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New Jersey Agency Issues Regulations on Statewide “Ban-the-Box” Law

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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. On November 2, 2015, New Jersey’s Department of Labor and Workforce Development, which is responsible for enforcing the Act, released “The Opportunity to Compete Act Rules” (Rules). The Rules became effective on December 7, 2015. This Insight will provide an overview of the Act and also will highlight key portions of the new rules.¹

The Act, which became effective on March 1, 2015, closely followed similar legislation enacted in other states in 2013 and 2014.² Since that time, more jurisdictions have enacted ban-the-box legislation, including New York City and Oregon.³

Covered employers should consider the various action items set out below in response to the New Jersey law and the new Rules. As a result of the proliferation of laws regulating the use of criminal history for employment purposes – and related class action litigation and Equal Employment Opportunity Commission “systemic”

1 The Opportunity to Compete Act Rules can be found at http://services.statescape.com/ssu/Regs/ss_8587520069162890957.htm. The link also includes the agency’s responses to a number of comments presented by various organizations.

2 See William Simmons and Thomas Benjamin Huggett, *Beyond “Ban the Box” – Philadelphia Makes Sweeping Changes to Criminal Records Screening Ordinance*, Littler Insight (Dec. 16, 2015); Adam Wit, Darren Mungerson and Jennifer Mora, *Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks*, Littler ASAP (Jul. 20, 2014); Rod Fliegel and Jennifer Mora, *“Ban-the-Box” and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records*, Littler ASAP (Feb. 14, 2014); Rod Fliegel and Jennifer Mora, *Rhode Island Enacts “Ban the Box” Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (July 17, 2013); Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *Minnesota Enacts “Ban the Box Law” Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers*, Littler ASAP (May 17, 2013).

3 See Jennifer Mora, David Warner, and Rod Fliegel, *New York City Commission on Human Rights Issues Guidance on Citywide “Ban-the-Box” Law*, Littler Insight (Nov. 9, 2015); Jennifer Mora, Jennifer Warberg and Philip Gordon, *Oregon to Become the Latest State to Ban the Box*, Littler ASAP (Jun. 22, 2015).

investigations – employers also may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local laws.⁴

The Opportunity to Compete Act

- **Coverage**

The Act defines the term “Employer” as “any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within” the State of New Jersey, “including the State, any county or municipality, or any instrumentality thereof.” The term “Employer” also covers “job placement and referral agencies and other employment agencies.” The Rules clarify that for purposes of determining whether an employer meets this 15-employee threshold, the employer must count employees who work inside or outside of New Jersey.

The Act defines the term “Employment” as “any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency; any form of vocational apprenticeship; or any internship.” As a geographical scope limitation, however, the Act states that “the physical location of the prospective employment **shall be in whole, or substantial part, within this State.**” Under the Rules, this condition is met “if the employer has reason to believe at the outset of the initial employment application process that the percentage of work hours that will be spent performing work functions within New Jersey by the successful candidate for prospective employment will equal or exceed 50 percent of the successful candidate’s total work hours.”

“Employee” means any “person who is hired for a wage, salary, fee, or payment to perform work for an employer.” It also applies to interns and apprentices. The Rules clarify that for interns and apprentices, the Act applies whether those positions are paid or unpaid. However, the term “Employee” excludes “any person employed in the domestic service of any family or person at the person’s home, any independent contractors, or any directors or trustees.”

- **Prohibited Inquiries**

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.” According to the Rules, “applicant for employment” means “any person whom an employer considers when identifying potential employees, through any means, including, but not limited to, recruitment, solicitation, or seeking personal information, or any person who requests to be considered for employment by an employer, or who requests information from an employer related to seeking employment.” It also includes current employees.

The Act broadly defines “Employment application” to mean any “form, questionnaire or similar document or collection of documents that an application for employment is required by an employer to complete.”

Moreover, covered employers are prohibited from making “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.” Thus, employers can make this inquiry **after** the initial employment application process has concluded (i.e., post-interview). According to the Rules, the term interview means “any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being

⁴ See Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA’s Adverse Action Requirements*, Littler Insight (Jan. 4, 2016); Rod Fliegel, Jennifer Mora, and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler ASAP (Aug. 1, 2014); Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler ASAP (Jan. 6, 2014); Rod Fliegel, Barry Hartstein and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012).

sought or the applicant's qualifications," but does not include "the exchange of e-mails or the completion of a written or electronic questionnaire." Consequently, the Act and the Rules permit an earlier inquiry into criminal history than the most stringent ban-the-box laws which require employers to wait until after making a conditional offer of employment before inquiring into criminal history.

The new Rules define "criminal record" to mean "information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, release, or conviction, including, but not limited to, any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of conditional discharge."

The Rules also address an issue common to multi-state employers – whether the application can still inquire about criminal record information while directing New Jersey applicants to skip the question. According to the Rules: "Nothing set forth in this section shall be construed to prohibit an employer who does business, employs persons, or takes applications for employment in at least one state other than New Jersey, from including an inquiry regarding criminal record on an employment application, so long as immediately preceding the criminal record inquiry on the employment application it states that 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." This administrative interpretation is more relaxed than the approach taken in several other jurisdictions. Under that approach, an instruction to applicants in the ban-the-box jurisdiction not to respond to a criminal history question in a multi-state employment application is considered insufficient to avoid violation of the ban-the-box law.

- **Exemptions**

The ban-the-box requirement does not apply if the employment sought or being considered is for a position:

1. in law enforcement, corrections, the judiciary, homeland security or emergency management;
2. where a criminal history record background check is required by law, rule or regulation, or where 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 where any law, rule or regulation restricts an employer's ability to engage in specific business activities based on the criminal records of its employees; or
3. designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

- **Voluntary Disclosure**

If an applicant voluntarily discloses any information regarding his or her criminal record, either orally or in writing, during the initial employment application process, the Act permits employers to "make inquiries regarding the applicant's criminal record during the initial employment application."

- **Use of an Applicant's Criminal Record**

Notably, the Act does not "preclude an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon," and further (and cryptically) provides that the refusal to hire an applicant on this basis "is consistent with other applicable laws, rules and regulations."

- **Job Advertisements**

Employers may not "knowingly or purposefully publish, or cause to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses." According to the Rules, "advertisement" means "any circulation,

mailing, posting, or any other form of publication, utilizing any media, promoting an employer or intending to alert its audience, regardless of size, to the availability of any position of employment.”

This restriction on the content of employment applications does not apply to any advertisement that solicits applicants for positions in law enforcement, corrections, the judiciary, homeland security, or emergency management, or any other position where a criminal history record background check is required by law, where 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 law, or where any law restricts an employer’s ability to engage in specified business activities based on the criminal records of its employees. The Rules further add that advertisements may have provisions setting forth any other qualifications for employment, including “the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training, or professional, occupation, or field experience.”

- **Remedies**

The Act does not provide aggrieved individuals with a private right of action against an employer who has violated, or is alleged to have violated, the law. Instead, the New Jersey Commissioner of Labor and Workforce Development can impose a civil penalty not to exceed \$1,000 for the first violation, \$5,000 for the second violation and \$10,000 for each subsequent violation.

Action Items

Due to the proliferation of “ban-the-box” laws, employers in New Jersey and elsewhere may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state and local employment laws which regulate use of an individual’s criminal history. Suggested action items are as follows:

- Review impacted job advertisements for impermissible language regarding criminal records.
- Review job applications, including applications embedded within applicant tracking systems, and related forms for impermissible inquiries regarding criminal records.
- Provide training and FAQs to employees who conduct job interviews and make or influence hiring and personnel decisions to explain permissible and impermissible inquiries into, and uses of, criminal records, and convey protocols for storing such records and documenting related hiring and personnel decisions.
- Review the hiring process to ensure compliance, including the timing of criminal background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.

Update postings and record retention requirements.