SWANSON, MARTIN & BELL, LLP

Employment Litigation and Counseling Newsletter

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Prohibiting Employers From Asking "The Question":

How Illinois and Chicago's recent "Ban the Box" Legislation Affects Employers and their Hiring Practices

Plus: Are your Non-Compete and Non-Solicitation Clauses Legally Enforceable?

Over the past several years, numerous state and city governments have enacted legislation commonly known as "Ban the Box". The purpose of these laws is to enable job seekers to display their credentials without being automatically excluded at the application stage due to their prior criminal history. These laws ultimately are supporting the laudable purpose of easing the barriers for ex-offenders to reenter the American workforce. However, these laws do present potential pitfalls for employers, who must now readjust their hiring policies and practices to remain compliant.

Illinois' Job Opportunities for Qualified Applicants Act

On January 1, 2015, Illinois' "Ban the Box" legislation became effective. The legislation, named the *Job Opportunities for Qualified Applicants Act* (Act), prohibits an employer from inquiring into, considering, or requiring disclosure of the applicant's criminal history in a job application. This Act applies to all employers with 15 or more employees and employment agencies. The law specifically prohibits these companies from inquiring into the criminal background of an applicant "until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency, or if there is not an interview, until after a conditional offer of employment is made to the applicant by the employer or the employment agency." The enforcement of this Act has been delegated to the Illinois Department of Labor, which has the ability to impose fines on employers for non-compliance of $3,000 or more, depending on the number of violations and the length of time an employer fails to remedy its violations.

While this Act prohibits employers from screening out applicants with criminal records by asking for them to disclose that information at the application stage, it does not prevent the employer from ever seeking that information. Once an applicant has been selected for an interview or has received a conditional offer of employment, that applicant may be questioned regarding his criminal history. Further, there is no prohibition in this Act of a criminal background check being run on an applicant prior to hiring. The Act also specifically does not prohibit an employer from notifying applicants in writing of specific offenses that will disqualify an applicant from employment in a particular position due to federal or Illinois law or the employer's policy. This allows employers to inform applicants that it will not be hiring individuals with certain criminal histories, for example, individuals convicted of sexual or violent offenses for positions involving childcare. However, employers should be dissuaded from simply stating it will not hire any person who has been convicted of a crime or a felony, as that prohibition could be found to violate the Act.

Finally, the Act also does not apply to job positions which fall into three specific categories:

1. Employers who are otherwise required to exclude applicant with certain criminal convictions from employment due to federal or state law.
2. Employers looking to fill job positions requiring a standard fidelity bond or equivalent bond, where the applicant's conviction of a specified criminal offense would disqualify the applicant from obtaining the bond.
3. Employers employing individuals licensed under the Emergency Medical Services Act.

As the Act's special applications to any employer may depend on interpretation of other federal or Illinois laws, it is important for employers to seek legal assistance in determining the applicability of the Act to all of their current or prospective job positions.

Chicago's Ordinance O2014-8347

In addition to the Illinois legislation, the City of Chicago has passed an even broader "Ban the Box" ordinance, which also became effective on January 1, 2015. The Chicago ordinance specifically

includes all employers "that are not subject to the *Illinois Job Opportunities for Qualified Applicants Act*." The Chicago ordinance prohibits these employers from inquiring into, considering, or requiring disclosure of an applicant's criminal records until after the applicant has been determined qualified and selected for an interview, or until after a conditional offer of employment has been extended. The Chicago ordinance includes similar exemptions as contained in the Illinois Act and does not prohibit employers from providing written notice of specific offenses that will disqualify an applicant from employment for a particular position.

The Chicago ordinance also contains an additional requirement that if the employer makes a decision not to hire an applicant partially based on that applicant's criminal record, the employer is required to inform the applicant of that basis at the time he is informed of the decision not to offer employment. The Chicago ordinance provides employers can be fined up to $1,000 for each day they are found to be in violation of the ordinance.

Conclusion

Illinois' *Job Opportunities for Qualified Applicants Act* and *Chicago Ordinance 02014-8347* place requirements on employers related to the type of questions asked in their job applications. Employers should review their job applications and policies regarding hiring to make sure the documents are in compliance with these laws. As there is interplay between these laws and other federal and Illinois laws, employers should seek legal assistance in determining whether certain exemptions apply to them and what type of information they can include in their job applications.

Are your Non-Compete and Non-Solicitation Clauses Legally Enforceable?

Does your company provide industry training to employees, enable employees to work with sensitive company data, develop relationships with key clientele, work on vital operations, position employees to thrive in the workplace, or have legitimate business interests to protect? If so, understanding whether or not your company's non-compete and non-solicitation clauses are legally enforceable should be an area of great concern.

One of our earlier newsletters covered the landmark Illinois First District Appellate Court decision *Fifield v. Premier Dealer Services*. In *Fifield*, the court held that no less than two years of continued employment constitutes adequate consideration in support of a restrictive covenant such as a non-compete clause.

The judiciary has been far from uniform in its collective reading of *Fifield* since it came down. Employers have thus been uncertain and uneasy about how to fortify restrictive covenants and make them enforceable. The wait, however, is thankfully over. The Illinois Judiciary has recently weighed in and has helped to potentially clear up the dreaded ambiguity surrounding restrictive covenants.

Confusion in the Courts

Right after the *Fifield* ruling, two Northern District of Illinois decisions disagreed on the two-year employment requirement and caused significant confusion.

In Montel Aetnastak, Inc. v. Miessen, the court declined to follow *Fifield,* holding that, "this Court does not find it appropriate to apply a bright line rule" regarding what constitutes sufficient consideration for a non-compete agreement. Declining to follow a two-year rule of continuous employment enunciated in *Fifield,* the court elected to employ a fact-specific approach.

Subsequently, in *Instant Tech., LLC v. Defazio,* the court rejected the holding in *Montel* and specifically applied *Fifield,* holding that at least two years or more of continued employment is needed to constitute adequate consideration for a restrictive covenant such as non-compete and non-solicitation clauses.

The Latest Developments

After this federal court split as to whether two years of continued employment should constitute a bright line rule for sufficient consideration, the Illinois Appellate court recently tried to clarify its stance.

The court in *Prairie Rheumatology Assocs., S.C. v. Francis* held that a restrictive covenant was unenforceable due to lack of consideration. The employee worked for the employer for 19 months—a mere five months short of the *Fifield* two-year rule. Though short of the two-year mark, the employer argued that the employee received additional consideration in the employment agreement that supported enforcement of the restrictive covenants. The employer claimed that in addition to the

employee's continued employment, the employee received the employer's assistance in obtaining hospital membership and staff privileges, access to previously unknown referral sources and opportunities for expedited advancement. However, the court elected to stringently follow the *Fifield* rule that two or more years of continuous employment is necessary to constitute adequate consideration. The court did not apply the fact-specific approach advanced in *Montel.*

How to Make Your Employment Contracts Enforceable

In light of the aforementioned cases and the ever-developing sector of employment law, there are various ways to ensure that your company's employment agreements and restrictive covenants are legal and enforceable. **Please contact Swanson, Martin & Bell, LLP to allow us to help you strengthen your employment agreements and protect your company's interests.**

Swanson, Martin & Bell, LLP recognizes associates Marvis A. Barnes and T. Allon Renfro for their assistance in drafting these articles.