

21 August 2014

*Practice Group:*

*Labor, Employment  
and Workplace Safety*

## Opportunity to Compete Act “Bans the Box” in New Jersey

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On August 11, 2014, New Jersey Governor Chris Christie signed into law the “Opportunity to Compete Act.”<sup>1</sup> Commonly referred to as a “Ban the Box” law, it will prohibit employers from inquiring about an applicant’s criminal background in the initial stages of a job application.

The new law will bar covered employers from inquiring about an applicant’s criminal record until after the employer has completed the initial hiring step of conducting an interview, in person or by any other means, of the applicant for employment. The law also prevents employers from including a question relating to an applicant’s criminal record on the employment application form (the “box”). The Legislature found the new law necessary to remove obstacles to employment faced by individuals with criminal records, in view of what it described as a dramatic increase in criminal background checks by employers.

After the initial employment application process has ended, New Jersey employers may make criminal background inquiries prior to making a formal offer. However, even after the initial employment application process ends, employers will not be able to inquire into criminal records that have been expunged or erased through executive pardon. The law will also bar employers from posting job advertisements stating that they will not consider applicants who have been arrested or convicted of a crime, unless the advertisement seeks applicants for one of the exempt positions set forth in the Act, as detailed below.

The New Jersey statute will not prohibit an employer from refusing to hire someone based on information the employer obtains in a background check that is conducted after the initial employment application process. The law also expressly provides that it preempts any local laws and ordinances regarding criminal histories in the employment contexts, except for ordinances adopted to regulate municipal operations. Thus, for example, the City of Newark’s more comprehensive “ban the box” law will be preempted when the New Jersey law takes effect.

Certain positions are exempt from the law, including law enforcement, corrections, the judiciary, homeland security and emergency management positions, and positions which by law, rule, or regulation may not be held by individuals with convictions or arrests. In addition, an employer may be exempt where a law, rule, or regulation restricts an employer’s ability to engage in specified business activities based on the criminal records of its employees.

The law does not provide for a private right of action for any violations. An applicant is limited to filing an administrative complaint, and civil penalties are limited to \$1,000 for first violations, \$5,000 for second violations, and \$10,000 for subsequent violations.

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<sup>1</sup> P.L. 2014, ch. 32..

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New Jersey joins many states, counties, and municipalities that have passed “ban the box” and similar laws restricting the ability of employers to consider the criminal histories of job applicants. Hawaii, Illinois, Massachusetts, Minnesota, New York, and Rhode Island have laws that apply to private employers. California, Colorado, Connecticut, Maryland, New Mexico, and the District of Columbia have laws that apply only to public employers. More than forty cities have similar legislation, and employers should be careful to check the state and municipal laws applicable to them.

In particular, New York City prohibits city agencies and some contractors from inquiring about an applicant’s criminal history on an initial job application or during an initial interview, and limits consideration of an applicant’s criminal history to felony convictions, unsealed misdemeanor convictions, and pending charges. Proposed legislation in New York City (the “Fair Chance Act”) would expand the prohibition to all employers and impose additional requirements upon employers, including requiring a written report on the decision not to hire an applicant based on a criminal history, which the applicant could then contest.

New Jersey’s new law goes into effect March 1, 2015. It applies to employers with 15 or more employees over 20 calendar weeks who do business, employ persons, or take applications for employment within the state of New Jersey, including job placement and referral agencies. It is limited to employment which is in whole, or in substantial part, within New Jersey.

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