

New Jersey Issues Final Ban-the-Box Regulations

The New Jersey Opportunity to Compete Act, the state's ban-the-box law, generally prohibits an employer from obtaining criminal history information from or about a job applicant during the initial stages of the hiring process. The law took effect on March 1. On December 7, the NJDOL published its final ban-the-box regulations. Employers will want to revisit their pre-employment practices and hiring protocols to ensure compliance with the new regulations.

Background

Employers generally use information from job applications to screen and select candidates for further consideration. Often, job applications ask them to indicate whether they have ever been convicted of a crime via a check-off box. 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 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.



New Jersey became the sixth state to "ban the box" for private employers when the [Opportunity to Compete Act](#) took effect on March 1, 2015. The law generally 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. The prohibition extends to both the job application and the first interview of the job applicant. With certain limited exceptions, the law also prohibits job advertisements or postings from excluding applicants with arrest or criminal records from consideration. On March 16, 2015, the NJDOL published proposed regulations to implement New Jersey's ban-the-box law. (See our [March 12, 2015 For Your Information](#).)

Final Regulations

On December 7, the New Jersey Department of Labor and Workforce Development (NJDOL) published its final ban-the-box regulations, effective immediately.

Definitions

While substantially similar to the proposed regulations, the final regulations include definitions for the terms "apprentice," "intern" and "interview" and provide further clarification as to which employers are covered by the law.

Covered employers. Employers that have 15 or more employees over 20 calendar weeks — whether or not those employees work in New Jersey — and do business, employ persons, or take applications within the state. The state and local governments are subject to the ban-the-box law but not the federal government.

Apprentice. An “apprentice” is an individual who is registered in good standing in an apprenticeship program approved or certified by the DOL’s Office of Apprenticeship.

Intern. An “intern” is a student or recent graduate who is working as a trainee to gain practical experience in an occupation.

Interview. An “interview” is any “live, direct contact” by the employer with the applicant — in person, by telephone or video conferencing — to discuss the employment being sought or the applicant’s qualifications. The exchange of emails or the completion of a written or electronic questionnaire does not constitute an interview.

Multi-State Employers and Applications

Notably, the regulations provide that employers that do business, employ persons or take applications for employment in New Jersey and in at least one other state are not required to omit a criminal record inquiry from their applications. However, if such an inquiry is included, the application must include an instruction immediately preceding the inquiry that states: “an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer this question.”

Additional Clarifications

In response to public comments on the proposed rules, the NJDOL provided the following responses:

- Inquiries into DWI/DUI or motor vehicle violations prior to completing a first interview would be prohibited because they may involve criminal charges
- Internet and other public records searches concerning an applicant’s criminal history prior to completing a first interview are prohibited
- Criminal history inquiries may be made upon completing a first interview, and the employer may refuse to hire based on an applicant’s criminal record
- Determination of independent contractor or employee status will be made using the so-called [ABC test](#) used for unemployment purposes
- In those instances where a law may disqualify an applicant with a prior conviction, the employer may inquire about an applicant’s entire criminal record before a first interview
- Client companies and/or the staffing companies, job placement or referral agencies, employee leasing companies and temporary help service firms they use may be subject to the new restrictions depending on their employer or co-employer status
- Third-party background checks concerning an applicant’s criminal record are prohibited prior to completing a first interview
- The NJDOL cannot seek to collect any penalty assessed until the employer has had an opportunity to be heard and a final administrative determination has been issued

While these clarifications were not expressly included in the final regulations, they are instructive as to how the NJDOL will enforce the new law.

In Closing

Employers that do business, employ individuals, or take applications for employment in New Jersey should review their hiring processes and make any needed changes to ensure compliance with the final ban-the-box regulations now in effect. Employers should also consider training those involved in the hiring process to ensure they are aware of these restrictions on criminal background inquiries.

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