
“The Box” is History — New Jersey “Bans the Box” and Limits When Employers Can Ask Job Applicants About Criminal Histories

Legal Alert

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Employers take note: a new law in New Jersey limits when and how employers can inquire about a job candidate’s criminal history. Employers that hire in New Jersey should review their application forms now to ensure compliance when this law takes effect on March 1, 2015.

Previously, New Jersey employers had broad leeway to require job candidates to disclose criminal histories at the application stage of the hiring process; typically candidates were required to check a box on the application form. Now, New Jersey joins twelve other states and nearly 60 municipalities (including Philadelphia and New York) in barring employers from asking candidates about their criminal history on initial job applications. On August 11, 2014, Governor Christie signed the “Opportunity to Compete Act” into law. This law, part of a broader movement known as “Ban the Box,” prevents public and private employers that employ more than 15 employees from asking about an applicant’s criminal history during the candidate’s “initial application phase.”

After the law takes effect, New Jersey employers must reserve questions about criminal history until after the initial application process is completed, which normally is after the employer has conducted an interview and determined the candidate is both qualified for the position and a leading candidate. Unlike Ban the Box laws in certain other states, New Jersey’s law does not require an employer to make a conditional offer of employment before inquiring about a candidate’s criminal history. The Opportunity to Compete Act also provides that if a candidate voluntarily discloses information relating to his or her criminal history, without being asked, then the employer is permitted to make follow-up inquiries.

New Jersey employers are prohibited from inquiring into some types of criminal history at any stage (for example, expunged records and arrests that did not result in conviction may not be considered). Further, the Act prohibits job advertisements from indicating candidates with an arrest or conviction will not be considered for a job. The Act does contain exceptions for certain employers or job categories, including law enforcement. Civil penalties (\$1,000 for first violations, \$5,000 for second violations, and \$10,000 for subsequent violations) may be imposed for violations of the Act, but the Act itself does not create a private right of action to allow an aggrieved job candidate to sue an employer that did not hire him or her for reasons banned by the Act.

Importantly, the Act does not require employers to hire candidates regardless of criminal history, but employers should keep in mind that, in certain instances, federal law may operate to limit the use of criminal records as hiring criteria when they have a disproportionate impact on candidates who belong to protected classes. Moreover, both the New Jersey Division on Civil Rights and the U.S. Equal Employment Opportunity Commission have taken the position that blanket prohibitions on hiring candidates with criminal histories (regardless of any relation to the job at issue) may be unlawful race discrimination, as such

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policies disproportionately exclude racial minorities. Finally, when it becomes effective, the Act also preempts any municipal Ban the Box ordinances (except for ordinances regulating municipal operations) to which employers may previously have been subject — including the City of Newark’s Ban the Box law.

To learn more about best practices for complying with the Opportunity to Compete Act or to address other labor and employment issues, we invite you to contact Adam E. Gersh or Katherine C. Oeltjen, or any member of Flaster Greenberg’s Labor & Employment Practice Group.

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