

Management Alert



New Jersey Still Considering Proposed Legislation to “Ban the Box”

The New Jersey Senate is still considering The Opportunity to Compete Act (S2586), which seeks to “ban the box,” effectively removing any questions related to arrests or convictions from employment applications. This proposed legislation is similar to a number of cities, including Newark; counties, and states across the country that have already “banned the box” and addresses the EEOC’s caution set forth in its April 25, 2012 Enforcement Guidance that employers may be exposed to significant liability unless they more carefully tailor the use of arrests and criminal convictions in their hiring and employment-related decisions. Like the EEOC Guidance, the proposed legislation makes clear that criminal background checks disproportionately affect racial and ethnic minorities and serve as a barrier to employment.

More than twenty-two people testified yesterday before the Senate Labor Committee in a three-hour session that ended with the Committee Chair Fred Madden (D-Gloucester) requesting a hearing on June 20, 2013 to accommodate additional comment. The bill, introduced by Senators Sandra Bolden Cunningham (D-Hudson), M. Teresa Ruiz (D-Essex), and Raymond J. Lesniak (D-Union), requires employers to solicit an applicant’s criminal history only after the employer deems the applicant preliminarily qualified and extends a conditional offer of employment.

The proposed legislation provides that before an employer makes any inquiry about an applicant’s criminal history, the employer must provide: (1) written notification advising the applicant that upon his/her written consent, the employer will conduct a background check and (2) a “Notice of Rights,” which outlines the protections afforded to the applicant under the proposed legislation.

In making an employment decision, an employer can consider the following convictions, regardless of when the conviction occurred:

- Murder;
- Attempted murder;
- Arson;
- Sex offense (for which an applicant served time in state prison and is required to register as a sex offender); and
- Terrorism

An employer can consider convictions for other offenses within either a five or ten year time frame depending on the severity of the offense. However, an employer is prohibited from taking an adverse action on the basis of:

- Any arrest or criminal accusation made against an applicant which is not then pending or which did not result in a criminal conviction;
- Expunged records or any record of an executive pardon, or other record legally nullified; or
- Adjudication of delinquency of a juvenile, any violation of a municipal ordinance, or any other sealed record.

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Similar to the EEOC's "individualized assessment," the proposed legislation requires employers to consider additional factors in combination with an applicant's criminal history, such as:

- Information related to the applicant's rehabilitation efforts and good conduct;
- The accuracy of the criminal records;
- The amount of time that has elapsed since the conviction or release from custody; and
- The nature of the circumstances surrounding the crime and its relationship to the duties of the position.

The consideration of these factors must be documented in a standardized form, the "Applicant Criminal Record Consideration Form," which specifies how the employer shall consider the above factors in reaching an adverse decision and the process for documenting that decision. An employer must make a good faith effort to discuss with the applicant the employer's concerns regarding his/her criminal history and suitability for the job while allowing the applicant an opportunity to explain and contextualize the nature of the offense(s); provide evidence of rehabilitation; and rebut any inaccuracies with the criminal record.

If, after discussing the applicant's criminal history, the employer decides not to hire the applicant, the proposed legislation requires that the employer provide the applicant in one package by registered mail:

- Written notification of the adverse decision;
- A copy of the results of the criminal inquiry;
- A completed copy of the Applicant Criminal Record Consideration Form; and
- A second copy of the Notice of Rights.

Following an adverse action, an applicant who was excluded from employment has ten business days to provide additional evidence related to the accuracy and relevance of his/her criminal background. An employer may, but is not required, to hold the position open until the applicant provides additional information. If the employer receives additional information but has not yet filled the position, the employer must consider the additional information. In the event the employer reviews the additional information and still upholds the adverse decision, the employer, within 45 days, must complete another section of the Consideration Form and provide the applicant with that form and written notice of the final decision.

To be clear, the proposed legislation does not apply when "any federal or State law or regulation requires or permits the consideration of a candidate's criminal history for the purposes of employment or prohibits individuals with a specific type of employment." For all other situations, however, an employer who fails to comply will be subject to a civil fine ranging from \$500 to \$7,500, depending on the number of employees employed at the time of the violation and whether the employer has committed similar violations in the past.

We will continue to track the progress of this proposed legislation and apprise you of any developments as they occur.

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