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New Jersey's "Opportunity to Compete Act" Continues the Nationwide "Ban-the-Box" Trend

By Rod Fliegel, Phil Gordon, Jennifer Mora and Keith Rosenblatt

On August 11, 2014, New Jersey Governor Chris Christie signed "The Opportunity to Compete Act," which restricts the ability of covered employers to inquire into, and use, criminal records. New Jersey's so-called "ban-the-box" law, which will be effective March 1, 2015, follows closely on the heels of similar legislation enacted in the past two years.¹

Covered employers should become familiar with the terms of the new law and consider the various action items set out below. Due to the proliferation of such laws—and related class action litigation and Equal Employment Opportunity Commission "systemic" investigations—employers also may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local laws.²

The Opportunity to Compete Act

Coverage

The new law defines the term "Employer" as "any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within" the State of New Jersey, "including the State, any county or municipality, or any instrumentality thereof." The term "Employer" also covers "job placement and referral agencies and other employment agencies." The term does not cover the United States or "any of its departments, agencies, boards, or commissions, or any employee or agent thereof."

- 1 See Adam Wit, Darren Mungerson and Jennifer Mora, [Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks](#), Littler ASAP (July 20, 2014); Rod Fliegel and Jennifer Mora, ["Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records](#), Littler ASAP (Feb. 14, 2014); Rod Fliegel and Jennifer Mora, [Rhode Island Enacts "Ban the Box" Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview](#), Littler ASAP (July 17, 2013); Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, [Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers](#), Littler ASAP (May 17, 2013).
- 2 See Rod Fliegel, Jennifer Mora, and William Simmons, [The Swelling Tide of Fair Credit Reporting Act \(FCRA\) Class Actions: Practical Risk-Mitigating Measures for Employers](#), Littler ASAP (Aug. 1, 2014); Rod Fliegel and Jennifer Mora, [Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014](#), Littler ASAP (Jan. 6, 2014); 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).

The law defines the term “Employment” as “any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency; any form of vocational apprenticeship; or any internship.” As a geographical scope limitation, however, the law states that “the physical location of the prospective employment **shall be in whole, or substantial part, within this State.**”

“Employee” means any “person who is hired for a wage, salary, fee, or payment to perform work for an employer.” It also applies to interns and apprentices. However, the term “Employee” excludes “any person employed in the domestic service of any family or person at the person’s home, any independent contractors, or any directors or trustees.”

Prohibited Inquiries

The law prohibits covered employers from requiring an “applicant for employment” to complete any “employment application that makes any inquiries regarding an applicant’s criminal record during the initial employment application process.”

The law broadly defines “Employment application” to mean any “form, questionnaire or similar document or collection of documents that an application for employment is required by an employer to complete.”

Moreover, covered employers are prohibited from making “any oral or written inquiry regarding an applicant’s criminal record during the initial employment application process.” The “initial employment application process” means “the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and **ending** when an employer has conducted a first interview, whether in person or by any other means, of an applicant for employment.” Thus, employers can make this inquiry **after** the initial employment application process has concluded (i.e., post-interview).

Exemptions

The ban-the-box requirement does not apply if the employment sought or being considered is for a position:

1. in law enforcement, corrections, the judiciary, homeland security or emergency management;
2. where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by any law, rule or regulation, or where any law, rule or regulation restricts an employer’s ability to engage in specific business activities based on the criminal records of its employees; or
3. designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

Voluntary Disclosure

If an applicant voluntarily discloses any information regarding his or her criminal record, either orally or in writing, during the initial employment application process, the law permits employers to “make inquiries regarding the applicant’s criminal record during the initial employment application.”

Use of an Applicant’s Criminal Record

Notably, the law does not “preclude an employer from refusing to hire an applicant for employment based upon the applicant’s criminal record, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon,” and further (and cryptically) provides that the refusal to hire an applicant on this basis “is consistent with other applicable laws, rules and regulations.”

Job Advertisements

Employers may not “knowingly or purposefully publish, or cause to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one

or more crimes or offenses.” This restriction on the content of employment applications does not apply to any advertisement that solicits applicants for positions in law enforcement, corrections, the judiciary, homeland security, or emergency management, or any other position where a criminal history record background check is required by law, where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by law, or where any law restricts an employer’s ability to engage in specified business activities based on the criminal records of its employees.

Remedies

The law does not provide aggrieved individuals with a private right of action against an employer who has violated, or is alleged to have violated, the law. Instead, the New Jersey Commissioner of Labor and Workforce can impose a civil penalty not to exceed \$1,000 for the first violation, \$5,000 for the second violation and \$10,000 for each subsequent violation.

Action Items

Due to the proliferation of “ban-the-box” laws, employers in New Jersey and elsewhere may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local employment laws which regulate use of an individual’s criminal history. Suggested action items are as follows:

- Assess coverage under the new law. Because the new law expressly states, in pertinent part, that it preempts “any ordinance . . . adopted by the governing body of a . . . municipality prior to the effective date of this act regarding criminal histories in the employment context,” except those “adopted to regulate municipal operations,” employers operating in Newark, New Jersey, should evaluate whether the new state law preempts Newark’s more onerous ban-the-box law.³
- Review impacted job advertisements for impermissible language regarding criminal records.
- Review job application and related forms for impermissible inquiries regarding criminal records.
- Provide training and FAQs to employees who conduct job interviews and make or influence hiring and personnel decisions to explain permissible and impermissible inquiries into, and uses of, criminal records, and convey best practices for storing such records and documenting related hiring and personnel decisions.
- Review the hiring process to ensure compliance, including the timing of criminal background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.
- Update postings and record retention requirements.

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3 See Rod Fliegel, Jedd Mendelson and Jennifer Mora, [Employers in Newark, New Jersey Must Comply with a New Ordinance Broadly Restricting Their Discretion to Rely on Criminal Records for Employment Purposes](#), Littler ASAP (Oct. 22, 2012).