**CALIFORNIA “BAN THE BOX’ LAW AND WOTC**

Over the past decade NEON has argued to state and local governments in favor of exceptions for WOTC screening under the ban the box laws that would otherwise prohibit pre-employment inquiries regarding an applicant’s criminal history. The most recent example of a WOTC exemption is in California’s regulations under the State’s ban the box that will go into effect October 1, 2023.

The California law (Government Code section 12952) contains a broad prohibition on employers requesting information regarding a job applicant’s criminal history prior to making a conditional offer of employment. The law has limited exemptions but does not specifically refer to WOTC.

However, California Regulations section 11017.1(j) provides a specific exemption from the prohibition and penalties for its violation for WOTC screening. Under the exemption, an employer may before making a conditional offer of employment ask an employee to complete question 2 of IRS Form 8850 which provides for a single answer to seven WOTC categories, including whether the applicant was convicted of a felony or released from prison for a felony during the past year. The exemption also specifies that the applicant may not be encouraged or forced to provide more specificity as whether the category he or she is under relates to ex-felon status, and that any information gathered under this question may only be used for WOTC qualification purposes.

The regulation permits employers to require an applicant to complete DOL Form 9061 (ICF) and specifically answer the ex-felon question, but only after a conditional offer of employment has been made. Again, any information developed as to an applicant’s ex-felon status may only be used for WOTC employment purposes and under conditions prescribed by law.

Finally, the regulations provide that any information gathered as to criminal history under this exception must be kept in a separate file from the applicant’s general personnel file and may not be used or disseminated for any purpose other than applying for WOTC.

The regulations contain a way under which California employers may participate in WOTC and ask the ex-felon question on the 8850 before making a conditional employment offer that is consistent with the way in which other jurisdictions have allowed the ex-felon question to date.

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