

Thinking Outside the Box in NJ: Employers Conducting Criminal Background Checks on Prospective Employees Must Proceed with Caution

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Background checks can be a useful—in today's society some may say *necessary*--tool to aid employers in making hiring decisions. However, when performing criminal background checks on prospective employees, or inquiring about a prospective employee's criminal record, New Jersey employers need to be aware of limits imposed by state and federal law.

The Opportunity to Compete Act

At the state level, the New Jersey Legislature has passed the Opportunity to Compete Act. The Act is part of a growing national trend of "ban the box" laws, which prohibit employers from asking about an applicant's criminal history on job applications. The Act's stated purpose is to remove employment obstacles for people with criminal records, compelling employers to consider a job candidate's qualifications first, without the stigma of a criminal record.

Under the Act, employers are:

- Prohibited from posting or distributing job advertisements stating that the employer will not consider applicants with a criminal record; and
- Prohibited from inquiring, orally or in writing, about a prospective employee's criminal record during the initial application process (both application and interview), *unless* the applicant voluntarily discloses this information.

The Act covers all New Jersey employers who employ fifteen or more people over at least twenty calendar weeks. However, the Act excludes:

- Law enforcement positions;
- Positions with the judiciary or emergency management; and
- Positions that are part of a larger program by the employer to hire applicants with criminal records.

Notably, the Act does not impose a complete ban on inquiring about an employee's criminal background. Indeed, employers can make such inquiries during later interview rounds and can also request that a prospective employee fill out a supplemental application after an initial interview. Furthermore, nothing in the Act prohibits an employer from refusing to hire a prospective employee because of his or her criminal record unless the record has been expunged.

Title VII

In addition to the state law, employers with at least 15 employees must also comply with Title VII. Title VII prohibits employers from treating applicants differently based on a protected class, such as race or national origin. Translation: employers must take care to apply the same standards to all their applicants when using criminal record checks.

Title VII also prohibits employers from using neutral policies that disproportionately affect members of a protected class *unless* the employer can demonstrate a valid business necessity for the policy.

Although the Third Circuit recently considered the issue of what constitutes a business necessity in *EI v. Southeastern Pennsylvania Transportation Authority*, the Court failed to provide reliable guidance for what constitutes a valid business necessity, therefore, all such policies should be carefully reviewed with Title VII's mandate in mind.

Accordingly, employers should proceed with caution when implementing policies that could conceivably affect members of a certain protected class disproportionately, even if a business necessity is asserted. Furthermore, even if an employer demonstrates a business necessity, a prospective employee can prevail if he or she can demonstrate that the goal behind the employer's policy can be achieved using a different method that does not create the same adverse impact on a protected class.

The Fair Credit Reporting Act

An additional requirement under federal law is triggered if an employer engages a third-party reporting agency to obtain information regarding a prospective employee's criminal record in the form of a consumer report, the employer must comply with the provisions of the Fair Credit Reporting Act:

- First, the employer must advise the employee in writing that a consumer report may be obtained and the employee must authorize the procurement of the report in writing before the report is obtained.
- Second, upon obtaining a report, if the employer decides to take any adverse action (i.e., rejecting the applicant) based on the information, the employer must first provide the employee with a copy of the report and a summary of consumer rights, which can found at https://files.consumerfinance.gov/f/201410_cfpb_summary_your-rights-under-fcra.pdf. An employer must then wait a reasonable amount of time before taking any adverse action.
- Third, if after providing notice and the report, the employer decides to take adverse action, the employer must then provide the employee with:
 - Notice of the decision;
 - Contact information for the reporting agency;
 - Notice that the reporting agency did not take the adverse action and cannot provide an explanation as to why the adverse action was taken; and
 - Notice that the applicant is entitled to obtain a free copy of the report within sixty days and that the applicant can dispute the accuracy of information in the report.

Do these laws preclude employers from taking advantages of the benefits of criminal background checks? No, rather the laws attempt to strike a balance between an employee's fair opportunity for employment and employers' needs to make sound decisions for the protection of their business interests. The watchword is use "caution" when inquiring about an applicant's criminal record or obtaining a criminal background check.

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