LEGAL UPDATE

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IOWA SUPREME COURT DECISION — LEGALITY OF "BAN THE BOX" ORDINANCE

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Iowa Association of Business and Industry v. City of Waterloo, the Waterloo Commission on Human Rights, and Martin M. Peterson, in His Official Capacity
Filed June 18, 2021
No. 20-0575
www.iowacourts.gov/courtcases/11920/embed/SupremeCourtOpinion

Factual and Procedural Background. On November 4, 2019, the City of Waterloo (Waterloo) voted to enact Ordinance 5522 (Ordinance). The Ordinance limits employer inquiries into the criminal histories of prospective employees. Specifically, the Ordinance prohibits all employers in Waterloo from asking about criminal history on a job application, bars employers with 15 or more employees from making any inquiry into an applicant's criminal history until a conditional offer of employment has been made, and bars employers with 15 or more employees from making an adverse hiring decision based solely on an applicant's arrests or pending criminal charges that have not resulted in a conviction, criminal records that have been expunged or are the subject of a pardon, or criminal records without a legitimate business reason.

While the Ordinance was under consideration, the Iowa Association of Business and Industry (ABI) wrote to the Waterloo City Council, claiming that the Ordinance violated Iowa Code section 364.3(12)(a), which limits the ability of cities to regulate employment terms and conditions. ABI immediately filed suit upon the Ordinance's final approval in the Black Hawk County District Court, against Waterloo, the Waterloo Commission on Human Rights (WCHR), and the city attorney in his official capacity. ABI's petition sought injunctive and declaratory relief on the ground that the Ordinance violated Iowa Code section 364.3(12)(a).

The district court held that on its merits, the Ordinance did not violate Iowa Code section 364.3(12)(a). The district court concluded that ABI's preemption argument required the district court to reconcile Iowa Code section 364.3(12)(a) with another provision of state law, Iowa Code section 216.19(1)(c), that provides the Iowa Civil Rights Act shall not be construed to limit a city or local government from enacting an ordinance that prohibits broader or different categories of unfair or discriminatory practices. The district court found that the Ordinance was within the authority given to cities under Iowa Code section 216.19(1)(c) to prohibit a broader range of discriminatory practices under local civil rights ordinances. The district court upheld the legality of the Ordinance. ABI appealed to the Iowa Supreme Court (Court).

Issues. Whether the Ordinance, which regulates the timing of when an employer can inquire into a prospective employee's criminal history and whether an employer may consider an employee's criminal history in the hiring decision, is preempted by Iowa Code section 364.3(12)(a).

Holding. The Court affirmed in part and reversed in part the district court's order, and remanded the decision of the district court. The Court upheld the portion of the Ordinance that delays the inquiry of an applicant's criminal history

during the hiring process but reversed the remainder of the Ordinance that further restricts the use of an applicant's criminal history.

Analysis. The Ordinance provides, in relevant part:

> B. Prohibited Use Of Criminal Record Information: In connection with the employment of any person, it shall be an unlawful discriminatory practice for an employer to include a criminal record inquiry on any application. It shall further be an unlawful discriminatory practice for an employer who employs fifteen (15) or more persons, but not private schools providing a regular course of instruction for any part of kindergarten through high school education, to engage in any of the following activity:
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> 1. To make any inquiry regarding, or to require any person to disclose or reveal, any convictions, arrests, or pending criminal charges during the application process, including but not limited to any interview. The application process shall begin when the applicant inquires about the employment being sought and shall end when an employer has extended a conditional offer of employment to the applicant. If the applicant voluntarily discloses any information regarding his or her criminal record at the interview, the employer may discuss the criminal record disclosed by the applicant.
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> 2. To make an adverse hiring decision based solely on the applicant's record of arrests or pending criminal charges that have not yet resulted in a conviction.
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> 3. To make an adverse hiring decision based on any criminal records which have been lawfully erased or expunged, which are the subject of an executive pardon, or which were otherwise legally nullified.
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> 4. To make an adverse hiring decision based on an applicant's criminal record without a legitimate business reason.

The Court began its opinion by describing the two types of restrictions contained in the Ordinance. The Ordinance imposes procedural limits on employers and substantive restrictions that forbid an employer from making an adverse hiring decision for certain reasons. The Court cited the Iowa Constitution and Iowa law, stating that "cities are generally granted home rule authority to enact ordinances." ABI argued the Ordinance was preempted by limitations set forth for cities in Iowa Code section 364.3(12)(a) which provides, in relevant part,

> A city shall not adopt, enforce, or otherwise administer an ordinance . . . providing for any terms or condition of employment that exceed or conflict with the requirements of a . . . law relating to the . . . hiring practices . . . or any other terms or conditions of employment.

The Court disagreed with the district court's determination that Iowa Code section 216.19(1)(c) supersedes the express limits provided in Iowa Code section 364.3(12)(a), stating that Iowa Code section 216.19(1)(c) does not grant such authority but is merely a "savings clause" that does not supersede the home rule limitations on cities pursuant to Iowa Code section 364.3(12)(a).

Waterloo further argued that the Ordinance is not preempted because it does not "exceed" the requirements of any existing law. The Court was not persuaded, stating that Waterloo overlooked the qualifiers provided by the Equal Employment Opportunity Commission that the use of criminal background checks by an employer on job applicants of a particular race was unrelated to job criteria or consistent with business necessity, and an employer could be held liable under Title VII of the Civil Rights Act of 1964. The Court noted that, under *Pippen v. State*, 854 N.W.2d 1 (Iowa 2014), the plaintiff needs to provide targeted proof in a disparate impact employment discrimination case. The Court also noted that Waterloo ignored general Title VII requirements that disparate impact must be proven on an employer-by-employer basis.

The Court disagreed with Waterloo's argument that the Ordinance simply duplicated existing federal and state civil rights protections and nothing more.

The final argument presented by Waterloo to the Court was that the Ordinance does not violate Iowa Code section 364.3(12)(a) because it does not establish or exceed different terms or conditions of employment from those already established in federal or state law, but implements existing civil rights law. The Court concluded that the Ordinance

is “preempted to the extent it attempts to establish terms and conditions of employment, including hiring practices that constitute terms and conditions of employment, but [is] not preempted otherwise.” The Court determined the Ordinance could be sustained upon severing the provisions that restrict adverse hiring decisions based upon an applicant’s criminal history that violate state law and retaining the provisions that delay inquiry into an applicant’s criminal history.

All justices concurred except Justice McDonald, who concurred in part and dissented in part, and Justice McDermott, who took no part. Justice McDonald stated that he would decline to address the part of the judgment of the district court that the majority affirmed because the issue relating to the phrase “terms or conditions of employment” as used in Iowa Code section 364.3(12)(a) was not presented or decided at the district court level nor raised on appeal by any party to the proceeding and therefore should not have been addressed, and he would have reversed the judgment on the issues that were properly preserved for and presented on appeal. Furthermore, Justice McDonald disagreed with how the majority interpreted the phrase “terms or conditions of employment” and stated that the fair and ordinary meaning of the statute preempts any local law regarding hiring practices that exceed federal or state law which the majority rejected and concluded that the statute preempts local law regarding hiring practices but only “those that amount to terms or conditions of employment.”

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