

New Jersey “Bans the Box” Statewide - Re: Disclosing Criminal History on Job Applications

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New Jersey joins the ranks of states that prohibit certain criminal history inquiries during the hiring process.

New Jersey’s Opportunity to Compete Act (OTCA), signed into law on August 11, is the latest among a rising tide of “ban the box” legislation that is sweeping the nation. The intent behind the OTCA is “to assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves.” The OTCA attempts to accomplish these goals by prohibiting employers from doing the following:

- Requiring an applicant to complete an employment application that inquires into the applicant’s criminal record “during the initial employment application process”
- Making any oral or written inquiries regarding an applicant’s criminal record “during the initial employment application process”
- Posting job advertisements that “explicitly provide[] that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses”¹

Although inquiries regarding an applicant’s criminal record are prohibited during the “initial employment application process,” which is defined as beginning when an applicant first communicates with a potential employer about a job and ends when the employer “has conducted a first interview,” nothing in the OTCA prohibits an employer from inquiring into an applicant’s criminal record after the initial employment application process has concluded. In addition, the OTCA provides that nothing therein “shall . . . preclude an employer from refusing to hire an applicant . . . based upon the applicant’s criminal history” unless the criminal record was expunged or the subject of executive pardon.

In a sweeping nod to employers, the OTCA prohibits any county or municipality from enacting any law or ordinance regarding “criminal histories in the employment context” and expressly preempts

any such law enacted prior to March 1, 2015 (the OTCA's effective date), except those dealing with municipal operations.

Who Is Covered?

The OTCA takes effect on March 1, 2015 and applies only to employers that have 15 or more employees over 20 calendar weeks and that “do[] business, employ[] persons, or take[] applications for employment” in New Jersey. Although the OTCA applies to “referral agencies and other employment agencies,” the “physical location of the prospective employment shall be in whole, or substantial part, within” New Jersey.

What Is Covered?

The OTCA defines a “criminal record” expansively to include “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom . . .”

Notable Omissions

The OTCA, unlike the laws of some other states (such as New York), does not enumerate specific factors that employers must consider when making employment decisions based on criminal records. In addition, and perhaps most important, the OTCA does not provide individuals with a private cause of action. Instead, violations are subject to a civil penalty not to exceed \$1,000 for the first offense and \$10,000 for each subsequent violation, collectible by the Commissioner of Labor and Workforce Development. Evidence of an employer's violation of the OTCA “shall not be admissible in any legal proceeding,” except one to enforce the OTCA.

Recommendations

To ensure compliance with the OTCA, employers subject to the law should do the following:

- Review their job postings and advertisements for compliance
- Review their job applications for compliance
- Review the law and prohibitions with hiring managers and others involved in the hiring process and conduct necessary trainings

Conclusion

Regardless of whether a company does business in a location that is subject to a “ban the box” law, many states and municipalities have other laws that restrict an employer's ability to make hiring decisions on the basis of an applicant's criminal background. Employers need to be aware of such restrictions. Employers that operate in multiple jurisdictions or nationwide and that use standard employment applications and hiring procedures should review their applications and employment procedures to determine if they are in compliance with all applicable laws regarding applicant criminal history.

^[1]. The OTCA exempts certain positions from its prohibitions, namely those that, as required by law, rule, or regulation, prohibit persons with certain criminal records from holding the employment in question, e.g., law enforcement, corrections, homeland security, etc. Also exempt are employers who inquire about criminal records during the initial hiring process as part of a “program or systemic effort” to hire persons who have been arrested or convicted.

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