LOCAL JURISDICTIONS ARE BEATING THE DRUM TO "BAN THE BOX"

By Jessica Summers, Paley Rothman

On January 1, 2015, and January 3, 2015, respectively, Montgomery County and Prince George's County became the second and third jurisdictions in Maryland (in addition to Baltimore City) to have laws restricting when and how a private employer can inquire about, and use, information related to a job applicant's criminal history.

Containing very similar substantive provisions, both of the new laws do far more than simply prohibit an employer from including questions about an applicant's criminal records on an initial job application (i.e. banning the box). Instead, they place clear restrictions on when during the hiring process employers may investigate or inquire into an applicant's criminal history.

Montgomery County

The new Montgomery County law, which was enacted by the Montgomery County Council on October 28, 2014, and which went into effect on January 1, 2015, applies to all employers that employ fifteen or more full-time employees in Montgomery County.

Under the Montgomery County law, an employer may not require an applicant to disclose the existence or details about an applicant's criminal record on an initial job application. Additionally, the law further restricts employers from inquiring about or investigating an applicant's criminal background until the conclusion of the applicant's first interview. As specified in the County Code, an "interview" means "any direct contact by the employer with the applicant whether in person or by telephone or internet communications to discuss: (1) the employment being sought; or (2) the applicant's qualifications[,]" but does not include "(1) written correspondence or email; or (2) direct contact made for the purpose of scheduling a discussion." As an exception to this rule, employers may inquire about criminal history before the end of the initial interview if it is voluntarily disclosed by the applicant.

After an employer has learned of an applicant's arrest or conviction record, the new law requires that, before making an employment decision based on an applicant's criminal record, the employer engage in an individualized assessment, much like that recommended in the EEOC's 2012 Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions. For further discussion of the EEOC's position on background checks see "EEOC Loses A Fourth Circuit Case on Background Checks" published herein. The purpose of this assessment is to consider whether the offense demonstrates a lack of fitness for the position applied for.

If an employer decides to withdraw a conditional offer of employment based on an applicant's arrest or conviction record, the law requires that the employer must: (1) provide the applicant with a copy of the criminal record being referred to; (2) provide the applicant with notice of the employer's intent to withdraw the offer; and (3) delay withdrawing the offer for seven days to give the employee time to review the criminal record and provide notice of any inaccuracies. If an employee comes forward within the seven days to provide notice of an inaccuracy, the employer must continue to delay its withdrawal of the offer and reconsider its decision based on the new information. If the employer ultimately decides to move forward and withdraw the offer, the law requires the employer to provide the applicant with written notice of the final action.

The statute does carve out certain exceptions to the restrictions set forth above. In the context of private-sector employers, the rules do not apply to (1) criminal background inquiries that are required by federal, state or county law, (2) employers "that provide programs, services, or direct care to minors or vulnerable adults" and (3) employers hiring for positions that require security clearance with the federal government.

Under Montgomery County law, employers who violate the law may be subject to civil penalties of up to $1,000 per violation. The law sets forth an administrative process for the County Commission on Human Rights to handle violations of this law. This process commences with a complaint being made to the Executive Director of the Office of Human Rights. Ultimately, the Commission's decision is appealable to the courts.

Prince George's County

The new Prince George's law, which was enacted by the Prince George's County Council on November 19, 2014, and which went into effect on January 3, 2015, applies to all employers that employ twenty-five or more full-time employees in Prince George's County (in comparison to Montgomery County's threshold of fifteen or more full-time employees).

Like Montgomery County's enactment, Prince George's County's new law both prohibits employers from asking about an applicant's criminal record on an initial job application and prohibits employers from inquiring about, or investigating, an applicant's conviction or arrest record until the conclusion of the applicant's first interview. The only substantive distinction between the Prince George's County and Montgomery County enactments is that the Prince George's County law does not include any definition of "interview" while Montgomery County's does.

As with Montgomery County, Prince George's County also requires that the employer engage in an individualized assessment before taking an employment action based on an applicant's criminal record and that the employer follow the same steps, as set forth above, before revoking a conditional offer based on an applicant's criminal record.

The Prince George's County law specifies that private employers are exempt from the statute's restrictions if (1) the inquiries are required by federal, state or county law or regulation or (2) the employer provides "programs, services or direct care to minors or vulnerable adults." In other words, the Prince George's County law has two of the same exemptions as Montgomery County, but unlike Montgomery County, does not include an express exemption for employers hiring for positions requiring security clearance.

The Prince George's County statute does not itself set forth the penal-

ties for violation of the law but, instead, instructs the Director of the Office of Human Rights to establish rules and regulations as to enforcement for the Prince George's County Council to approve.

Comparison of County Ban the Box Laws

Montgomery and Prince George's Counties' new laws on employer investigations and inquiries into applicants' criminal histories are significantly less restrictive than Baltimore City's law on the same subject. As was discussed in Donald F. Burke's article in the Fall 2014 edition of this Newsletter, Baltimore City's background investigation law prohibits employers from making any inquiry or investigation into an applicant's criminal record until a conditional offer of employment has been made, whereas Montgomery and Prince George's Counties allow such inquiries after the completion of the initial interview. In this respect, the Baltimore City law more closely resembles the District of Columbia's ban the box law , which also requires employers to make a conditional offer before investigating an applicant's criminal conviction history. Baltimore City also applies its law to smaller employers than the other two counties, making the law applicable all employers with ten or more full-time employees.

Concluding Comments

It is important to note that in all of the above mentioned jurisdictions, if the employer is using a consumer reporting agency, as defined by the Fair Credit Reporting Act (FCRA), to perform an investigation into an applicant's or employee's background, the employer will also be obligated to follow the requirements set forth by the FCRA. These requirements include obtaining the employee or applicant's advance consent before running the background check and providing the employee or applicant with specific notices both before and after taking adverse actions based on a background check.

With local background check laws applicable to an increasing number of employers in Maryland, employers and their counsel should review their current background check and hiring processes and forms in relation to applicable law and train all employees involved in the hiring process to ensure no premature inquiries or investigations of criminal histories are made.

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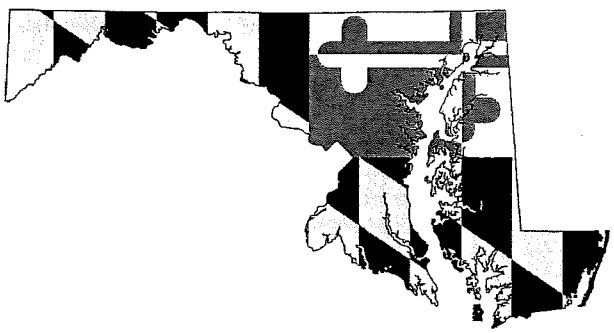
1. Codified at Montgomery County Code, Chapter 27, Article XII.
2. Codified at Prince George's County Code, Subtitle 2.
3. Codified at Baltimore City Code, Article 11, Subtitle 14.
4. Codified at D.C. Code, Chapter 20-152



DUELING WAYS SUBCONTRACTOR EMPLOYEES ARE COVERED FOR WORKER'S COMPENSATION CLAIMS

By Ethan L. Don, Paley Rothman

The Court of Appeals, in *Elms v. Renewal by Anderson,* 439 Md. 381 (2014), set forth two (2) ways in which a prime contractor could be liable for work-related injuries suffered by employees of a subcontractor. The facts of the case are not particularly unique, making the analysis broadly applicable.

Richard Elms, the plaintiff, was a sole proprietor who operated an unincorporated home improvement business, Elms Construction, which did window and door installation work for Renewal by Anderson ("Renewal"), the defendant in the case. Mr. Elms represented to Renewal that he carried worker's compensation for his employees, but apparently did not notify Renewal that he was not covered by that policy.

In August 2008, Elms was injured installing a window at a Renewal customer's home. He filed a workers' compensation claim alleging that he was a common law employee of Renewal. Renewal argued that he was an independent contractor and therefore not a "covered employee" under the law. The Maryland Workers' Compensation Commission ruled in Renewal's favor finding Elms to be an independent contractor. The Circuit Court overturned the Commission ruling. The Court of Special Appeals reversed the Circuit Court and held that Md. Code Ann., Lab. & Empl. § 9-508 – entitled "principal contractor liability for compensation" and commonly known as the statutory employer provision – abrogated the common law. The Court of Appeals granted Elms' petition for certiorari. The basic question was the interplay, or lack thereof, between the common law employer/employee relationship and a statutory employer/employee relationship created to cover principal contractors that ordinarily would not be considered the worker's employer under common law rules of master and servant.

The primary issues in Elms were nicely summarized by the Court as follows:

> [T]he initial determination in any workers' compensation case is whether the injured worker maintains a common law employer/employee relationship with an alleged employer. If the injured worker does not maintain a common law employer/employee relationship with the alleged employer, the inquiry is over, and the worker is not entitled to recover compensation benefits through the alleged employer. By contrast, when a common law employer/employee relationship exists between the injured worker and his or her direct employer (e.g., a subcontractor), but the injured worker is unable to recover compensation benefits through that employer, only then do we analyze the constructs of the relationship of the injured worker and the principal contractor under § 9-508 [the statutory employer provision]. This conclusion is consistent with the intent and purpose of the statute, specifically, to provide protection to employees of subcontractors who would otherwise be unable to recover for their work-related injuries.