

New Jersey's New "Ban the Box" Law - Implications of the "Opportunity to Compete Act" on Criminal Background Checks by Employers and the Continuing Need for Prospective Employees to Obtain Expungement

08/26/14

New Jersey's New "Ban the Box" Law

"Banning the Box" is the catch phrase used to describe a growing trend in legislation that bars would-be employers from inquiring about a job applicant's criminal record during the initial round of the application process. The "box" refers to the familiar question on most written job applications expressly probing into prior arrests, charges, and convictions, although the focus of the movement extends to interviews or early inquiries of any kind into criminal background. On August 11, 2014, New Jersey joined several other states and cities throughout the country by passing the "[Opportunity to Compete Act](#)," prohibiting certain employers from early consideration of an applicant's criminal record. The law radically alters typical early screening procedures, and employers and applicants should take note.

Under the new law, employers of fifteen or more workers (over a minimum of twenty calendar weeks) may inquire about an applicant's criminal record only *after* an initial interview or assessment has taken place. Only after consideration has been given to the merits of the candidate in these early stages can the employer explore the criminal background of the candidate. The law carves out exceptions, including but not limited to jobs in law enforcement and the judiciary, jobs for which criminal checks are required by law, and jobs for which lack of prior record is required for licensing or similar purposes. Beyond those narrow exclusions, employers face significant penalties for violating the law.

Public Policy Considerations

The policy behind the legislation is simple. Often in this competitive job market, otherwise-qualified job seekers - capable individuals who could easily enter and thrive in the workforce - face almost-certain rejection upon their disclosure of past criminal histories that bear no resemblance to the rehabilitated candidate presently seeking employment. Banning early inquiry into criminal backgrounds attempts to level the playing field for deserving individuals whose success is impeded only by the shadow of a past and anomalous transgression or mistake. The goal of the law is to help get deserving feet into doors that would likely have slammed shut without the help of the legislation.

Understandably, however, many applicants with unsavory histories who would place the employer in peril or otherwise fail to meet the standards for the job can and should be weeded out in an employer's quest to find the appropriate candidate and protect its business interests. Employers must be permitted to exercise sound discretion in their hiring choices. The law, therefore, does allow for consideration of criminal history at some point later in the process, and even at the outset in certain instances when otherwise required by law.

Impact on Employers – Review Procedures and Train Staff

So where does this leave employers? Although the legislation does not take effect until March of 2015, employers should immediately review their written applications and interview policies and protocols to ensure their practices do not run afoul of the law. It is always important to seek the assistance of experienced legal counsel when developing a framework for employment applications that complies with relevant and applicable

law. Now, more than ever, employers must understand their rights and limitations. If the law applies to a particular employer, it is important to recognize that no advertisement or posting can even suggest that candidates with criminal histories will not be considered. Nor can early inquiries hint at the issue of past criminal activity, unless volunteered by the candidate. Violations of the law will exact penalties of \$1,000 for a first offense, \$5,000 for a second offense, and \$10,000 for each subsequent violation. Employers must identify when they can and how they will consider criminal records and train their staff accordingly.

Impact on Applicants – No Substitute for Expungement

It is important that applicants also understand their rights and seek legal advice if they believe an employer has violated the law. Nevertheless, while New Jersey's Opportunity to Compete Act does much to assist applicants, there is no question that criminal histories can and will likely be considered at some point in the process. For that reason, it is always important for individuals to explore their eligibility for expungement of their criminal (and even juvenile) histories before embarking on the job search process.

Whether convicted or not, records of arrests and charges remain available for easy access and can pose insurmountable barriers for those seeking to live law-abiding and productive lives. Through expungement proceedings, these records can be sealed and shielded from disclosure in eligible cases. Expungements essentially restore individuals who have been arrested, charged, and/or convicted of a crime or offense to the place they were prior to the offense. Simply put, expungements permit applicants, with very narrow exception, to deny the existence of any criminal record. Expungement orders bar disclosure of the information by any officials or law enforcement agencies with access to information about an individual's criminal background and require them to respond, upon a request for information, that there is no record.

An expungement is an invaluable tool for anyone seeking to escape the burden of a past record. Because expungements require strict adherence to the laws governing the process and the filing of a petition in Superior Court, those seeking to have their records expunged should always consult an attorney experienced in this area. Too often, clients seek the assistance of a capable attorney only *after* they learn – sometimes from a prospective employer – that an earlier expungement attempt was not handled properly, leaving records still available through a routine background check. Therefore, it is important that expungements be done right, ensuring that records are properly sealed. "Banning the box" is a start, but expungement remains the most-effective way to ensure that an applicant is in the best possible position to compete for jobs in this difficult economy.

Practice

- Criminal Defense