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New Jersey's Newly Enacted "Ban-the-Box" Law

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On August 11, 2014, New Jersey's Governor, Chris Christie, signed into law the Opportunity to Compete Act ("OCA"), the so-called "ban-the-box" law, which prohibits employers from asking about criminal convictions on a job application or during the applicant's initial job interview. Employers should take note of the following key provisions:

1. The OCA becomes effective March 1, 2015.
2. The OCA only applies to larger employers of 15 or more individuals. It is generally assumed that only one employee needs to be physically employed within the State of New Jersey, consistent with New Jersey's other employment laws. Specifically excluded from the OCA are domestic workers and independent contractors.
3. Employers will be prohibited from posting any job advertisements stating that it will *not* consider individuals with criminal records; unless of course, the position sought is exempt from the OCA, as further discussed below.
4. Employers will be prohibited from asking about any individual's criminal history until after the initial application process is finished. This includes both paper and electronic job applications and verbal inquiries during an initial interview. The initial application process is considered finished after the first interview has been conducted. After this point, the employer then can make inquiries about an applicant's criminal history including conducting a criminal background check.
5. Interestingly, the OCA does not prohibit voluntary disclosures of criminal history, meaning that, if an applicant voluntarily discloses this information, the Employer would be permitted to ask for more information about the applicant's criminal history.
6. Ultimately, the OCA does not prevent Employers from refusing to hire someone based on criminal history information they uncover after the initial application process is completed, unless the criminal record or relevant portion thereof has been expunged or erased through executive pardon. Of course, the Employer's rejection of an applicant for employment based on his or her criminal history must comply with other applicable employment laws or regulations.
7. Moreover, there is no private right of action. However, employers found to have violated the OCA may incur civil penalties issued by the New Jersey Commissioner of Labor and Workforce Development (\$1,000 for first violations, \$5,000 for second violations, and \$10,000 for subsequent violations).
8. The law also sets forth several exceptions. Specifically, the OCA does not apply to employment positions in law enforcement, corrections, the judiciary, homeland security, emergency management or if the employer is seeking to employ those who have criminal records. In addition, the OCA does not protect individuals if they are legally prohibited from holding a particular position based on a conviction or arrest or if the employer is "restricted from

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specified business activities” based on the criminal records of its employees.

The Bottom Line. Employers should first assess whether they are covered by the OCA. If so, they need to review and revise, where necessary, job applications and advertisements for possible unlawful language regarding criminal histories. Management employees who are responsible for recruitment and hiring also need to be trained on permissible inquiries into the criminal history of job applicants. Employers should also review the entire hiring process to ensure compliance with the OCA including, but not limited to, use of criminal background checks, distribution of mandatory releases and notices, and the updating of postings and policies.■

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