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"BAN THE BOX" AND INCREASING REGULATION OF BACKGROUND CHECKS

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I. INTRODUCTION

Over the past few years, in response to the number of job applicants who are unable to obtain employment due to their criminal backgrounds, states and localities across the U.S. have increasingly targeted the pre-employment process. "Ban the box" and fair-chance hiring laws limit the amount of personal information an employer can use to evaluate a job applicant, thereby forcing the employer to focus on the applicant's credentials and other qualifications. The aim is to provide applicants with a fair(er) shot during the hiring process, such as by removing the conviction history question (or "checkbox") from the job application and postponing the background check inquiry until later in the process. However, box laws neither preclude employers from ever inquiring about an applicant's criminal history nor require employers to hire applicants with criminal records.

Jurisdictions are adopting other policies as well, such as incorporating the best practices of the 2012 Equal Employment Opportunity Commission ("EEOC") guidance on the use of arrest and conviction records in employment decisions and embracing targeted hiring strategies. These laws require employers to consider, among other factors, (1) the nature of the conviction; (2) the relationship between the conviction and the job; (3) the length of time since the conviction; and (4) evidence of mitigating circumstances or rehabilitation, such as good conduct. *See, e.g.*, *EEOC V. BMW Mfg. Co., LLC*, No. 7:13-cv-01583-HMH, 2014 U.S. Dist. LEXIS 169849, at *4-5 (D.S.C. Sept. 8, 2015) (requiring defendant, as part of consent decree, to refrain from further use of its allegedly discriminatory criminal record screening policy and to bring policy in line with 2012 EEOC guidance).

Furthermore, in November 2015, former President Barack Obama endorsed box laws and instructed the Office of Personnel Management ("OPM") to remove inquiries about criminal records from federal employment applications. As a result, several major companies, such as Google and Starbucks, have revised their internal hiring policies: they now perform individualized assessments of applicants with criminal convictions and provide such applicants with an opportunity to explain the circumstances surrounding their convictions. However, many of these companies continue to ask applicants to self-disclose their criminal histories despite both the EEOC guidance and relevant box laws.

There are other initiatives under way as well. For example, there is renewed interest in the Fair Credit Reporting Act, with a recent rash of class actions asserting that employers have violated the law's notice requirements when conducting credit checks and investigations. In addition, states have started passing equal pay and salary history laws to address the pay disparity between men and women. Given these developments, employers—particularly those with a multistate presence—should be prepared to potentially revise each step in their pre-employment process, from job postings to background checks authorization forms to offer letters.

This paper summarizes state and federal law addressing an employer's right to conduct pre-employment criminal history, credit history, and salary history checks.

II. BAN THE BOX LAWS

As of June 2017, twenty-eight states have adopted ban the box laws. Many of these laws only cover public or state employers. However, nine states—Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont—as well as the District of Columbia and twenty-nine cities and counties, have extended their box laws to cover government contractors and private employers. In addition, fifteen localities extend their fair-chance laws to private employers in the region: Austin (Tex.), Baltimore (Md.), Buffalo (N.Y.), Chicago (Ill.), Columbia (Mo.), the District of Columbia, Los Angeles (Cal.), Montgomery County (Md.), New York City (N.Y.), Philadelphia (Pa.), Portland (Or.), Prince George's County (Md.), Rochester (N.Y.), San Francisco (Cal.), and Seattle (Wash.).[1]

However, at the federal level, several laws require criminal history background checks and bar applicants with prior convictions from certain employment. These laws include the Federal Deposit Insurance Act (the FDIC cannot hire anyone "convicted of any criminal offense involving dishonesty or breach of trust or money laundering"); the Secure and Fair Enforcement for Mortgage Licensing Act (to obtain a license at a national, state, or foreign bank, the employee must disclose any criminal regulatory actions taken against her); the Truth in Lending Act (loan originators must receive criminal and credit checks); and FINRA Rule 3110(e) (investigates applicants to determine whether she "is subject to a statutory disqualification or whether the applicant may present a regulatory risk for the firm and customers").

1. CALIFORNIA

a. California Assembly Bill 1843. CAL. LAB. CODE § 432.7 (2016) (effective Jan. 1, 2017). Applies to public and private employers. Prohibits an employer from inquiring into, or basing a hiring decision on, any arrest that did not result in conviction. There are exceptions for positions with background checks mandated by law.

b. California Assembly Bill 218. CAL. LAB. CODE § 432.9 (2013) (effective July 1, 2014). Applies only to public employers (state agencies, cities, and counties). Removes questions about a convictions from job applications and postpones these inquiries until later in the hiring process.

c. San Francisco Fair Chance Ordinance. San Francisco, California Police Code § 4901 *et seq*. Applies to private employers. Prohibits an employer from inquiring into an applicant's criminal history until (1) a live interview with applicant or (2) the applicant receives a conditional offer. The employer may not consider arrests not leading to conviction, judicially dismissed or expunged

[1] For a comprehensive breakdown of the various ban the box laws in effect across the U.S., *see* Michelle Matividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NATIONAL EMPLOYMENT LAW PROJECT (May 2017), http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf

convictions, or convictions more than seven years old. The law requires the employer to consider several factors when reviewing an applicant's criminal history, such as post-conviction letters of recommendation and evidence of rehabilitation.

2. COLORADO

a. Colorado House Bill 1263. COLO. REV. STAT. § 24-5-101 *et seq.* (2012) (effective August 8, 2012). Applies only to public employers and licensing agencies. Prohibits an employer from performing a background check until (1) it determines the applicant is a finalist for the position or (2) the applicant receives a conditional offer. The employer may not base a denial or withdrawal of an offer on any arrest that did not result in conviction. If the employer takes adverse action due to the applicant's criminal history, the employer must review certain mandatory factors (based off the EEOC guidance): "the nature of the conviction; whether there is a direct relationship between the conviction and the position's duties . . . any information produced by the applicant or produced on his or her behalf regarding his or her rehabilitation and good conduct; and the time elapsed since the conviction." There are exceptions for positions with background checks mandated by law.

3. CONNECTICUT

a. Connecticut House Bill 5237. CONN. GEN. STAT. § 16-83 *et seq.* (2016) (effective Jan. 1, 2017). Applies to public and private employers. Prohibits an employer from inquiring about arrest and conviction history information on an initial employment application. The employer cannot use prior convictions for which the prospective employee received a provisional pardon or certificate of rehabilitation as the sole basis for discharge. There are exceptions for positions with background checks mandated by law.

4. DELAWARE

a. Delaware House Bill 167. DEL. CODE ANN. tit. 19, § 710; tit. 29, § 6909B (2014) (effective Nov. 4, 2014). Applies only to public employers (the state and its agencies and political subdivisions). Prohibits the employer from inquiring into or considering an applicant's "criminal record, criminal history, credit history, or credit score . . . during the initial application process, up to and including the first interview." Once a background check is conducted, the employer shall only consider felonies for ten years from the completion of sentence, and misdemeanors for five years from the completion of sentence. There are exceptions for positions with background checks mandated by law.

5. DISTRICT OF COLUMBIA

a. District of Columbia Counsel Bill 20-642 (Fair Criminal Record Screening Amendment Act). D.C. CODE § 24-1351 *et seq.* (2014) (effective Aug. 29, 2014, amending the Re-entry Facilitation Amendment Act of 2012). Applies to public employers and private employers with eleven or more employees. Prohibits the employer from inquiring into an applicant's conviction history until after extending a conditional offer of employment. The employer can only withdraw the offer "for a legitimate business reason" and must consider several factors, including job-relatedness of the offense and evidence of rehabilitation. The law also imposes (1) fines for violations ($1000 to $5000) and (2) (voluntary) reporting requirements of hiring data. There are exceptions for positions with background checks mandated by law.

6. GEORGIA

a. Georgia Executive Order (signed by Gov. Nathan Deal on Feb.23, 2015). Applies only to public employers. Removes questions regarding criminal history from applications for state employment. The employer cannot use an applicant's criminal record as an automatic bar to employment, and it must postpone inquiries into an applicant's criminal record until after the initial stage of the pre-employment process. There are exceptions for "sensitive" government positions in which a criminal history would be an immediate disqualification.

7. HAWAII

a. Hawaii House Bill 3528. HAW. REV. STAT. § 378-2.5 (1998). Applies to public and private employers. Prohibits the employer from inquiring into an applicant's conviction history until after it has made a conditional offer of employment. The employer may only consider an applicant's conviction record within the previous ten years, excluding periods of incarceration. The employer may withdraw its conditional offer if the applicant's conviction "bears a rational relationship to the duties and responsibilities of the position."

b. ***Shimose v. Hawai'i Health Sys. Corp.***, 345 P.3d 145 (Haw. 2015). Plaintiff had been convicted of possession with intent to distribute methamphetamines. His post-incarceration employer found out about his felony drug conviction and removed him from a clinical rotation at an HHSC facility. The Hawaii Supreme Court held that denial of summary judgment had been proper: there was no rational relationship between the prior conviction and the core duties of the job, though there was an issue of fact as to the rational relationship between the prior conviction and Plaintiff's access to controlled substances.

8. ILLINOIS

a. Illinois House Bill 5701 (Job Opportunities for Qualified Applicants Act). 30 ILL. COMP. STAT. 105/1 *et seq.* (2014) (effective Jan. 1, 2015). Applies to

private employers with fifteen or more employees. Prohibits the employer from inquiring into an applicant's criminal record until (1) the employer selects the applicant for an interview or (2) the applicant receives a conditional offer. There are exceptions for positions with state or federal law exclusions for certain convictions.

b. Illinois Executive Order 1 (signed by Gov. Pat Quinn on Oct. 3, 2013). Directed state agencies, boards, and commissions to "ban the box" for state hiring. Specifically, they must request an applicant's permission—using an "Authorization for Release of Criminal History Information" form—to obtain information relating to the applicant's criminal history. They may only request permission after the applicant "has been deemed eligible and is being considered for a specific position."

c. Chicago Municipal Code Amendment. City of Chi. Mun. Code ch. 1-160-010. Applies to public and private employers. Prohibits an employers from inquiring into an applicant's criminal convictions until (1) the employer determines the applicant is "Qualified" and selects her for an interview or (2) the applicant receives a conditional offer. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

9. KENTUCKY

a. Kentucky Executive Order (signed by Gov. Matt Bevin on Feb. 1, 2017). Applies only to public (state executive branch) employers. Requires all executive branch job applications to be amended, removing questions regarding the applicant's convictions and criminal history. The order also prohibits the employer from inquiring into an applicant's convictions and criminal history until after it has contacted the applicant to offer her an interview for the position.

10. LOUISIANA

a. Louisiana State Civil Service Rule 22.4.1 (effective May 3, 2017). Prohibits state employers from inquiring about an applicant's criminal record on application forms for "classified" service positions. They may inquire about the record either (1) during an interview or (2) after a conditional offer of employment.

b. Louisiana House Bill 266. LA. REV. STAT. ANN. § 42:1701 (2016) (effective Aug. 1, 2016). Applies to some public employers. Prohibits an employer from inquiring into an applicant's criminal history until after the applicant (1) has had an opportunity to interview or (2) receives a conditional offer. There are exceptions for positions with background checks mandated by law.

11. MARYLAND

a. Maryland Senate Bill 4. MD. CODE ANN., STATE PERS. & PENS. § 2-203 (2013) (effective Oct. 1, 2013; includes a June 30, 2018 sunset provision). Applies only to public employers. Prohibits an employer from inquiring into an applicant's criminal history "until the applicant has been provided an opportunity for an interview." There are exceptions for certain positions, such as "a position in the office of the sheriff for any county."

b. Baltimore Ordinance. Fair Criminal-Record Screening Practices, At. 11, § 15-1-16. Applies to public and private employers. Prohibits an employer from inquiring into an applicant's criminal history until extending a conditional offer. There are exceptions for positions with background checks mandated by law.

12. MASSACHUSETTS

a. Massachusetts Senate Bill 2583. MASS. GEN. LAWS ch. 6, § 167 *et seq.* (2010) (effective Nov. 4, 2010). Applies to public and private employers. Prohibits an employer from using an initial written employment application to inquire into an applicant's criminal history. Applicants must receive a copy of their criminal history report (1) prior to being questioned about their history and (2) if the employer makes an adverse decision based on the report (paralleling a component of the Fair Credit Reporting Act). Criminal records provided by the state may only contain felony convictions (previous ten years), misdemeanor convictions (previous five years) and pending charges. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

13. MINNESOTA

a. Minnesota Senate Bill 523. MINN. STAT. § 364 *et seq.* (2013) (effective Jan. 1, 2014). Expands 2009 law to apply to public and private employers. Prohibits an employer from inquiring into an applicant's criminal history until (1) the employer selects the applicant for an interview or (2) the applicant receives a conditional offer. Private employers risk fines for their failure to comply: for example, employers with more than twenty employees in the state may be fined up to $500 per violation (not to exceed $2000 in a calendar month). There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law. Also, statutory protections that predate the Senate Bill 523 include prohibiting a public employer from disqualifying an applicant unless the conviction is "directly related" to the position sought; requiring consideration of job-related factors; and precluding use of arrest records not followed by a valid conviction.

14. MISSOURI

a. **Missouri Executive Order 16-04** (signed by Gov. Jay Nixon on Apr. 11, 2016). Applies only to public employers. Requires all executive branch initial job applications to be amended, removing questions regarding the applicant's convictions and criminal history. There are exceptions for positions where a criminal history would render the applicant ineligible.

15. NEBRASKA

a. **Nebraska Legislative Bill 907.** NEB. REV. STAT. § 7-201 *et seq.* (2014) (effective July 18, 2014). Applies only to public employers. Prohibits an employer from inquiring into an applicant's criminal history until after the employer has determined the applicant meets the minimum requirements of the position. There are exceptions for positions with background checks mandated by law or where an applicant with a conviction history would be automatically disqualified by law.

16. NEVADA

a. **Nevada Assembly Bill 384.** Amending NEV. REV. STAT. § 284.240 *et seq.* (2017) (effective Jan. 1, 2018). Applies only to public (state and local) employers. Prohibits an employer from inquiring into an applicant's criminal history until (1) the employer's final in-person interview with the applicant or (2) the applicant receives a conditional offer. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

17. NEW JERSEY

a. **New Jersey Assembly House Bill 1999 & Senate Bill 1484 (Opportunity to Compete Act).** N.J. STAT. ANN. § 34:6B-11 *et seq.* (2014) (effective Mar. 1, 2015). Applies to public and private employers (preempting Newark ban the box ordinance). Prohibits an employer from inquiring into an applicant's criminal history—including internet searches—until after the employer has conducted its first interview with the applicant. The employer may not consider expunged or pardoned convictions when making an employment decision. In addition, the employer may not publish an advertisement for a job that will not consider an applicant who has a conviction. Employers who violate the law "shall be liable for a civil penalty in an amount not to exceed $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation." There are exceptions for positions with background checks mandated by law, such as jobs in law enforcement.

18. NEW MEXICO

a. **New Mexico Senate Bill 254.** N.M. STAT. ANN. § 28-2-3 (2014) (amending "Criminal Offender Employment Act" (1974)) (effective May 19, 2010).

Applies only to public employers, including cities and counties. Prohibits an employer from inquiring into an applicant's criminal history on an initial application until the applicant has been "selected as a finalist." While the employer may consider an applicant's convictions to determine eligibility, the convictions may not serve as an "automatic bar." When making an employment decision, the employer may not rely on (1) arrest records that did not result in conviction or (2) misdemeanor convictions not involving moral turpitude.

19. NEW YORK

a. New York (announced Sept. 21, 2015 by Gov. Andrew Cuomo). Applies only to public employers. In a press release, Gov. Cuomo said the state would "adopt 'fair chance hiring' for New York State agencies." Does not require an applicant for a competitive agency position to disclose or discuss information regarding prior convictions until "the agency has interviewed the [applicant] and is interested in hiring him or her."

b. New York City Fair Chance Act. N.Y.C. Admin. Code § 8-102 *et seq.* (effective June 29, 2015). Applies to public employers and private employers with ten or more employees. Prohibits an employer from inquiring into an applicant's criminal history until extending a conditional offer. After inquiring into the applicant's arrest or conviction record, but before taking any adverse employment action, an employer must (1) provide a written copy of the inquiry to the applicant; (2) perform an York Correction Law and provide a written copy of that analysis to the applicant; and (3) allow the applicant a reasonable time period (seven business days) to respond, during which time the employer must hold open the position for the applicant. There are exceptions for positions with background checks mandated by law, such as jobs in law enforcement. This law complements N.Y.C.'s credit history law (also enacted in 2015), which prohibits employers from inquiring into an applicant's consumer credit history.

20. OHIO

a. Ohio House Bill 56 (Ohio Fair Hiring Act). OHIO REV. CODE ANN. § 9.73 *et seq.* (2015) (effective Mar. 23, 2016). Applies only to public employers, including cities and counties. Prohibits an employer from including any questions about criminal records on initial employment applications. The law also prohibits the employer from using a felony conviction against certain classes of public employees, unless the conviction occurs while that employee is employed in the civil service.

b. Ohio Administrative Policy HR-29 (effective June 1, 2015). The Ohio Department of Administrative Services removed questions regarding conviction and arrest history from the initial application for state employment. The Department also required hiring decision-makers to weigh factors similar to those from the EEOC guidance.

21. OKLAHOMA

a. Oklahoma Executive Order 2016-03 (signed by Gov. Mary Fallin on Feb. 24, 2016). Applies only to public employers. Requires all executive branch initial job applications to be amended, removing questions regarding the applicant's convictions and criminal history. There are exceptions for positions where a criminal history would render the applicant ineligible.

22. OREGON

a. Oregon House Bill 3025. OR. REV. STAT. § 659A.360 (2015) (effective Jan. 1, 2016). Applies to public and private employers. Prohibits an employer from inquiring into an applicant's criminal convictions until after (1) the initial interview with the applicant or (2) the applicant receives a conditional offer. The employer cannot include any questions about criminal convictions on an initial employment application. There are exceptions for positions with background checks mandated by law. Also, the employer is not prevented from considering an applicant's conviction history when making a hiring decision.

23. PENNSYLVANIA

a. Pennsylvania Order (announced May 5, 2017 by Gov. Tom Wolf). Applies only to non-civil service positions that fall under the governor's jurisdiction. Requires state agencies to adopt fair-chance hiring human resources policies that remove questions about conviction history from job applications. Prohibits consideration of certain information, including arrests and expunged convictions. There are exceptions for law enforcement and security personnel.

b. Philadelphia Ordinance. City of Philadelphia Code, Ch. 9-3500. Applies to public and private employers. Prohibits an employer from inquiring into an applicant's criminal convictions during the application process.

c. ***King v. Gen. Info. Servs., Inc.***, 903 F. Supp. 2d 303 (E.D. Pa. 2012). Defendant, a consumer reporting service, disclosed incorrect information about Plaintiff to a potential employer. Plaintiff alleged that the Defendant had violated the FCRA. The Court addressed ban the box legislation in other jurisdictions as a national trend "towards restricting both the dissemination and consideration of adverse information that is potentially harmful to an individual's economic opportunities." The Court ruled in Plaintiff's favor, denying Defendant's motion for judgment on the pleadings.

24. RHODE ISLAND

a. Rhode Island House Bill 5507. R.I. GEN. LAWS § 28-5-6 *et seq.* (2013) (effective Jan. 1, 2014). Applies to public and private employers. Prohibits an

employer from inquiring into an applicant's criminal convictions until the first interview with the applicant. However, the employer may inquire about the applicant's conviction history during the interview. Remedies for violations of the law include back pay, compensatory and punitive damages, and attorney's fees. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

25. TENNESSEE

a. Tennessee Senate Bill 2440. TENN. CODE ANN. § 8-50-1 (2016) (effective Apr. 14, 2016). Applies only to public employers. Prohibits state agencies from inquiring into an applicant's criminal convictions on any initial application form. For an applicant with a conviction record, the employer must consider factors similar to those from the EEOC guidance, such as the relationship of the offense to the specific job duties, seriousness of the offense, and any evidence of rehabilitation. Of note, in March 2016, the governor signed Senate Bill 2103, which prevents cities and counties in the state from expanding fair-chance laws to local private employers.

26. TEXAS

a. Austin Ordinance. City of Austin, tit. 4, ch. 4-15. Applies to public and private employers. Prohibits an employer from inquiring into an applicant's criminal history until extending a conditional offer. The ordinance applies to all types of employment: full-time, temporary or seasonal, contract, casual or contingent, and participation in a vocational, apprenticeship, or educational training program. An adverse employment action cannot be based on criminal history unless "the employer has determined that the individual's criminal history bears a direct relation to the duties and responsibilities of the job and makes the individual unsuitable for the job."

27. UTAH

a. Utah House Bill 156. UTAH CODE ANN. § 34-52-101 *et seq.* (2017) (effective May 8, 2017). Applies only to public employers. Prohibits an employer from inquiring into an applicant's conviction history until after (1) the initial interview with the applicant or (2) the applicant receives a conditional offer. There are exceptions for certain positions, including positions with background checks mandated by law.

28. VERMONT

a. Vermont House Bill 261. VT. STAT. ANN. tit. 21, § 495j (2016) (effective July 1, 2017). Applies to public and private employers. Prohibits an employer from requesting criminal record information on its initial employment application form. The employer may inquire about criminal history "during an interview or

once the [applicant] has been deemed otherwise qualified for the position." However, the applicant must have an opportunity to explain the information and present evidence of rehabilitation. Employers face a civil penalty of up to $100 for each violation. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

b. Vermont Executive Order 03-15 (signed by Gov. Peter Shumlin on Apr. 21, 2015). Applies only to public employers. Implements a ban the box policy to "provide qualified applicants with the opportunity to explain a criminal record when applying for state positions."

29. VIRGINIA

a. Virginia Executive Order 41 (signed by Gov. Terry McAuliffe on Apr. 3, 2015). Applies only to public employers. Removed questions relating to convictions and criminal history from state employment applications. Prohibits an employer from basing hiring decisions on an applicant's criminal history "unless demonstrably job-related and consistent with business necessity." There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

30. WASHINGTON

a. Seattle Ordinance. Seattle Mun. Code 14.17. Applies to public and private employers. Prohibits an employer from inquiring into an applicant's criminal history until completing an initial screening to identify qualified applicants. The employer cannot advertise open positions that exclude individuals with arrest or conviction history. The employer must have a "legitimate business reason" to take an adverse employment action against the applicant due to a criminal record or pending criminal charge. The employer faces a warning for the first violation, a $750 fine for the second violation, and a $1000 fine for the third violation.

31. WISCONSIN

a. Wisconsin Assembly Bill 373. WIS. STAT. § 230.16 (2016) (effective July 1, 2016). Applies only to public (civil service) employers. Prohibits an employer from inquiring into an applicant's criminal record on the initial job application and delays inquiries until the applicant is certified for the position. There are exceptions for positions where an applicant with a conviction history would be automatically disqualified by law.

III. SALARY HISTORY LAWS & FCRA LITIGATION

Some states are also looking into fair-chance laws that would prevent an employer from inquiring into a job applicant's salary history during the hiring process. One of the primary goals of such laws is to address the pay gap between men and women.

In August 2016, as part of a package of pay equity laws, Massachusetts became the first state to enact a law prohibiting an employer from asking a job applicant about her salary history. Under Massachusetts Senate Bill 2119, the employer must wait to ask until after it makes a job offer that includes compensation. MASS. GEN. LAWS ch. 149, § 105A(c)(2) (2016). The employer is limited to the use of market surveys (to the extent they are available for positions) and discussing salary "expectations." However, the employer will not violate the law if (1) the applicant voluntarily discloses her past compensation, or (2) the employer inadvertently learns about the applicant's past compensation when performing background checks or verifying application details. The law, which also prohibits an employer from retaliating against an applicant who refuses to disclose her salary history, is set take effect on July 1, 2018.

On the heels of the Massachusetts salary history bill, lawmakers in other jurisdictions—including twenty-five states—are pushing similar measures, with varying levels of success:

a. California Assembly Bill 1676 amended the state's Fair Pay Act, holding that "[p]rior salary shall not, by itself, justify any disparity in compensation." CAL. LAB. CODE § 1197.5(a)(3) (2016). The law took effect on Jan. 1, 2017. Also, at the local level, the San Francisco Board of Supervisors has introduced its own salary history ordinance.

b. New York Executive Order 161, signed by Gov. Andrew Cuomo on Jan. 9, 2017, prohibits state agencies from inquiring into the salary history of job applicants until after extending a conditional offer of employment. New York City passed a similar ban, prohibiting city agencies from seeking an applicant's previous wage, salary, or benefits information—through either the applicant or public records—until after an offer is made. The law will take effect on Oct. 31, 2017.

c. The District of Columbia was considering its a bill that would require employers to publish salary ranges for open positions; however, the bill died when the city council adjourned on Jan. 2, 2017. Also, at the federal level, Rep. Eleanor Holmes Norton (D-D.C.) has joined with several other House members to propose a federal prohibition on mandatory salary-history sharing. The proposal faces staunch opposition from Republicans.

d. New Orleans' law took effect on Jan. 25, 2017. The law prohibits city agencies from requesting an applicant's salary history.

e. Philadelphia's pay history law was slated to take effect on May 23, 2017. A legal challenge from the Chamber of Commerce led the city to stay

enforcement. The law also faces potential preemption from several bills proposed by Pennsylvania state lawmakers.

f. Pittsburgh's law took effect on Jan. 30, 2017. The law prohibits the city from inquiring into an applicant's salary history or relying on salary history in the hiring process, unless the applicant volunteered the information. The law faces similar preemption concerns as Philadelphia's law.

These laws coincide with the sharp rise of class actions filed under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681, which governs an employer's use of background checks. The FCRA requires that an individual must be notified if information in their file is used against them in an adverse action. The individual has a right to dispute inaccurate information, must give her consent for reports to be provided to employers, and may seek damages from violators. *See King*, 903 F. Supp. 2d 303.

While the FCRA requires employers to provide job applicants with notice of adverse actions, it does not go much further to protect applicants. Specifically, the FCRA does not (1) govern how employers should consider an applicant's criminal history; (2) prevent employers from refusing to hire an applicant due to her criminal record; or (3) apply to consumer reports prepared by non-consumer reporting agencies. Consequently, many fair-chance laws address one or more of these issues and include supplemental FCRA provisions.

IV. PAY EQUITY LAWS

In 2016, fueled in part by renewed interest across the U.S. to raise the minimum wage, pay equity laws took effect in California, Maryland and New York. Massachusetts' aforementioned salary history law, set to take effect in 2018, includes several pay equity provisions as well. These laws strengthen existing equal pay laws, making it more difficult to discriminate against workers based on sex. Each of the pay equity laws has unique provisions:

a. Massachusetts Senate Bill 2119 requires employers to pay men and women the same when performing "comparable work"—i.e., work "substantially similar" in skill, effort, responsibility, and working conditions (with limited exceptions for seniority, geography, education, and merit). MASS. GEN. LAWS ch. 149, § 105A(b). The law also precludes salary secrecy: an employer cannot block its employees from discussing information relating to their wages with one another.[2] *Id.* § 105A(c)(1).

b. New York Executive Order 161 prohibits state agencies from asking an applicant for current or prior salary information before extending a conditional offer of employment. New York Executive Order 162, similar to the EEOC equal pay data rule (see below), requires state contractors and their subcontractors to submit job title and salary information for each employee

[2] While employees already have this right under the federal National Labor Relations Act, the law does not apply to supervisors.

working on a contract, on top of the equal employment opportunity information already required.

c. California Senate Bill 1063 further expanded the Fair Pay Act, requiring employees who perform "substantially similar work" under similar working conditions to be paid equally (with exceptions for seniority, merit, or some other bona fide factor besides race, sex, or ethnicity). CAL. LAB. CODE § 1197.5(a).

d. Maryland requires employers to inform employees about promotions in the full range of career tracks. The aim is to incentivize employers to post all open positions, even those not typically posted in the past. In addition, while pay comparisons in Maryland and New York are made between similar positions in the same county, pay comparisons in Massachusetts and California have no geographical limitations.

Beyond the state level, the EEOC's equal pay data rule, finalized in September 2016, faces hostility from the Trump administration. The rule would require employers with more than one hundred workers to submit pay data by gender, race, and ethnicity on their employer information report, known as EEO-1, as well as include summary pay data and report the number of hours worked by employees. It was expected to cover 60,000 employers and 63 million employees, with the first deadline for the new report set for March 31, 2018. Critics have argued the rule would be both overly burdensome and ineffective, with the job categories and pay bands used in the reports too broad to help the EEOC achieve its equal pay goal. On Jan. 25, 2017, President Trump designated Victoria Lipnic as the EEOC's acting chair. Ms. Lipnic was the only commissioner who had voted against the rule; however, since the Commission operates by vote, no one commissioner can change the agency's current position.

Despite uncertainty at the federal level, pay equity laws are likely to spread into more states in 2017. All employers, even those in jurisdictions without newly updated laws, should review compensation data to ensure that employees within a given region are being fairly and consistently paid without regard to sex, race, or some other protected characteristic.

