

One Minute Memo®



New Jersey Clarifies that Statewide Ban-the-Box Law Includes Expunged Records and Online Applications

By Jennifer L. Mora

Seyfarth Synopsis: The New Jersey ban-the-box law - "The Opportunity to Compete Act" – which restricts the ability of covered employers to inquire into, and use, criminal records, became effective on March 1, 2015. More recently, the New Jersey governor signed a bill amending that law to clarify that it covers online employment applications and includes requests for expunged records early in the hiring process.

As previously reported, on August 11, 2014, New Jersey Governor Chris Christie signed "The Opportunity to Compete Act" – New Jersey's so-called "ban-the-box" law – which restricts the ability of covered employers to inquire into, and use, criminal records. That law became effective on March 1, 2015 and was part of a nationwide trend by states and local governments to enact legislation requiring employers to wait until later in the hiring process to inquire about and consider criminal history.

What is Current Law in New Jersey?

As a reminder, the Act prohibits covered employers from requiring an "applicant for employment" to complete any "employment application that makes any inquiries regarding an applicant's criminal record during the initial employment application process." "Employment application" is broadly defined to mean any "form, questionnaire or similar document or collection of documents that an application for employment is required by an employer to complete."

In addition, the Act makes it unlawful for covered employers to make "any oral or written inquiry regarding an applicant's criminal record during the initial employment application process." The "initial employment application process" means "the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview, whether in person or by any other means, of an applicant for employment." This means that employers can make this inquiry after the initial employment application process has concluded (i.e., post-interview).

If an applicant voluntarily discloses information about his or her criminal record during the initial employment application process, the employer may "make inquiries regarding the applicant's criminal record during the initial employment application."

Some positions are exempted from the ban-the-box requirement, including positions where, among other things:

- a criminal history record background check is required by law, rule or regulation;
- an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by any law, rule or regulation; or
- any law, rule or regulation restricts an employer's ability to engage in specific business activities based on the criminal records of its employees.

What's New in the Act?

On December 20, 2017, Governor Chris Christie signed Senate Bill S-3306, which amended the Act in two respects.

First, it clarified that the restrictions into inquiring about criminal history on an employment application apply to expunged records. The addition of "expunged criminal records" to the law is curious because the original version of it broadly covered "criminal records" generally, which certainly would have included expunged records.

Second, the original law provided that employers could not make any "oral or written" inquiry regarding an applicant's criminal record during the initial employment application process. To make clear the prohibition is more broad, S-3306 also amends the Act to state that the law also applies to an "**online**" application.

Next Steps for Employers

Although the ban-the-box law has been effective since 2015, New Jersey employers should determine whether they need to revise job applications, interview guidelines, and policies and procedures for criminal background checks. Employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of credit history information and the fair credit reporting laws.

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