

Hiring Practices of New Jersey Employers Impacted by Recent Changes in the Law Regarding Criminal Record Inquiries

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The New Jersey Opportunity to Compete Act, which became effective March 1, 2015, is requiring many New Jersey employers to revise their hiring practices, including job applications, interviewing practices and advertisements for prospective employees, in order to comply with new rules governing the manner in which job applicants may be asked about their criminal histories.

The Act prohibits covered employers, during the “initial employment application process,” from requiring a prospective employee to complete a job application that inquires about his or her criminal record, and also from otherwise asking about the applicant’s criminal record, whether orally or in writing. For this purpose, the “initial employment application process” begins when an applicant makes an initial inquiry to an employer about possible employment or a particular job opening (or when an employer first makes such an inquiry of a job applicant or prospective employee, as the case may be), and ends once the employer conducts a first interview of the job applicant, whether in person or otherwise.

The Act, which generally applies to New Jersey employers (and those who do business in the state) with 15 or more employees, also prohibits covered employers from using employment advertisements that expressly disqualify from consideration applicants with an arrest or conviction. The Act does not prohibit an employer from deciding not to hire an applicant based upon his or her criminal record, unless the record has been expunged or the conviction pardoned.

However, if an employer uses a job applicant’s criminal history in making an employment decision, they must be careful to comply with federal, state and local anti-discrimination laws. For example, all policies and procedures regarding the criminal records of job applicants should be applied consistently, regardless of an applicant’s race, age, religion, national origin, sex or other protected characteristic. In addition, a policy or practice that is neutral on its face may nonetheless violate anti-discrimination laws if, for example, it disproportionately excludes from consideration applicants within a particular protected group. In view of these and other potential pitfalls, employers should seek counsel before considering an applicant’s criminal record in the hiring process.

There are certain limited exceptions to the Act’s prohibitions against asking about a job applicant’s criminal history during the initial application process and using employment advertisements that exclude candidates with criminal records. For example, if an applicant voluntarily discloses any information

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regarding his or her criminal record during the initial application process, the employer may then inquire further about the applicant's criminal record. In addition, an employer may ask about an applicant's criminal record during the initial application process, or use an employment advertisement that excludes from consideration candidates with an arrest or conviction, in certain other limited circumstances (e.g., if a criminal background check for the position is legally required, if the employer would be legally prohibited from engaging in certain business activities based on its employees' criminal records, or if an applicant may be legally ineligible for the job if he or she has a particular arrest or conviction).

A covered employer who violates the Act is subject to civil penalties imposed by the New Jersey Department of Labor and Workforce Development in an amount not to exceed \$1,000 for the first violation, \$5,000 for the second violation and \$10,000 for each subsequent violation.

While employers should periodically review their hiring procedures and employment application materials to ensure compliance with ever-changing employment laws, the Act's new rules make it particularly important for New Jersey employers to take such action without delay. It is also critical that all employer personnel involved in the hiring process, especially those conducting initial interviews of applicants, be familiar with the Act's new requirements. Employers should also review their employment advertisements and other recruitment materials to ensure that they do not improperly disqualify employment candidates based on their criminal histories.

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