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## Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes

By Rod Fliegel, Jedd Mendelson, and Jennifer Mora

Effective November 18, 2012, most employers that operate in Newark, New Jersey must comply with a new ordinance<sup>1</sup> broadly restricting their discretion to rely on criminal background records for employment purposes. The ordinance prohibits a covered employer from, among other things, conducting a criminal history inquiry unless and until the employer has determined in good faith that such an inquiry is warranted based on the “sensitivity” of the position, has provided the requisite notices to the candidate, and has extended to the candidate a conditional offer of employment. The ordinance does not include a private right of action, but instead provides for the enforcement of fines of up to \$1,000 for each violation by an office or agency of the City that will be designated by the Mayor of Newark. It remains to be seen whether the plaintiffs’ employment bar will attempt to bring *Pierce*-type public policy actions, claiming that individuals whose rights have been violated under the ordinance necessarily have a right to vindication by suing directly in court.

The Newark ordinance is representative of the intensive focus on how employers use criminal records by federal, state, and local governments and government agencies, including the federal Equal Employment Opportunity Commission (EEOC).<sup>2</sup> For example, new statutes have been enacted in Indiana, Massachusetts, and Ohio.<sup>3</sup> Employers throughout the U.S., and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of credit history information<sup>4</sup> and the fair credit reporting

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1 Newark New Jersey File No. 12-1630, *Ordinance to Assist the Successful Reintegration of Formerly Incarcerated People into the Community by Removing Barriers to Gainful Employment and Stable Housing after Their Release from Prison; and to Enhance the Health and Security of the Community by Assisting People with Criminal Convictions in Reintegrating into the Community and Providing for Their Families*. Text of the Ordinance is available [here](#).

2 See Rod Fliegel, Barry Hartstein, and Jennifer Mora, [EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers](#), Littler ASAP (Apr. 30, 2012).

3 See Rod Fliegel, Jennifer Mora, and William Simmons, [Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks](#), Littler ASAP (June 26, 2012); Rod Fliegel, William Simmons, and Inna Shelley, [Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders](#), Littler ASAP (Aug. 10, 2012); Christopher Kaczmarek, Carrie Torrence, and Joseph Lazazzero, [Massachusetts Employers Face New Obligations When Conducting Background Checks Involving Criminal History Records](#), Littler ASAP (Mar. 9, 2012).

4 See, e.g., Rod Fliegel and Jennifer Mora, [Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes](#), Littler ASAP (June 18, 2012).

laws.<sup>5</sup> Most immediately, employers with operations in Newark should assess whether they are covered by the ordinance, and, if so, whether they need to revise their job advertisements, job applications, template notice letters (commonly known as “adverse action” notices), and guidelines and documentation for the hiring process

## Covered “Employers”

The ordinance defines an “employer” broadly as “any person, company, corporation, firm, labor organization, or association which has five (5) or more employees and does business, employs persons, or takes applications for employment within the City of Newark, including the City of Newark and any City department, agency, board, or commission, or any employee or agent thereof.” The definition of the term “employment” also is expansive and extends to “any occupation, vocation, job, work, or employment with or without pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency, or any form of vocational or educational training with or without pay.” In one of the few qualifications spelled out in the text, the ordinance states that “the physical location of the prospective employment must be in whole or substantial part, within the City of Newark.”

## Exemptions

The prohibitions in the ordinance do not apply “where any federal or state law or regulation requires the consideration of” criminal history information, but only as to the offenses or types of offenses that are embraced by the law or regulation. Also exempt are “any positions designated by the employer to participate in a federal, state or local government program or obligation that is designed to encourage the employment of those with criminal histories.”

## Unlawful Employment Practices

The ordinance makes certain employment practices unlawful and also imposes affirmative obligations on covered employers.

### ***Advertisements***

The ordinance makes it unlawful for a covered employer “to produce or disseminate any advertisement that expresses, directly or indirectly, any limitation on eligibility for employment arising from a candidate’s criminal history.” The term “advertisement” includes “any circulation, mailing, posting, or any other form of publication, utilizing any media, promoting the employer or intending to alert its audience, regardless of size, to the availability of any position of employment.”

### ***Job Applications***

The ordinance makes it unlawful for a covered employer to make “any pre-application criminal history inquiry.” The term “pre-application inquiry” means “any inquiry that precedes the application process, including, but not limited to, in connection with any decision regarding employment, any recruitment of candidates, attempts to identify candidates, or solicitation of candidates.” It also is unlawful for a covered employer to “make any inquiry regarding a candidate’s criminal history during the application process.” The term “inquiry” means “any direct or indirect conduct intended to gather information from or about [an] applicant, candidate or employee, using any mode of communication, including but not limited to application forms, interviews, and criminal history checks.”

## Criminal History Questions

The ordinance makes it unlawful for a covered employer to inquire about:

- arrests and criminal charges that never resulted in a conviction;
- records that have been erased, expunged, the subject of an executive pardon or otherwise legally nullified;

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5 See Rod Fliegel and Jennifer Mora, *Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013*, Littler ASAP (Sept. 4, 2012); Rod Fliegel and Jennifer Mora, *The FTC Staff Report on “40 Years of Experience with the Fair Credit Reporting Act” Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011).

- juvenile adjudications of delinquency or any records which have been sealed;
- convictions for indictable offenses that are more than eight years old, measured from the date of sentencing; and
- disorderly person convictions or municipal ordinance violations that are more than five years old, measured the same way.

## Affirmative Obligations

Covered employers may ask about both pending criminal charges and convictions for murder, voluntary manslaughter and certain serious sexual offenses, regardless of the sentencing date. If a candidate has a conviction within the permissible time period (e.g., an indictable offense within eight years), an employer also apparently is entitled to know about all prior disorderly person and indictable offense convictions. However, covered employers are prohibited from making these permissible inquiries until they have done all of the following:

- made “a good faith determination that the relevant position is of such sensitivity that a criminal history inquiry is warranted,” and determined the candidate is “otherwise qualified” for the position (meaning the candidate “meets all other criteria for a position or consideration for a position”);
- extended a conditional offer of employment to the candidate; and
- provided in advance to the candidate specific written notices, with the required disclosures.<sup>6</sup>

Furthermore, covered employers must consider the following factors when evaluating the candidate or employee and the results of any criminal history inquiry:

- the nature of the crime and its relationship to the duties of the position sought or held;
- any information pertaining to the degree of rehabilitation and good conduct, including information that the applicant or employee produces, or information produced on his or her behalf;
- whether the job at issue provides the opportunity to commit a similar offense;
- whether the circumstances leading to the offense are likely to reoccur;
- the length of time that has elapsed since the offense and the extent to which the employer factored this length of time into its decision-making; and
- any certificate of rehabilitation issued by any state or federal agency.

Covered employers also must document consideration of these facts in the prescribed format.<sup>7</sup>

If a covered employer intends to take adverse action against an applicant or employee based on the criminal history inquiry (i.e., “refusal, rescission, or revocation of the offer of a position with the employer, or termination of employment”), it must first, within a “reasonable period of time,” provide the individual with the following in a single package sent by registered mail:

- notification of the adverse decision, including the specific reason for the adverse decision, the specific conviction that relates to the position, and an explanation of the employer’s consideration of the factors included in the Applicant Criminal Record Consideration form;
- a photocopy of the results of the criminal history inquiry;
- a copy of the Applicant Criminal Record Consideration form; and
- a statement that the individual has an opportunity for “review,” including how the individual may present evidence related to the employer’s consideration of the factors set out above and the types of evidence that may be presented.

Covered employers must wait a minimum of 10 business days from the date that the candidate or employee receives the foregoing notices before taking the final adverse action against the candidate or employee. Furthermore, if the individual invokes the right to review, and

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<sup>6</sup> The publicly available version of the ordinance is incomplete: it indicates that certain form notifications are provided, but does not include them.

<sup>7</sup> The publicly available version of the ordinance refers to an Applicant Criminal Record Consideration form, but it neither includes a copy of the form nor states where the form can be found.

specifically the right to “present information and evidence related to the accuracy and/or relevance of the results of the criminal history inquiry,” including the prescribed factors for evaluation, a covered employer must:

- review the information and documentation received from the candidate or employee;
- document in writing the “information and evidence” received from the candidate or employee and the employer’s final action, specifically stating the reason for the final action; and
- notify the candidate or employee, within a “reasonable period of time,” of the final action and provide a copy of the required documentation.

Finally, the ordinance requires covered employers to maintain information in a confidential manner and restricts the manner in which criminal history information can further be disseminated.

## Enforcement

Under the terms of the ordinance, an initial “Type 1 violation” is subject to a fine of up to \$500 and each subsequent “Type 2 violation” is subject to a fine of up to \$1,000. Again, although the ordinance does not include a private right of action, it remains to be seen whether the plaintiffs’ employment bar will attempt to bring so-called *Pierce* public policy actions, claiming that individuals whose rights have been violated under the ordinance necessarily have a right to vindication by suing directly in court.

## Recommendations

Most immediately, employers with operations in Newark should assess whether they are covered by the ordinance, and, if so, whether they need to do the following:

- revise job advertisements;
- revise job applications;
- revise template notice letters and the corresponding enclosures, including the notices required by the fair credit reporting laws (“adverse action” notices);
- revamp the sequencing and timing of events in the hiring process; and
- implement guidelines and documentation that comply with the ordinance.

Employers throughout the U.S., and particularly multi-state employers, also should continue to monitor developments in this and related areas of the law. By the end of the year, similar ordinances may be enacted in Seattle, Washington<sup>8</sup> and Washington, D.C.<sup>9</sup>

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<sup>8</sup> Seattle, Washington Council Bill No. 117583. Text of the Bill is available [here](#).

<sup>9</sup> Washington, D.C. Bill 889. Text of the Bill is available [here](#).