

PUBLICATION

New North Carolina Law Prohibits Employers from Asking Applicants for Information About Expunged Criminal Arrests, Charges, and Convictions

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Imagine a scenario where the applicant you are about to hire as Chief Financial Officer was convicted of a crime, perhaps embezzlement, that he managed to get expunged, but you'll never know because you can't ask him about it.

North Carolina allows arrests, charges, and convictions of certain crimes to be expunged, i.e., erased from someone's criminal record. Beginning December 1, 2013, the majority of North Carolina employers are prohibited from requiring an applicant to disclose information about those expunged events. With the exception of law enforcement agencies, "[a]n employer or educational institution shall not, in any application, interview, or otherwise, require an applicant for employment or admission to disclose information concerning any arrest, criminal charge, or criminal conviction of the applicant that has been expunged . . ."

Further, employers can't ask about an expunged arrest, charge, or conviction even if they already know about it: An employer "shall not knowingly and willingly inquire about any arrest, charge, or conviction that they know to have been expunged."

What happens if you ask anyway?

First, you may not get an answer. The applicant does not have to respond: "An applicant need not, in answer to any question concerning any arrest or criminal charge that has not resulted in a conviction, include a reference to or information concerning arrests, charges, or convictions that have been expunged."

Second, you could get fined. If an employer violates these prohibitions, the first violation will result in a written warning from the Commissioner of Labor. Any violations that occur after receipt of the warning will result in a fine of up to \$500 per violation.

Thankfully, the drafters made clear that the new prohibitions do not provide a private cause of action against any employer. The text of the law can be found

here:<http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S91v5.pdf>

Bottom Line: Most employers do not ask specifically about expunged events, but these prohibitions are broader than that. Because these amendments prohibit an employer from requiring an applicant to disclose information about expunged events, a general question about an applicant's criminal history may be a violation. Thus, employers with employees in North Carolina should (1) train anyone involved in the application and interview process on these new prohibitions; and (2) review their employment applications to ensure that they are in compliance. Adding "with the exception of information about expunged arrests, charges, and convictions" to a question about an applicant's criminal history may save you from receiving a strongly worded letter and a fine from the North Carolina Commissioner of Labor.