

EX-CONVICTS MAY SOON CLAIM DISCRIMINATION PROTECTION

On June 24, 2011 the Puerto Rico House of Representatives approved Senate Bill 1730 which, if signed by the Governor, will provide individuals with past criminal records the same protection against employment discrimination as provided to other covered groups under Puerto Rico's General Antidiscrimination in Employment Act, Commonwealth Law No. 100 of June 30, 1959, as amended. The Bill will soon be sent to the Governor, who may sign or veto the measure (expressly or by pocket veto).

The Bill amends Law No. 100 to protect individuals that have committed criminal offenses from being unreasonably denied employment merely because of their prior conviction(s). This is accomplished by stating in the Bill that the condition of "ex-convict" is a "social condition." Thus, rather than adding "ex-convicts" as a separate protected group, the Bill includes such individuals within the group protected from "social condition" employment discrimination under Puerto Rico's Law No. 100. In doing so, the Bill adopts the position of a concurring opinion in Puerto Rico Supreme Court's tied judgment in *Rosario Díaz v. Toyota de P.R.*, 116 D.P.R.1 (2005).

In *Rosario Díaz*, the Supreme Court's inability to issue a majority opinion maintained the Court of Appeal's decision. The appellate court had concluded an employer's refusal to hire a job applicant with criminal record violated Puerto Rico's constitutional and Law No. 100 protection against discrimination based on the "social condition" of the individual. Other panels of the Court of Appeals have held to the contrary.

The Bill acknowledges that ex-convicts carry with them a social stigma similar to other disadvantaged "social conditions." The Bill finds that in most instances the ex-convict status negatively affects them throughout their lives.

If the Bill becomes law, employers will no longer be allowed to broadly refuse to hire (or reinstate) anyone with a prior criminal record. Instead, if an employer intends to consider such a factor, a refusal to hire or rehire must be reasonably based after weighing the following considerations, among others: (1) the nature and seriousness of the offense (this is not in the Bill but appears in the cited *Rosario Díaz* opinion); (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 offense was committed and the job application or reinstatement request; and (7) the employer's legitimate interest in protecting its property, safety and well-being, as well as that of its employees and the general public.

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, plus litigation costs. Further, Law No. 100 violations are classified as *misdemeanors* punishable by a fine of up to \$5,000 and/or imprisonment for up to 90 days.

If passed, Puerto Rico will join a short list of five other states that have laws requiring private sector employers to make an individualized assessment of the impact of the criminal record on an applicant's qualifications for the job. However, the Bill *does not* adopt provisions applicable in other jurisdictions that exempt certain employers from coverage or limit liability claims against employers who hire ex-convicts. Further, since Law No. 100 also applies to government corporations that operate as a private enterprise, it is uncertain how it will impact existing rules that restrict the employment in the public sector of certain individuals with criminal records.

Although the Bill's stated purpose is to ban employers from unreasonably rejecting ex-convicts' job applications, the text of the Bill goes further. Since it includes ex-convicts within the protected category of "social condition," the Bill extends to them the statutory protection from being terminated, suspended or discriminated against with regard to their compensation, benefits, terms, conditions, opportunities and privileges of employment.

Similarly, the Law No. 100 presumption of discriminatory intent is extended to ex-convicts, if the employer's adverse action is found to lack "just cause."

The Bill does not expressly prohibit an inquiry as to an applicant's prior criminal record. However, the Puerto Rico Secretary of Labor and Human Resources' Regulation issued under Law No. 100 prohibits an inquiry as to an individual's protected status (for example, an application form cannot inquire as to an applicant's race, gender, age,...and social condition.) Further, the Regulation contains a *presumption* of discrimination when an adverse employment action is taken after a prohibited inquiry is made. (Art.17).

If the Bill becomes law, employers will need to promptly adopt policies and procedures to incorporate these new limitations in its recruitment and personnel- management protocols, and train their supervisors accordingly.

O'Neill & Borges is available to assist in developing these policies and providing training.

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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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