

New Jersey “Ban the Box” Law Takes Effect, “Draft Rule” Proposed

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New Jersey's so-called “ban the box” law took effect on March 1, preventing most employers in the State from asking about a prospective employee's criminal history on the initial job application and until after the first interview of the candidate has taken place.

Last week, the New Jersey Department of Labor and Workforce Development proposed a “[draft rule](#)” for purposes of clarifying certain provisions of the law. Though “the draft rule proposal is not binding,” it intends to “assist the regulated community in its efforts to comply with the [law]” and to “eliminate some confusion” regarding how the Department will “interpret” and “enforce” the law. The draft rule is slated for publication in the New Jersey Register on March 16, 2015, and will then be subject to a public hearing and sixty-day comment period.

In short, the draft rule not only summarizes key aspects of the law, but also seeks to clarify the following provisions:

Coverage

The law defines the term “employer” to include anyone that (i) has 15 or more employees over 20 calendar weeks and (ii) conducts business, employs persons, or takes applications for employment within the State of New Jersey. The draft rule clarifies that the law only applies to employers with “15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”

The law also defines the term “employment” to cover paid employment, including work that is temporary or seasonal, contingent, or through an employment agency, as well as apprenticeships or internships, so long as the “physical location of the prospective employment shall be in whole, or substantial part, within this State.” The draft rule interprets “in substantial part” to mean where “the employer has reason to believe at the outset of the initial employment application process” that the candidate will be performing at least 50% of his or her work in New Jersey.

Prohibitions

Under the law, an employer may not make any oral or written inquiry regarding an applicant's criminal record during the initial employment application process. The draft rule clarifies that this prohibition applies to inquiries of "anyone" regarding the applicant's criminal history (not just the applicant himself).

Exceptions

The law does permit an employer to inquire into an applicant's criminal history during the initial employment application process where the applicant voluntarily discloses (whether orally or in writing) his or her criminal record. The draft rule clarifies that, where the applicant makes a voluntary disclosure, the employer may make inquiries to "anyone" regarding the applicant's criminal record (not just the applicant himself).

The draft rule also sets forth definitions for each of the positions to which the law does not apply (e.g., "law enforcement," "corrections," "the judiciary," "homeland security" and "emergency management").

Penalties

Under the law, violations can result in a monetary penalty of no more than \$1,000 for a first violation, \$5,000 for a second violation, and \$10,000 for each subsequent violation. The draft rule states that the Department shall not assess a penalty until it provides the employer with "written notification of the violation," "the amount of the penalty," and "the opportunity to appeal the penalty assessment to the Commissioner." And, in assessing the amount of the penalty, the Department shall consider "the seriousness of the violation," "the past history of the previous violations by the employer," "the good faith of the employer," "the size of the employer," and "any other factors" deemed appropriate under the circumstances.

Takeaway

New Jersey employers should carefully review the draft rule described in this post and contemplate taking any additional measures necessary to comply with the law.

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