

Answering Your Questions On NJ's 'Ban-The-Box' Law

Law360, New York (September 12, 2014, 10:43 AM ET) -- Last month, New Jersey Gov. Chris Christie signed the Opportunity to Compete Act into law, giving those with criminal histories more equality when it comes to applying for a job.

Trenton-based employment litigator Jill Cohen of Eckert Seamans Cherin & Mellott LLC offers these practical tips for employers and hiring managers to better understand the "ban the box" bill, which bars some companies from inquiring about an applicant's criminal record.



Jill R. Cohen

Q. What should people know about the enactment of this law and why is it actually considered a win for both businesses and employers?

A: It's helpful for employers to understand that this law has been in the works a long time in New Jersey, and prior iterations of this bill were far more restrictive on employers. For instance, prior versions of the proposed law would have prohibited employers from asking about criminal records until after a conditional offer of employment was made to an applicant, or even would have required an employer to complete certain paperwork if an employer chose not to hire an applicant with a criminal record. With the law that was actually signed by Gov. Christie, employers can ask about an applicant's criminal background after an initial interview and need not wait until making a conditional offer of employment to a candidate. Similarly, an employer need not complete any paperwork following the rejection of an applicant with a record. As I watched the law weave its way through the New Jersey Legislature, I observed local business lobbying groups doing a great job at helping narrow the scope of the law to be both practical for employers, while still meeting the original goals of the proposed legislation.

Q: From a New Jersey employer's perspective, how does banning the box change the recruitment and/or job application process? Beyond the obvious, what unexpected lines of questions or pitfalls are associated with banning an employer's ability to screen job applicants based on criminal background?

A: I don't think it changes anything that drastically. The law is nicknamed ban the box because the law effectively bans the checkbox on an employment application that asks an applicant about a criminal record. This requirement is relatively straightforward. Employers already need to be careful about what they should and shouldn't ask on an interview to protect themselves from claims of discrimination, so this line of questioning about criminal background is just one more area an employer needs to keep in mind. Moreover, an employer may ask about a criminal background after an initial interview, so the employer can still screen applicants as fully as before — just a tad later in the hiring process. Finally, the law applies only to New Jersey employers with 15 or more employees over 20 calendar

weeks, so the law does not apply to smaller businesses.

Q. Does the law apply universally to all employers in New Jersey? Are there any other exemptions?

A: As stated, the law applies only to New Jersey employers with 15 or more employees over 20 calendar weeks. Certain employers who have more than 15 employees are still exempt, including those in the fields of law enforcement, corrections, the judiciary, homeland security and emergency management. Employers are also exempt if an applicant's conviction or arrest record renders the applicant legally prohibited from holding the position. Finally, the law does not apply to voluntary disclosures, so if an applicant voluntarily begins discussing his or her criminal background without being first asked, asking about it becomes fair game for the employer. Employers should also note that the law preempts any laws covering similar subjects on a local government level, so municipalities, for example, may not enact more stringent versions of the law than the statewide version recently signed by Gov. Christie.

Q. Do you have recommendations for how an employer can legally question a job candidate to discover quality of character/skills without compromising the new law?

A: This is a great question because the very point of the law is to allow employers to discover the character and skills of an applicant without first being prejudiced by an applicant's criminal background. The point is for an applicant to be given a fair shot at an initial interview before having to reveal his or her criminal background to a potential employer. I'm sure the authors of the law would be pleased with the premise of this question. The simple answer, however, is that an employer simply should avoid asking applicants about a criminal background on an application and during an initial interview. If they avoid that, they should be fine, generally speaking. There may be other ways to comply with the law while still obtaining a thorough background check, and if an employer is concerned with complying with the law, they should consult a qualified employment attorney to advise them. The law is relatively straightforward, and an employment attorney should be able to give some basic do's and don'ts to an employer about how to comply with the law beyond what is being discussed here.

Q. How does this legislation interact with an organization's requirements for background checks?

A: First of all, as stated, certain industries and positions are exempt from this law, so for those professions where a criminal background would make it illegal for the applicant to hold the position, for example, those employers are exempt from the law's requirements. As for general employers, there are many ways to check someone's background and fitness for a particular position without asking directly about a criminal background. An employer may check references, for instance. Ultimately, however, an employer may ask about criminal background — just not on the application and not during the initial interview.

Q. Is there a financial implication (e.g., training staff, recruitment resources, etc.,) associated with this legislation for an average employer?

A: As for training, employers should take efforts to make sure that any employee who is interviewing or interacting with applicants is aware of the change in the law, which takes effect March 1, 2015. For larger employers, a human rights professional can assist with notifying employees. A general reminder or legal update to all employees close to March 1, 2015, wouldn't be a bad idea, either. As for penalties, the law provides civil penalties of \$1,000 for the first violation, \$5,000 for the second offense and \$10,000 for each additional violation. Of significance, the law does not give rejected applicants any private right of action against employers, and liability pursuant to this law cannot be used to

establish liability pursuant to another law.

Q. What types of infractions can you predict as a result of the legislation? How aggressive do you think New Jersey will be in pursuing infractions when the law goes into effect?

A: Personally, I expect the state will be aggressive. This law has been in the pipeline a long time. The name of the law is the Opportunity to Compete Act, so, as the name suggests, the state is eager to give former convicts a chance to compete in the job market. Having said that, enforcement will depend largely on applicants coming forward to the New Jersey Department of Labor and Workforce Development and complaining that the law was violated. I imagine prisons will be educating newly released convicts about their rights pursuant to the law as part of return-to-work training.

Q. What do you think the legislation will do for unemployment in New Jersey? What positive (short-term or long-term) results do you predict? Will the law open up better opportunities for those who have completed time in a correctional facility?

A: The point of the law is to give former convicts a chance to compete for jobs, rather than being weeded out before having a chance to interview for a position. If the law works as intended, we will see more former convicts obtaining jobs in New Jersey. How this will improve the overall unemployment rate is unclear, because presumably the availability of open positions depends on the demand created by employers, not necessarily on the supply of workers applying in the job market. The law should allow former convicts to at least get their proverbial foot in the door for an interview.

Q. If you could give employers one takeaway about this law what would it be?

A. As a lawyer, of course I have more than one thing to say! However, if I have to narrow my answer down to one thing, allow me to subdivide my comment: (a) change your employment applications to remove the checkbox asking about an applicant's criminal background; (b) do not ask an applicant about his or her criminal background until after completing a first interview; and (c) it's a good idea to have a reliable employment attorney who can notify you about employment law changes that may affect your business — such as this new law — or who you can call with quick questions as they pop up in your business, such as any questions relating to complying with this new law.

—By Jill R. Cohen, Eckert Seamans Cherin & Mellott LLC

Jill Cohen is an associate in Eckert Seamans Cherin & Mellott's Trenton, New Jersey, office.

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