



OUR INSIGHTS

Final New Jersey Ban-the-Box Regulations Issued Today, Effective Immediately

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Published Date: December 7, 2015

The New Jersey Department of Labor and Workforce Development (NJLW) published its long awaited, final “ban-the-box” regulations today, which take effect immediately. The final regulations, and the NJLW’s comments to the regulations, clarify the following issues regarding New Jersey’s [Opportunity to Compete Act](#) (OTCA). For a detailed discussion of the OTCA, please see [our August 2014 summary](#).

- 15-Employee Minimum.** Employers with at least 15 employees *anywhere*—not just those employers with 15 employees *in New Jersey*—are covered by the OTCA. Thus, any employer with at least 15 employees that does business, employs persons, or takes applications for employment in New Jersey, is covered by the law.
- Multi-State Employment Applications.** In a move that is favorable to employers, the regulations adopted [our proposal](#) on employers that use a single, common application for hiring in multiple states. The regulations do *not require* employers to create a separate New Jersey application that omits all criminal history questions. Rather, employers may use an application that includes a criminal history inquiry so long as, immediately preceding such an inquiry, the application 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.” In addition, it is permissible to include a statement on an employment application to the effect that “the applicant may later be subject to a criminal background check as a condition of employment.”
- Pre-Interview Internet Searches.** The OTCA provides that, unless an exception applies, an employer may not inquire about an applicant’s criminal history until after completing a first interview. The regulations clarify that an employer also may not conduct *an Internet search concerning an applicant’s criminal record* prior to completing a first interview. Although not stated specifically in the regulations, an employer presumably is prohibited from conducting a specific search for criminal record information, but is not prohibited from conducting a general Internet search about an applicant.
- “Interview” Defined.** The regulations clarify that an “interview” means “any live, direct contact by the employer with the applicant, whether in person, by telephone, or video conferencing. . . . Interview shall not

mean the exchange of emails.” An employer can satisfy the interview requirement “with a single, live contact between the employer and the job applicant.” Thus, “if there are multiple interviews scheduled on a given day, once the first of those interviews has concluded,” subsequent interviewers may make criminal history inquiries of the applicant.

5. **Deliberative Process.** After completing a first interview, an employer is *not* required to conduct any sort of deliberative process or initial screening of an applicant before making a criminal history inquiry. Immediately upon completion of the first interview, the employer may make a criminal history inquiry.
6. **Entire Criminal Record Accessible.** In those situations when an employer may inquire about an applicant’s criminal record before completing a first interview—such as when an applicable law may disqualify a person with specific convictions from holding the position sought—the employer may inquire about the applicant’s *entire* criminal record and not merely those prior convictions that may be specific disqualifiers.

The final regulations also clarify the following additional points:

- The OTCA prohibits inquiries into DWI/DUI or motor-vehicle violations before completing a first interview because the inquiry may include information about formal criminal charges.
- The so called “ABC test” will be used to determine whether an individual is a covered employee or an independent contractor under the OTCA.
- The regulations promulgate definitions for the terms “apprentice” and “intern.”
- The regulations provide detailed guidance to employers that use staffing companies, job placement or referral agencies, employee leasing companies, or temporary help service firms, in addition to employee-supplying companies. In a nutshell, the prohibitions imposed by the OTCA can apply to the agency, or both the agency and the employer, depending on their co-employment status.
- Employers are prohibited from running third-party background checks using a consumer reporting agency concerning criminal history records until after completing a first interview.
- Assessment of penalties for violations follows standard administrative procedure: no monies would be collected until employers have notice and an opportunity to be heard.
- Employers that obtained criminal history information about an applicant prior to the effective date of the OTCA are not in violation of the Act.

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Mark has a diverse litigation and counseling practice representing both private and public sector employers. For more than 25 years he has been defending employers in discrimination, harassment, wrongful termination, retaliation, breach of contract, wage and hour, and other employment-related cases before state and federal courts, administrative agencies and arbitration tribunals. Mark also provides counseling and compliance advice to employers with respect to the full spectrum of employment...

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Evan J. Shenkman is a member of Ogletree Deakins' Knowledge Management Department, serving as the firm's Senior Knowledge Management Counsel. In this role, Mr. Shenkman is responsible for capturing and organizing the collective knowledge of the firm's attorneys, allowing them to work more effectively and efficiently for their clients. For instance, Mr. Shenkman develops and collects comprehensive "best practices" documents for use by firm attorneys, provides updates...
