MODRALL SPERLING

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Employment Law Alert

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Employment Law at Modrall Sperling

New Mexico presents unique challenges in employment law, and for more than 75 years, the experience of Modrall Sperling has spoken directly to the needs of private and public sector employers across our state. We represent them in a wide variety of matters before federal and state courts, administrative bodies, and the courts of the Navajo Nation.

While we are prepared to litigate as necessary, we use our experience to guide clients in developing stronger policies, trainings and employee handbooks that help prevent litigation in the first place.

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Guidance for New Mexico Employers: Criminal Background Checks for Job Applicants

Many employers in New Mexico want to know if a job applicant has a criminal background. While this can certainly be important information for an employer to have, requesting the information during the interview process can give rise to claims of discrimination against the employer. This article examines the current state of New Mexico law on asking job applicants about convictions, describes the EEOC's recent move toward finding that disqualifying candidates based on criminal history can be discriminatory, and advises employers on best practices to avoid inadvertent discrimination in the hiring process.

New Mexico's "Ban the Box" Law

"Ban the Box" is a national movement aimed at persuading employers to remove from their job applications the check box asking if the applicant has ever been convicted of a crime. In 2010, New Mexico became the second state in the nation to pass "Ban the Box" legislation with respect to state employment. Under this law, state government employers may not ask about an applicant's criminal history on an initial application, and shall only consider a conviction "after the applicant has been selected as a finalist for the position." NMSA § 28-2-3(A). Further, while state employers may "take into consideration" an applicant's criminal history, a conviction may not automatically disqualify someone from public employment. *Id.* This law only applies to the majority of state employers; it does not apply to private employers or law enforcement. *See* NMSA § 28-2-5.

During this legislative session, Senate Bill 78 (SB 78) proposes expanding Ban the Box legislation to private New Mexico employers. SB 78, which is sponsored by Senators Bill O'Neill (Bernalillo County) and Alonzo Baldonado (Valencia County), proposes that "if a private employer uses a written employment application, the employer shall not make an inquiry regarding the applicant's conviction on the employment application but may take into consideration an applicant's conviction after review of the applicant's written application and upon discussion of the employment with the applicant." On January 18, 2017, the Legislative Finance Committee prepared a Fiscal Impact Report regarding SB 78 and stated that the bill "may reduce costs stemming from recidivism by making it easier for ex-convicts to obtain and retain employment." The Fiscal Impact Report also advises that "nine states – Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont – now prohibit private as well as public employers from posing questions about a job applicant's conviction history until later in the hiring process."

Criminal Background Checks for Private Employers

Whether the employer can ask about criminal history as part of the initial application or later during the interview process, there are still limitations regarding the use of criminal background information during the hiring process.

Under Title VII of the Civil Rights Act, employers may not screen job applicants based on criminal history if this practice significantly disadvantages racial minorities <u>and</u> does not accurately predict whether the applicant is likely to be a responsible, reliable or safe employee. There are two ways in which an employer may run afoul of the law when conducting background checks on applicants.

First, employers must not treat job applicants with the same criminal history differently fully on the basis of race. Second, even where employers hold every applicant to the same standard, this process could still have a disparate impact on applicants of certain races. If this is the case, the employer may only refuse to hire an ex-offender if

doing so would be "job related and consistent with business necessity."[1]

Over the past several years, both the EEOC and individual plaintiffs have filed several lawsuits alleging racial discrimination on the basis of criminal background checks by employers. In these cases, the plaintiff must prove discriminatory impact by showing statistical evidence that the employer's practice disadvantages racial minorities. The burden then shifts to the employer to show that its practice is job related and consistent with business necessity.

Best Practices for Avoiding Unintentional Discrimination Claims

To avoid inadvertent discrimination and the possibility of an expensive lawsuit, private employers in New Mexico should consider the following steps:

1. Do not refuse to hire someone based on an arrest record alone.[2] Just because someone was arrested does not mean they are guilty of a crime.

2. Although a conviction is reliable evidence of guilt, the EEOC recommends against a blanket policy of refusing to hire anyone with a criminal record. The EEOC advises, "A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by law."[3] Instead, consider whether the applicant's particular crime accurately predicts whether he will be a responsible, reliable or safe employee.

3. When considering applicants' criminal records, apply the same standards to everyone. For example, you may not refuse to hire a minority applicant because of a misdemeanor conviction for public intoxication if you would overlook the same in a white applicant.

For more information on this topic, please contact Emily Chase-Sosnoff at emily.chase-sosnoff@modrall.com or by calling 505-848-1800.

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[1] https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

[2] Id.

[3] https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

Three Things New Mexico Employers Should Know for 2017

Deadline Imposed for Compelling Arbitration

Do you have arbitration agreements with your employees? If so, you should be aware that New Mexico enacted a new rule specifying the time by which a party must move to compel arbitration after a legal complaint has been filed. Pursuant to Rule 1-007.2, which took effect on December 31, 2016, "a party seeking to compel arbitration of one or more claims shall file and serve on the other parties a motion to compel arbitration no later than ten (10) days after service of the answer or service of the last pleading directed to such claims." This means that if an employee files a legal complaint against his employer and the employer has an arbitration agreement with the employee, the employer will need to move quickly to compel arbitration. Previously, there was no firm deadline for the employer to move to compel arbitration; courts considered a variety of factors when deciding whether the motion to compel was timely including whether there was prejudice to the employee by the status of activity in the underlying lawsuit.

New Mexico Legislation to Watch

During this legislative session, there are many proposed bills that could affect New Mexico employers. In particular, employers should pay close attention to the following:

Increasing the Minimum Wage: There are currently four bills targeted at increasing the minimum wage. HB 27 seeks to increase the current state-wide minimum wage of $7.50 per hour to $15.00 per hour. HB 134 seeks to increase the minimum wage for various school employees to $15.00 per hour. SB 36 proposes increasing the state-wide minimum wage to $8.45 per hour for employers with more than 10 employees. And, HB 67 proposes to increase the minimum wage from $7.50 to $10.10 over three calendar years, starting on January 1, 2018.

Pregnant Worker Accommodation Act, HB 179: If enacted, this bill would make it a illegal for employers with four or more employees to discriminate against pregnant employees. Discrimination includes, for example, refusing to make a reasonable accommodation, refusing to hire, discharging, or demoting the pregnant individual. Currently, employers with more than 15 employees are prohibited against discrimination under the federal Pregnancy Discrimination Act. The proposed bill would directly affect small New Mexico businesses which are currently outside the scope of the federal legislation.

Private Employer Conviction Inquiries, SB 78: This bill proposes to prohibit private employers from inquiring about an applicant's prior convictions on the initial employment application. This type of legislation is often called, "Ban the Box" and similar legislation currently applies to state employers in New Mexico. If enacted, the bill would prevent private employers from inquiring about prior criminal history until after the employer has reviewed the application and discussed employment with the applicant.

A New Year's Resolution for 2017: Update Your Job Descriptions: When a disabled employee is demoted, transferred or terminated because the employee cannot perform the essential functions of his job (even with reasonable accommodations), one factor the courts look at to determine whether something truly is an essential function of the job is whether it is included in the employee's written job description. On January 17, 2017, the Tenth Circuit upheld summary judgment in favor of an employer on a disability discrimination claim and reaffirmed that factors considered in determining whether something is an essential function of an employee's job include (1) the employer's judgment as to which functions are essential, **(2) the written job description**, (3) the consequences of not requiring the employee to perform the essential function, and (4) the current work experience of employees in similar jobs. *See Wickware Jr. v. Johns Manville*, 2017 U.S. App. LEXIS 801 (Unpub. January 17, 2017). If you have not reviewed your company's job descriptions recently, it is worthwhile to spend some quality time with them to make sure they adequately set forth the essential functions of each job.

For more information on this topic, please contact Megan T. Muirhead at megan.muirhead@modrall.com or by calling 505-848-1800.

Modrall Sperling's Recent Success for New Mexico Employer

Despite an alleged dispute of fact, Modrall Sperling attorneys successful gained summary judgment by arguing that lay witness testimony could not overcome expert testimony based on objective factual data. Plaintiff

Juanita Garcia was an operator of a power plant owned and operated by the City of Farmington. The plant generates electricity in part through use of steam turbines. She was fired for failing to control steam pressure. She brought several claims against the City including Title VII claims for Gender Discrimination, Hostile Work Environment, Retaliation, and National Origin Discrimination. In general, she argued that equipment failures at the power plant made it impossible to control pressure. She and one other lay witness testified to the equipment failure. The City obtained expert testimony, based on operational data stored in a computer, that no equipment malfunction occurred, but rather that Ms. Garcia had failed to properly operate the equipment allowing steam pressure to rise too high, too fast. After the fact witnesses admitted that pressure had increased too quickly to too high a level; and that the computer data should reflect the equipment failure, the City moved for summary judgment. The Court ruled that the lay witness testimony could not rebut the expert testimony based on objective data. By gaining dismissal of all claims at the summary judgment phase, Modrall Sperling attorneys (Brian Nichols, Jeremy Harrison, and Zoë E. Lees) saved their client the time and expense of a trial. The case is on appeal.