

ASSEMBLY COMMITTEE SUBSTITUTE FOR
ASSEMBLY, No. 1999
STATE OF NEW JERSEY
216th LEGISLATURE

ADOPTED JUNE 23, 2014

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Assemblywomen Jasey, Tucker, Assemblymen Garcia, Giblin, Gusciora, Wilson, Senators Lesniak, Ruiz, Pou and Norcross

SYNOPSIS

“The Opportunity to Compete Act;” establishes certain employment rights for persons with criminal record.

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Budget Committee.

AN ACT concerning certain employment rights of persons with criminal records and supplementing Title 34 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. This act shall be known and may be cited as “The Opportunity to Compete Act.”

2. The Legislature finds and declares that:

a. Removing obstacles to employment for people with criminal records provides economic and social opportunities to a large group of people living in New Jersey, increasing the productivity, health, and safety of New Jersey communities.

b. Criminal background checks by employers have increased dramatically in recent years, with estimates of 90 percent of large employers in the United States now conducting background checks as part of the hiring process.

c. Barriers to employment based on criminal records stand to affect an estimated 65 million adults in the United States with criminal records.

d. Employment advertisements in New Jersey frequently include language regarding criminal records that either explicitly precludes or strongly dissuades people from applying.

e. Individuals with criminal records represent a group of job seekers ready and able to contribute and add to the workforce.

f. Securing employment significantly reduces the risk of recidivism for persons with criminal records.

g. Currently, at least 64 states, counties, and cities have enacted or passed statutes, ordinances, or policies to remove barriers to the employment of persons with criminal histories by public and private employers.

h. The nation's largest public employer, the United States government, and the nation's largest private employer have each implemented their own policies removing barriers to the employment of persons with criminal histories.

i. Numerous other major businesses and organizations have voluntarily implemented their own policies removing barriers to the employment of those with criminal histories.

j. It is the intent and purpose of "The Opportunity to Compete Act" to improve the economic viability, health, and security of New Jersey communities and to assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves.

3. As used in this act:

"Advertisement" means any circulation, mailing, posting, or any other form of publication, utilizing any media, promoting an employer or intending to alert its audience, regardless of size, to the availability of any position of employment.

"Applicant for employment" means any person whom an employer considers when identifying potential employees, through any means, including, but not limited to, recruitment, solicitation, or seeking personal information, or any person who requests to be considered for employment by an employer, or who requests information from an employer related to seeking employment, and shall include any person who currently is an employee of the employer.

"Criminal record" means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, release or conviction, including, but not limited to, any sentence arising from a verdict or plea of guilty or nolo

contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of conditional discharge.

“Employee” means a person who is hired for a wage, salary, fee, or payment to perform work for an employer, but excludes any person employed in the domestic service of any family or person at the person’s home, any independent contractors, or any directors or trustees. The term also shall include interns and apprentices.

“Employer” means any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within this State, and means the State, any county or municipality, or any instrumentality thereof. The term shall include job placement and referral agencies and other employment agencies, but excludes the United States or any of its departments, agencies, boards, or commissions, or any employee or agent thereof.

“Employment” means any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency; any form of vocational apprenticeship; or any internship. The physical location of the prospective employment shall be in whole, or substantial part, within this State.

“Employment application” means a form, questionnaire or similar document or collection of documents that an applicant for employment is required by an employer to complete.

“Initial employment application process” means the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted an interview and determined the applicant is qualified, whether in person or by any other means, and selected the applicant as the employer’s first choice to fill the position.

4. a. Except as otherwise provided in section 8 of this act:

(1) an employer shall not require an applicant for employment to complete any employment application that makes any inquiries regarding an applicant’s criminal record during the initial employment application process.

(2) an employer shall not make any oral or written inquiry regarding an applicant’s criminal record during the initial employment application process.

b. Notwithstanding the provisions of subsection a. of this section, if an applicant discloses any information regarding the applicant’s criminal record, by voluntary oral or written disclosure, during the initial employment application process, the employer may make a reasonable, limited inquiry regarding only the criminal history disclosed.

c. An employer may inquire into and consider the criminal history of an applicant after the employer has conducted an interview, determined the applicant to be qualified, and selected the applicant as the employer’s first choice to fill the position.

d. Nothing set forth in this section shall be construed to prohibit an employer from requiring an applicant for employment to complete an employment application that makes any inquiries regarding an applicant’s criminal record after the initial employment application process has concluded or from making any oral or

written inquiries regarding an applicant's criminal record after the initial employment application process has concluded. The provisions of this section shall not preclude an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, provided that such refusal is consistent with sections 5 and 6 of this act as well as any other applicable laws, rules and regulations.

5. a. An employer shall not be permitted to consider when making an employment decision, or require any applicant to disclose or reveal, or to take any adverse employment action against any applicant on the basis of:

(1) any arrest or criminal accusation made against the applicant that did not result in a conviction, unless it is then pending;

(2) any record which has been erased or expunged or any record that has been the subject of an executive pardon unless such records are explicitly made relevant for the position by a federal or State law, rule, or regulation;

(3) a conviction for a disorderly persons offense or a conviction for conduct from another state which, if committed in this State, would constitute a disorderly persons offense, where the date of sentence or the release from any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of the application for employment, unless the applicant was subsequently convicted of a crime or disorderly persons; or

(4) a conviction for a crime of the first through fourth degree or a conviction for conduct from another state which, if committed in this State, would constitute a crime of the first through fourth degree, where the date of sentence or the release from any period of incarceration resulting therefrom, whichever date is later, occurred ten or more years prior to the date of the application for employment, unless the applicant was subsequently convicted of a crime or disorderly persons.

b. Notwithstanding paragraphs (3) and (4) of subsection a. of this section, an employer may inquire about and consider when making an employment decision convictions for the following crimes regardless of the date of sentence or the release from incarceration:

(1) criminal homicide, including murder, manslaughter, and death by auto, as defined by N.J.S.2C:11-2;

(2) attempted murder as defined by N.J.S.2C:5-1 and N.J.S.2C:11-3;

(3) arson and arson-related offenses as defined by N.J.S.2C:17-1;

(4) sex offenses as defined by subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2);

(5) robbery as defined by N.J.S.2C:15-1;

(6) kidnapping as defined by N.J.S.2C:13-1;

(7) human trafficking as defined by section 1 of P.L.2005, c.77 (C.2C:13-8);

(8) possession of weapons during commission of certain crimes as defined by section 1 of P.L.1998, c.26 (C.2C:39-4.1);

(9) burglary as defined by N.J.S.2C:18-2;

(10) aggravated assault as defined by N.J.S.2C:12-1;

(11) any crime listed in 18 U.S.C. Chapter 113B – Terrorism, and any crime listed in the "September 11th, 2001 Anti-Terrorism Act," P.L.2002, c.26 (C.2C:38-1 et seq); and

(12) any offenses of a nature substantially similar to an offense set forth in paragraphs (1) through (11) of this subsection b. committed in another jurisdiction, regardless of when they occurred.

6. a. In reasonably evaluating an applicant for a position for which a criminal history inquiry is conducted pursuant to this act, the employer also shall collectively consider additional factors, including but not limited to:

(1) any information, if provided to the employer by or on behalf of the applicant, pertaining to the accuracy of the criminal record in question;

(2) any information, if provided to the employer by or on behalf of the applicant, pertaining to the degree of rehabilitation and good conduct;

(3) the nature of the offense and how long ago it occurred;

(4) the duties and settings of the job sought or held.

b. An employer who has any questions or concerns relating to the applicant's criminal history and suitability for the position sought or held based on a criminal history inquiry shall make a good faith effort to discuss with the applicant these questions or concerns and, while the position remains open, consider any information provided by the applicant.

7. Unless otherwise permitted or required by law, an employer shall not knowingly or purposefully publish, or cause to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses. The provisions of this section shall not apply to any advertisement that solicits applicants for a position in law enforcement, corrections, the judiciary, homeland security, or emergency management, or any other employment position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by any law, rule or regulation, or where any law, rule, or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees. Nothing set forth in this section shall be construed as prohibiting an employer from publishing, or causing to be published, an advertisement that contains any provision setting forth any other qualifications for employment, as permitted by law, including, but not limited to, the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training or professional, occupational, or field experience.

8. The provisions of this act shall not apply if:

a. The employment sought or being considered is for a position in law enforcement, corrections, the judiciary, homeland security or emergency management;

b. The employment sought or being considered is for a position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding that employment as required by any law, rule or regulation, or where any law, rule, or regulation restricts an employer's ability to engage in

specified business activities based on the criminal records of its employees, except that any adverse employment decision regarding a position subject to this exemption that is based on a criminal history outside of the enumerated offenses or time periods of the applicable federal or State law, regulation, or rule shall remain subject to section 6 of this act; or

c. The employment sought or being considered is for a position designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

9. a. The governing body of a county or municipality shall not adopt any ordinance, resolution, law, rule or regulation regarding criminal histories in the employment context, except for ordinances adopted to regulate county or municipal operations.

b. The provisions of this act shall preempt any ordinance, resolution, law, rule or regulation adopted by the governing body of a county or municipality prior to the effective date of this act regarding criminal histories in the employment context, except for ordinances adopted to regulate county or municipal operations.

10. a. No employer shall be found liable based on the exclusion from consideration of the portions of an applicant's or employee's criminal record deemed outside the scope of consideration by section 5 of this act.

b. In negligent hiring or negligent retention claims based in whole or part on an employee's criminal record, no employer shall be found liable unless the employer's hiring decision is found to have been grossly negligent.

c. The penalties set forth in section 11 of this act shall be the sole remedy provided for violations of this act. Nothing set forth in this act shall be construed as creating or establishing a standard of care or duty for employers with respect to any law other than this act. Evidence that an employer has violated, or is alleged to have violated, the provisions of this act, shall not be admissible in any legal proceeding with respect to any law or claim other than a proceeding to enforce the provisions of this act. Nothing set forth in this act shall be construed as creating, establishing or authorizing a private cause of action by an aggrieved person against an employer who has violated, or is alleged to have violated, the provisions of this act.

11. Any employer who violates this act shall be liable for a civil penalty in an amount not to exceed \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation collectible by the Commissioner of Labor and Workforce Development in a summary proceeding pursuant to the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

12. This act shall take effect the first day of the seventh month next following the date of enactment, but the Commissioner of Labor and Workforce Development may take any anticipatory administrative action in advance as shall be necessary for the implementation of this act.