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## **New Ordinance Passed in Newark, New Jersey Regarding Criminal Background Check**

**Published Date:** October 15, 2012

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**Published Date:** October 15, 2012

The city of Newark, New Jersey recently passed an ordinance effective November 18, 2012, that will impact most employers in Newark. The new ordinance applies to employers with five or more employees that do business, employ, or take applications for employment within the city of Newark. The ordinance contains several requirements related to the application process, including requirements related to criminal background checks.

### **General Requirements**

An employer may not:

- Make any inquiries related to the criminal history of any applicant, prior to making a conditional offer of employment; or
- Conduct a criminal history inquiry regarding a candidate unless the employer has made a good faith determination that the relevant position is of such sensitivity that a criminal history inquiry is warranted.

Prior to conducting any criminal history inquiry about an applicant or employee, the employer must provide standard written notification (i.e., in the consent form) that:

- Upon the written consent of the applicant or employee, the employer will conduct a criminal history inquiry (this is the same as the federal requirement under the Fair Credit Reporting Act (FCRA)); and
- Following any adverse decision, the applicant or employee will have the right and opportunity to present evidence regarding the accuracy and relevance of the background check (this is noticeably different than the federal requirement, which requires employers to review such information before making an adverse employment decision).

### **Limitations on Criminal Information Received**

If an employer determines that it is able to run a criminal background check for an applicant or employee, the employer is limited to inquiring about the following:

- Indictable offense convictions for eight (8) years following the sentence, including termination of any period of incarceration;
- Disorderly persons convictions or municipal ordinance violations for five (5) years following the sentence, including termination of any period of incarceration; and
- Pending criminal charges, which may include cases that have been continued without a finding, until such time as the case is dismissed.

Employers may not inquire about or take any adverse action against any applicant or employee on the basis of:

- Any arrest or criminal accusation made against the applicant or employee, which is not then pending against that individual and which did not result in a conviction;
- Any records which are erased, expunged, the subject of an executive pardon, or otherwise legally nullified; and
- Any juvenile adjudications of delinquency or any records which have been sealed.

Convictions for murder, voluntary manslaughter, and sex offenses punishable by a term of incarceration in state prison are not subject to the limitation outlined above.

### **Required Considerations**

If an employer runs a criminal background check, it must use the following factors in evaluating the applicant or employee based on his or her criminal background check:

1. The nature of the crime and its relationship to the duties of the position sought or held (same as the [April 2012 EEOC Guidance](#) on criminal background checks);
2. Any information pertaining to the degree of rehabilitation and good conduct, including any information produced by the applicant or employee, or produced on his or her behalf (same as the [April 2012 EEOC Guidance](#) on criminal background checks);
3. Whether the prospective job provides an opportunity for the commission of a similar offense(s) (not a factor in the [April 2012 EEOC Guidance](#) on criminal background checks);
4. Whether the circumstances leading to the offense(s) are likely to reoccur (not a factor in the [April 2012 EEOC Guidance](#) on criminal background checks);
5. The amount of time that has elapsed since the offense(s) and whether the employer factored that into the employment decision (similar to the [April 2012 EEOC Guidance](#) on criminal background checks); and
6. Any certificate of rehabilitation issued by any state or federal agency (similar to the [April 2012 EEOC Guidance](#) on criminal background checks).

An employer must document in writing its consideration of these factors and use the Applicant Criminal Record Consideration form, which specifies how the employer should document the decision to revoke a conditional offer. An applicant who has a conditional offer revoked subsequent to a criminal record inquiry must be provided with a copy of the Applicant Criminal Record Consideration form.

### **Adverse Action**

If after conducting a criminal history inquiry the employer makes an adverse employment decision, the employer must, within a reasonable period of time:

- Notify the applicant or employee of the adverse employment decision;
- Provide the applicant or employee with a photocopy of the results of the criminal history inquiry, indicating the particular conviction(s) that relate(s) to the position's responsibilities and a copy of the Applicant Criminal Record Consideration form;
- Provide the applicant or employee with a written notice of rejection, specifically stating the reasons for the adverse decision and including the employer's consideration of the six factors outlined above; and
- Advise the applicant or employee of the opportunity for review, outlined below, including how the applicant or employee may present evidence related to the employer's consideration of the six factors outlined above, and what kinds of evidence may be presented.

A copy of these notices must be sent in one package by registered mail to the applicant or employee. This process is noticeably different than the federal FCRA-required process of Pre-Adverse Action Letter, reasonable waiting period, followed by an Adverse Action Letter, which will cause employers subject to the new Newark ordinance to have to modify their background check processes.

### **Opportunity for Review**

The applicant or employee has 10 business days after receipt of the notices outlined above to respond to the employer regarding the results of the criminal history inquiry. The employer must provide the applicant or employee with an opportunity to present information and evidence related to the accuracy and/or relevance of the results of the criminal history inquiry, including information pertaining to any of the factors used in the decision. The employer must review all information and documentation received from the applicant or employee prior to making any final decision regarding employment. An employer must document in writing: (a) the information and evidence provided; (b) the employer's consideration of this information and evidence; and (c) the employer's final action, specifically stating the reasons for the final action taken. The employer must, within a reasonable period of time, notify the applicant or employee of the final action and provide the individual with a copy of (a) through (c). This process varies from the federal FCRA process, including in the timing of the adverse action decision, notifications to employees, employee responses, and required employer responses.

### **Exemptions and Enforcement**

These requirements do not apply where any federal or state law requires the consideration of the applicant's or employee's criminal history.

The Mayor of Newark will designate an office or agency of the city to enforce the ordinance with penalties ranging from \$500 to \$1,000.

### **Additional Information**

If you have questions regarding the new ordinance and its impact on your workplace, contact the Ogletree Deakins attorney with whom you normally work, the firm's

Background Check Advice Team at [backgroundcheckadvice@ogletreedeakins.com](mailto:backgroundcheckadvice@ogletreedeakins.com), or the Client Services Department at 866-287-2576 or via email at [clientservices@ogletreedeakins.com](mailto:clientservices@ogletreedeakins.com).

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