

New Jersey Ban-the-Box Law Takes Effect

On March 1, New Jersey became the latest state to “ban the box” for private employers when its Opportunity to Compete Act took effect. The law prohibits both public and private employers with 15 or more employees from inquiring into an applicant’s criminal history during the initial stages of the hiring process. Employers will want to revisit their pre-employment and hiring protocols — and their application process in particular — to ensure compliance with the new restrictions.

Background

Employers generally use information from job applications during the screening process to select candidates for further consideration. Job applications often contain a check-off box, asking applicants to indicate whether they have ever been convicted of a crime. A growing number of states and cities have adopted so-called “ban-the-box” laws that generally prohibit employers from including such a question on job applications. Since Hawaii became the

Banning the Box for Private Employers

Six states — Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island — and at least 25 cities and counties have enacted so-called “ban-the-box” laws that apply to private employers. Among those cities are Baltimore, Buffalo, Chicago, Philadelphia, San Francisco, Seattle, and Washington DC.

first state to remove conviction questions from job applications in 1998, 13 states and nearly 100 cities nationwide have enacted laws that restrict public and/or private employers’ inquiries into an applicant’s criminal history.

Ban-the-box laws do not prevent employers from considering an individual’s criminal history, but they generally delay employer inquiries until later in the hiring process. The nature and extent of information an employer may consider and when criminal background inquiries may be made varies among states and localities with ban-the-box laws in place. Some bar inquiries about criminal convictions until after a conditional offer of employment has been made, while others only defer these inquiries until an application has been submitted or an initial interview has occurred. (See our [October 8, 2014 FYI In-Depth](#).)

Comment. Given recent trends, additional cities and states are likely to adopt ban-the-box laws this year. Employers should monitor developments, and make any necessary adjustments to their pre-employment and hiring procedures as state and local laws change.

New Jersey Bans the Box

The New Jersey Opportunity to Compete Act ([Act](#)), the state's ban-the-box law, restricts when in the hiring process an employer may obtain criminal history information from or about a job applicant. The law took effect on March 1.

Comment. Newark and Atlantic City previously enacted ban-the-box ordinances. Except to the extent that the ordinances regulate municipal operations, they are now preempted by the state law.

The Act covers employers any person, company, corporation, firm, labor organization, or association that has at least 15 employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within New Jersey. State and local public employers are covered, but the federal government and its agencies are excluded. For purposes of the new law, covered "employment" means prospective employment physically located in New Jersey, in whole or substantial part. Certain types of jobs are exempt, regardless of where they are located, including positions in law enforcement, corrections, emergency management, the judiciary, and homeland security.

The Act generally prohibits covered employers from inquiring into job applicants' criminal background or requiring them to complete applications that make any criminal history inquiries during the initial application process (IEAP). The prohibition extends to both the job application and the first interview of the job applicant. It also prohibits posting job advertisements stating that applicants who have been arrested or convicted of a crime will not be considered.

Generally, an employer may require an applicant to complete an employment application that includes criminal history inquiries after the initial employment application process has concluded. Similarly, employers may conduct a criminal background check — or make written or oral inquiries about an applicant's criminal record to anyone (including the applicant) — after the applicant's first interview or after a conditional offer of employment has been made.

New Jersey employers may inquire about applicants' criminal records before the first interview if:

- An applicant voluntarily discloses a criminal record during the initial application process
- The applicant is being considered for a position in law enforcement, corrections, the judiciary, homeland security, emergency management, or other position where a background check is required by law, rule, or regulation
- The applicant could legally be precluded from holding the position because of a record
- A law, rule, or regulation restricts the employer's ability to engage in specified business activities based on its employees' criminal records

While the Act does not give individuals a right to sue, it does summarize penalties the New Jersey Department of Labor and Workforce Development (NJDOL) may assess for noncompliance. Employers may be subject to a civil penalty of \$1,000 for a first violation; \$5,000 for a second violation; and \$10,000 for each subsequent violation. The NJDOL's website now provides [instructions](#) on how to file a complaint under the Act.

EEOC's Position

In 2012 [guidance](#), the Equal Employment Opportunity Commission endorsed removing criminal history questions from job applications. The guidance maintains that disqualifying job applicants based on having a criminal record would be unlawful unless the employer can show that the exclusion is job related and consistent with business necessity.

Proposed Regulations

On February 25, 2015, the NJDOL published [draft proposed regulations](#) to implement New Jersey's ban-the-box law. The proposed regulations, which will be published in the March 16, 2015 issue of the *New Jersey Register*, provide a number of important clarifications:

Covered Employers. Employers that have 15 or more employees over 20 calendar weeks means 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

Applicant for Employment. An "applicant for employment" is broadly defined to include anyone an employer considers when identifying potential employees, anyone who asks to be considered for employment, or who requests information from an employer related to seeking employment. Applicants include potential employees and persons who are currently employed by the employer (including paid and unpaid interns and apprentices).

Job Location. Whether a job is located in New Jersey is determined at the beginning of the application process based on the total work hours in the state. If the employer reasonably expects 50% or more of the working time in the position to be in New Jersey, it is considered to be in New Jersey.

Voluntary Disclosure. Employers cannot make any oral or written criminal history inquiry to the applicant or to anyone else during the IEAP – unless the applicant voluntarily discloses information about his or her criminal background history.

Exemptions. The proposed regulations provide specific definitions for positions that are excluded from coverage under the Act, including jobs in law enforcement, corrections, emergency management, the judiciary, and homeland security.

Penalty Assessments and Appeal Right. The proposed regulations offer guidance on five factors that the NJDOL may take into account when calculating administrative penalties including: the seriousness of the violation; the employer's history of violations; the employer's good faith; the employer's size; and "any other factors which are deemed to be appropriate under the circumstances." They also confirm that employers will have a right to appeal any assessment to the state labor commissioner.

In Closing

Employers that do business, employ individuals, or take applications for employment in New Jersey should review their employment applications and any job advertisements or postings to ensure they do not improperly request criminal history information or represent that applicants with arrest or criminal conviction records will not be considered for employment. Employers should also consider training those involved in the hiring process to ensure they are aware of the new restrictions on criminal background inquiries. As the ban-the-box movement continues to gain momentum, employers in other states and localities will also want to take stock of their hiring processes, and make any needed changes to ensure compliance with the growing patchwork of ban-the-box laws.

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