

Legislation Bars Employers from Conducting Criminal Background Checks During Initial Stages of Hiring Process

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October 2014

New Jersey's recent enactment of the Opportunity to Compete Act requires employers to delay criminal background checks until after the first interview of an applicant. The Act will take effect on March 1, 2015. The adopted version of the legislation, which was signed into law by Governor Christie on August 11, 2014, is significantly watered down from its original proposal, as well as in comparison to legislation adopted by other states that prohibit employers from inquiring into a candidate's criminal record until a conditional offer is made.

In essence, the Act defers any inquiry into a candidate's criminal background until "the initial employment application process," typically the submission of an application and an initial interview, has been completed. The Act's passage is in keeping with a nationwide trend dubbed "ban the box," which seeks to reduce rates of recidivism by opening employment opportunities to individuals with criminal histories, reducing their high unemployment rate and utilizing their productive capacity.

The Act imposes the following restrictions upon employers. First, employers are prohibited from including in job advertisements statements that they will not consider applicants with prior arrests or convictions. Additionally, employers may not inquire into a candidate's criminal history during the initial contact (including the initial interview) unless such information is volunteered by the candidate.

The scope and application of the Act is limited, however. After the "initial employment application process," the Act does not preclude employers from checking the candidate's criminal background, nor does it bar employers from refusing to hire employees with prior criminal records.

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The Act applies only to employers with more than 15 employees, and does not apply to law enforcement, corrections, homeland security, the judiciary or to positions where law specifically requires or permits the consideration of a candidate's criminal history.

The Act does not provide for a private cause of action for its violation. Instead, violators will be liable for civil penalties that increase progressively based on the number of violations. Specifically, a first violation carries a \$1,000 penalty, a second violation carries a \$2,000 penalty, and each subsequent violation carries a \$10,000 penalty.

What Should Employers Do?

In light of the enactment of the Opportunity to Compete Act, employers should review and revise their employment applications and hiring policies before March 1, 2015 to eliminate any questions regarding candidates' criminal records or any history of prior arrests. Likewise, the appropriate changes should be made to employee handbooks and human resources personnel should be trained on the Act's prohibitions and requirements.

While the early proposals of the Act included the definition of inquiry, the enacted version omits it. It is thus unclear whether the Act prohibits independent criminal record checks. Considering the intent of the Act and to ensure compliance, it is recommended that employers do not take any steps towards ascertaining whether an applicant has a criminal background before the initial application process is over.

Please contact the Author of this Alert, **Maja M. Obradovic**, with questions regarding the Opportunity to Compete Act or other employment law issues.