, Inc. (BIG), that includes criminal and financial public records.

To further exacerbate the conflict of goals, FINRA stated that member firms must ensure that such background investigations are conducted in accordance with all applicable laws, rules and regulations, including federal and state requirements (such as ban the box legislation).

So what is the take away on this conflict between "Ban the Box" legislation and FINRA Rule 3110(e) for member firms? It is important to look at a number of issues in your attempt to balance your obligations to FINRA, and the legal requirements of "Ban the Box" legislation. In general, those issues include:

- What laws apply to your company - Consult with your employment counsel to see if there are any state or local laws that apply to your business and how they conflict with FINRA, so that you can comply with both requirements.
- Revise job application forms - Review your employment application form. If it asked about a criminal history, consider removing that question or check box. Then have the form reprinted.
- Revise employment process - Do not make a criminal inquiry a part of the initial employment interview process. Notwithstanding that, after the initial interview, provide the applicant with a Form U-4 for completion.
- Review internal HR policies - Update your company's HR policies as needed.
- Training - Instruct hiring personnel to ask about criminal history during interviews. It's best for someone who is knowledgeable, like an HR manager, to handle all legally sensitive matters.
- Understand how to read background checks - Talk with the background checking services you use to see how they designate criminal history; however, keep in mind that the Form U-4 disclosures don't differentiate between an arrest that resulted in a conviction or whether the charge was dismissed later.

We hope that this information has been helpful to you. Should you have any additional questions or concerns, please feel free to contact Daniel E. LeGaye or Michael Schaps by e-mail or phone, at 281-367-2454, or consult with your legal counsel or compliance consultant. This legal update has been provided to you courtesy of The LeGaye Law Firm, P.C., 2002 Timberloch Drive, Suite 200, The Woodlands, Texas 77380. Visit our web site at www.legayelaw.com.

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