

Add New Jersey To The List Of "Ban-the-Box" States

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Yesterday, New Jersey joined 12 other states in its enactment of the "ban-the-box" legislation whereby employers will be prohibited from asking job applicants at the outset about their criminal records. Following New Jersey Governor Chris Christie's execution of the [Opportunity to Compete Act](#) (Act), New Jersey became the fifth state – in addition of Hawaii, Massachusetts, Minnesota and Rhode Island – to impose the "ban-the-box" prohibitions on private-sector employers. Under the Act, an employer is barred from conducting any pre-application inquiry regarding the person's criminal history or from making such inquiries during the application process. However, an employer may consider such information should an applicant voluntarily disclose his or her criminal history during the application process. Otherwise, **only after** the employer determines that the candidate is otherwise qualified and has received a conditional offer of employment, may an employer make an inquiry regarding the individual's criminal history. Assuming the conditions permitting such inquiry have been met, the employer must provide written notice of its intent to make the criminal history inquiry and the candidate must provide written consent to this inquiry after receipt of a Notice of Rights (which is outlined fully in the Act). An employer is permitted to take into consideration the following criminal history when making an employment decision:

- A conviction of murder or attempt to commit murder regardless of when the conviction occurred.
- A conviction of terrorism regardless of when the conviction occurred.
- A conviction of a crime of the first through fourth degree for 10 years following the release from custody or from the date of sentence if the person was not sentenced to a term of confinement.
- A conviction of disorderly persons offense for five years following the release from custody or from the date of sentence if the person was not sentenced to a term of confinement.
- Any pending criminal charges, which include cases that have been continued without a finding, until the case is dismissed.

An employer **cannot** take into consideration the following when making an employment decision:

- Any arrest or criminal accusation that is not pending against the person.
- Any record that has been erased or expunged.
- Any record of an executive pardon.
- Any adjudication of delinquency of a juvenile.

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- Any violation of a municipal ordinance.
- Any record that has been sealed.

When making an employment decision based on the criminal history, an employer is required to consider the following factors:

- Any information regarding the candidate's rehabilitation and good conduct, including a certificate of rehabilitation issued by the state or federal agency.
- The accuracy of the criminal record in question.
- The amount of time that has lapsed since the conviction and release from custody.
- The nature and circumstances surrounding the crime and the relationship to the duties of the employment position sought.

The employer must document its consideration of these factors and complete the Applicant Criminal Record Consideration Form (Form) (which is outlined fully in the Act). The employer must explain its consideration of these factors should it rescind the conditional offer of employment from the candidate following receipt of the criminal history. If the employer withdraws its conditional offer of employment based on the criminal history, the employer must provide the candidate with written notice of the adverse decision, a copy of the results of the criminal history inquiry, the completed Form, and second Notice of Rights. Within 10 business days following receipt of this information, the candidate may provide additional information and evidence to the employer regarding the accuracy and relevance of the results of the criminal history inquiry. During that time, the employer must hold the position open for a candidate, but is not required to wait for the candidate's response before filling the position. If the position has not been filled and a response is provided, the employer must consider the additional information from the candidate. If, after consideration of the additional information, the employer rejects the candidate, the employer must complete Part B of the Form and provide the candidate the supplemented Form and written notice of the final decision. The Act requires employers to keep the completed Form (and supplemental Form if applicable) for a period of three years from the date of completion. Finally, the Act does not prohibit an employer from considering a candidate's criminal history if federal or state law requires or permits consideration of such or prohibits an individual with a specified criminal history from obtaining a certain type of employment. This exemption is to be narrowly construed.