



**New Jersey Department of Labor and Workforce
Development Publishes Regulations to Implement
the New Jersey Opportunity to Compete Act
("Ban the Box")**

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New Jersey Department of Labor and Workforce Development Publishes Regulations to Implement the New Jersey Opportunity to Compete Act (“Ban the Box”)

On March 1, 2015, the New Jersey Opportunity to Compete Act, or “Ban the Box” law, became effective for employers in the state of New Jersey. The Act makes it unlawful for employers in the state with 15 or more employees to inquire about or require an applicant to disclose criminal convictions during the “initial application process.” The Act also prohibits employers from posting or publishing job advertisements stating that they will not consider anyone who has been arrested or convicted of a crime, except in limited circumstances.

The Act does not ultimately prohibit employers from inquiring as to a candidate’s criminal history or prevent employers from running criminal background checks on candidates, but simply alters the timeframe within such inquiries may be made. The Act prohibits covered entities from inquiring into a candidate’s criminal history on an initial employment application. Criminal background checks may not be conducted until *after* the initial employment process, defined as the period beginning with the employer’s first contact with the candidate, and ending with his or her first interview. Covered employers may make criminal background inquiries prior to making a formal offer of employment. Employers may refuse to hire an applicant based on his or her criminal record, unless the record has been expunged or erased through executive pardon.

The Act provides several positions which are exempted from the above prohibited actions, including positions in law enforcement and corrections, judiciary, homeland security, or any other employment position where a criminal background check is required by law, rule or regulation, or where an arrest or conviction 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 specified business activities based on the criminal records of its employees.

On March 16, 2015, the New Jersey Department of Labor and Workforce Development (NJDOLE) published proposed regulations to implement the New Jersey Opportunity to Compete Act, as follows:

- Under the Act, a covered employer is defined as any person, company, corporation, firm, labor organization or association, and does business, employs persons or take applications for employment within the State of New Jersey, with 15 or more employees over 20 calendar weeks.
- Under the Act, covered “employment” means ***prospective employment that is physically located, in whole or substantial part, in New Jersey.*** The assessment as to covered employment is made at the outset of the application process and is met if the employer reasonably expects 50 percent or more of the working time in the position to be in New Jersey.
- The proposed regulations clarify that the Act prohibits employers from making any oral or written inquiry into an applicant’s criminal background to anyone - not just the applicant - during the initial employment application process. However, under the proposed regulations, an employer can make an oral or written criminal history inquiry to anyone if the applicant voluntarily discloses information regarding his or her criminal

background history.

- The Act does not create a civil cause of action for a violation of the Act. Applicants may file an administrative complaint with the Commissioner of Labor and Workforce Development. Civil penalties for employers found in violation are \$1,000 for a first violation, \$5,000 for a second violation and \$10,000 for each subsequent violation. The proposed regulations offer guidance as to the factors the NJDOL should consider when deciding the amount of an administrative penalty assessed under the Act, including:
 - the seriousness of the violation
 - the past history of previous violations by the employer
 - the good faith of the employer
 - the size of the employer
 - any other factors which are deemed appropriate under the circumstances.
- The proposed rules further provide a right for employers to appeal an assessment to the Commissioner of the NJDOL.

When the Opportunity to Compete Act was enacted in New Jersey in August 2014, New Jersey joined five other states enacting similar “Ban the Box” legislation, including Hawaii, Illinois, Massachusetts, Minnesota, and Rhode Island. Several municipalities throughout the U.S. have also enacted ban-the-box ordinances, including Philadelphia, Baltimore, and San Francisco.

A public hearing on the proposed new rules will be held on Tuesday, April 7, 2015 at the Department of Labor and Workplace Development in Trenton, New Jersey. The NJDOL is also accepting written comments on the regulations through May 15, 2015.



Emily Mahler is an associate in Margolis Edelstein’s Employment and Labor Law Group. She represents corporations, small businesses, nonprofit organizations and public entities in labor and employment litigation. She appears regularly in federal and state courts throughout Pennsylvania and New Jersey, as well as before the U.S. Equal Employment Opportunity Commission, Pennsylvania Human Relations Commission, and other state and local administrative agencies. She is a certified arbitrator in the Philadelphia Court of Common Pleas.