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New Jersey Bans the Box for Private Employers

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Governor Christie has signed The Opportunity to Compete Act, which takes effect March 1, 2015 and prevents many private employers in the State of New Jersey from asking prospective employees about their criminal history on the initial job application. In "banning the box" for private employment, New Jersey joins only a handful of states (Hawaii, Illinois, Massachusetts, Minnesota, and Rhode Island) and cities (Philadelphia (PA), Newark (NJ), Buffalo (NY), Seattle (WA), San Francisco (CA), Baltimore (MD), and Rochester (NY)). This alert highlights key provisions of the Act and examines the implications for covered employers.

Key Provisions

The Act covers any employer 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.[1] Under the Act, an employer may not require an applicant to complete an employment application[2] that makes any inquiries regarding an applicant's criminal record during the "initial employment application process." An employer also may not make any oral or written inquiry regarding an applicant's criminal record during the initial employment application process, or post any advertisement stating that it will not consider an applicant with a past arrest or conviction.[3] These prohibitions are subject to exceptions (as listed below).

For purposes of the law, the initial employment application process begins when an applicant *or* the employer first inquires of the other about a prospective employment position or job vacancy, and ends when an employer has conducted a first interview of the applicant (whether in person or by any other means). "Applicants" include applicants for paid employment,[4] including work that is temporary or seasonal, contingent, or through an employment agency, as well as apprenticeships or internships. Under the Act, current employees[5] of the employer also can qualify as "applicants" (*i.e.*, when an employee applies for a position internally).

After the initial employment application process has concluded, an employer may inquire into an applicant's criminal record (consistent with applicable state and federal law), and may refuse to hire the applicant based on the results, unless the record was expunged or erased through executive pardon *and* provided that the refusal does not run afoul of any other laws, rules, and regulations.

Exceptions

The prohibitions of the Act do not apply:

- to positions sought in law enforcement, corrections, the judiciary, homeland security or emergency management;
- where the employer is required to run a criminal background check by law, rule, or regulation (that is not preempted by the Act),
- where an arrest or conviction would serve as a bar to employment under any law, rule, or regulation (that is not preempted by the Act), or
- where any law, rule, or regulation (that is not preempted by the Act) restricts an employer's ability to engage in specified business activities based on the criminal records of its employees.

The Act also permits 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, or
- as part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons with criminal histories.

Preemption

Significantly, the Act preempts any ordinance, resolution, law, rule or regulation adopted by a county or municipality regarding criminal histories in the employment context, except for ordinances adopted to regulate municipal operations. As such, starting March 1, 2015, the Act preempts the "ban the box" ordinance adopted by the City of Newark as it relates to *private employers*.

Enforcement & Remedy

The Act does not allow for lawsuits in court. The "sole remedy" consists of monetary penalties of no more than $1,000 for a first violation, $5,000 for a second violation, and $10,000 for each subsequent violation.

Takeaway

Unless otherwise exempted, New Jersey employers shouldremove any inquiries concerning an applicant's criminal history from their initial job applications, and should wait to commence a criminal background check until after the employer has conducted a first interview. When asking about or otherwise considering criminal history in hiring and personnel decisions, employers should remember to:

- ensure that hiring guidelines regarding employment of individuals with criminal records are consistent with federal, state, and local law;
- conduct individualized assessments of candidates when possible;
- train managers on the appropriate use of criminal history in hiring, promotion, and separation; and
- adhere to Fair Credit Reporting Act and other state and local requirements before conducting background checks and before taking adverse actions against applicants or employees based on criminal history.

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If you have any questions or concerns regarding the Act, please contact the lawyers at Proskauer.

[1] The Act covers the State and any county, municipality, or instrumentality thereof, but excludes the United States and any of its departments, agencies, boards, or commissions. The Act also covers employment agencies.

[2] The Act broadly defines "employment application" to include any form, questionnaire, or similar document that the employer requires an applicant to complete.

[3] The Act does not prevent an advertisement from setting forth any other qualifications for employment, as permitted by law, including, but not limited to, the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training or professional, occupational, or field experience.

[4] The physical location of the prospective employment must be in whole, or substantial part, within the State.

[5] The Act defines an "employee" as any person hired to perform work for pay, excluding any person employed in the domestic service of any family or person at the person's home, independent contractors, or any directors or trustees.

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