

DISCRIMINATION LAW MAY SOON PROTECT EX-CONVICTS

The Puerto Rico Senate recently approved by a unanimous vote a bill which, if enacted into law, would provide individuals with past criminal records the same protection against employment discrimination as the one provided to other covered groups by Puerto Rico's General Antidiscrimination Act, Commonwealth Law No. 100 of June 30, 1959, as amended. Senate Bill 2159 was approved by the Senate on April 14, 2008, and was referred to the House of Representatives on May 15, 2008.

This Bill amends Law No. 100 to protect individuals that have committed criminal offenses and misdemeanors from being unreasonably denied employment merely because of their past conviction(s). As stated in the Bill, it seeks to resolve by legislative means the 3-to-3 split vote entered on October 24, 2005 by Puerto Rico's Supreme Court in *Rosario Díaz v. Toyota de Puerto Rico*, 2005 TSPR 154.

In *Rosario*, the justices were equally divided on whether Puerto Rico's prohibition against discrimination "on the basis of social condition" prohibits an employer from rejecting a job applicant due to his criminal record. The Court's inability to issue a majority opinion maintained the Court of Appeal's decision, which concluded that an employer's refusal to hire a job applicant due to its policy against hiring individuals with criminal records violated Puerto Rico's constitutional protection against discrimination based on the social condition of the individual.

The Bill acknowledges that ex-convicts carry with them a social stigma that in most instances negatively affects them throughout their lives, and

face what the Senate has described as "rampant discrimination" when seeking employment.

However, the Bill also recognizes the importance of an employer's prerogative of denying employment to ex-convicts when their enrollment may endanger public security, the well-being of minors, the prevention and abolition of crime and the protection of its proprietary interests and those of its employees, clients and the general public.

If the Bill becomes law, employers will no longer be allowed to broadly prohibit hiring anyone with a criminal record. Instead, employers would have to consider, among other things, the following criteria: (1) the nature and severity of the offense; (2) the relationship between the offense, the employment sought and the duties and responsibilities of the position; (3) applicant's rehabilitation, including any information the applicant or a third party may provide regarding same; (4) the circumstances under which the offense took place, including any mitigating conditions; (5) the applicant's age when the offense occurred; (6) the time transpired between the conviction and the job application; and (7) the employer's legitimate interest in protecting its property, safety and well-being, as well as that of its employees and the public in general.

With regard to the application of these criteria, the Bill states that an employer could only reject an application if, in its final analysis, the employer concludes that hiring the applicant would involve a risk that could reasonably expose its interests, those of its employees and the community in general. According to the current drafting of the Bill, employers would not face liability if a decision to

reject a job application is based on a “reasonable examination” of these criteria. Violations for unreasonably refusing to hire an ex-convict may expose the employer to payment of double the damages suffered by the applicant and having to hire the rejected applicant. Further, violations are classified as misdemeanors punishable by a fine no lower than \$500 or higher than \$2,000 and/or imprisonment for up to 6 months.

Although the Bill’s stated purpose is to ban employers from unreasonably rejecting ex-convicts’ job applications, its text goes further, providing ex-convicts with protected status, and therefore, with protection from being terminated, suspended or discriminated against with regards to their compensation, benefits, terms, conditions, opportunities and privileges of employment, because of past criminal convictions.

If the Bill becomes law, employers would need to adopt policies and procedures to incorporate these new criteria in its recruitment and personnel-management protocols, and train their supervisors accordingly. O’Neill & Borges is available to assist in developing these policies.

TAX-EXEMPT DISCHARGE INDEMNITY

If enacted into Law, House Bill 4261 would exempt any discharge indemnity payment made under Puerto Rico’s Unjust Dismissal Act (Commonwealth Law No. 80 of May 30, 1976, as amended) from payment of any local or federal tax. Law No. 80 establishes a discharge indemnity paid by the employer to any employee hired for an indefinite term who is discharged without cause.

Currently, Law No. 80 exempts employers from making payroll deductions from these payments. However, employees must pay taxes on said amounts since they currently constitute “income” under the Internal Revenue Code and the Puerto Rico Tax Code.

Should you wish to monitor these or other bills more closely, or wish to communicate your point

of view on these matters, feel free to contact us. O’Neill & Borges maintains an experienced “Government Affairs” practice group that handles such requests.

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Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, please contact our labor and employment lawyers.

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