SENATE, No. 2586

STATE OF NEW JERSEY

215th LEGISLATURE

INTRODUCED FEBRUARY 21, 2013

Sponsored by:

Senator SANDRA B. CUNNINGHAM

District 31 (Hudson)

Senator M. TERESA RUIZ

District 29 (Essex)

Senator RAYMOND J. LESNIAK

District 20 (Union)

Co-Sponsored by:

Senators Pou, Gill, Stack and Weinberg

SYNOPSIS

"The Opportunity to Compete Act;" establishes certain employment rights for persons with criminal histories.

CURRENT VERSION OF TEXT

As introduced.



(Sponsorship Updated As Of: 3/12/2013)

1 AN ACT concerning employment rights of persons with criminal histories and supplementing Title 10 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 "The Opportunity to Compete Act."

- 2. The Legislature finds and declares that:
- a. Removing obstacles to employment for people with prior criminal records provides economic and social opportunities to a large group of people living in New Jersey, which, in turn, increases the productivity, health, and safety of New Jersey communities.
- b. Criminal background checks by employers have increased dramatically in recent years, with estimates of ninety percent of large employers in the United States now conducting background checks as part of the hiring process.
- c. Commercially-run criminal background checks commonly contain errors and inaccuracies and even Federal Bureau of Investigation (FBI) background checks are out of date 50 percent of the time.
- d. Barriers to employment based on criminal records stand to affect an estimated 65 million adults in the United States with criminal records.
- e. Barriers to employment based on criminal records disproportionately exclude racial and ethnic minorities.
 - f. Employment advertisements in New Jersey frequently include language regarding criminal records that either explicitly preclude or strongly dissuade people from applying.
- g. Individuals with criminal records represent a group of job seekers ready and able to contribute to the workforce.
- h. Research has shown that many individuals with prior criminal histories pose no greater risk of future criminality than do people with no criminal history and are equally qualified, reliable, and trustworthy candidates for employment.
- i. Securing employment significantly reduces the risk of recidivism.
- j. It is the intent and purpose of "The Opportunity to Compete 40 Act" to improve the economic viability, health, and security of New 41 Jersey communities and to assist people with conviction histories to 42 reintegrate into the community and to provide for their families and 43 themselves.
 - k. Currently, at least 50 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.

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- l. At least six of New Jersey's sixteen largest employers already implemented policies in other states or nationwide which remove barriers to the employment of persons with criminal histories.
- m. The nation's largest public employer, the United States federal government, and the nation's largest private employer, Wal-Mart Stores, Inc., have each implemented their own policies removing barriers to the employment of persons with criminal histories.
 - n. Numerous other major businesses and organizations have voluntarily implemented their own policies removing barriers to the employment of those with criminal histories, including, among others, British Petroleum, Exxon Mobil, McDonald's, Microsoft, Procter & Gamble, Royal Dutch Shell, Staples, Starbucks, and Target.

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3. As used in this act:

"Adverse employment decision" shall include, but not be limited to, the refusal, rescission, or revocation of the offer of a position or termination of employment.

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

"Applicant Criminal Record Consideration Form" means the following written standardized form:

	Applicant Criminal Record Consideration Form
	In compliance with the New Jersey Opportunity to Compete Act, any
	employer who withdraws a conditional offer of employment after conducting
	a criminal history inquiry on an applicant must provide the applicant with a
(copy of the results of the criminal history inquiry and a completed copy of
	this form after first having a discussion with the candidate. Once the
	candidate has received appropriate notice from a prospective employer of a
	withdrawn offer because of the results of a criminal history inquiry, that
	candidate can dispute the results of the criminal history inquiry or respond
	with additional information for consideration within 10 business days.
	though the employer may go ahead and fill the job during that time. If any
	additional information is received in that 10-day period and the employer has
	not yet filled the position, the employer must fill out Part B of this form and
	provide it to the candidate.
	Employers must keep a copy of this form in their records for three years from
	the date of completion.
	Part A.
	1. What position does the candidate seek or employee hold?
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	3. What crime(s), present in the candidate's criminal history, were relevant, either individually or collectively, to the decision to revoke the conditional offer?
	4. How much time has elapsed since the crime(s) or release from custody?

	nformation did the candidate provide during your conversation? his information relate to the candidate's suitability for the position n? Did the applicant or employee provide evidence of rehabilitation
or inaccur	acies in the criminal record? Evidence of rehabilitation tends to the candidate has changed his or her life for the better. This may
life, comp	staining a certificate of rehabilitation, living a drug or alcohol free leting a substance abuse program, regular employment, a stable e, volunteering in the community or mentoring youth, etc.
	, volunteering in the community of mentoring youth, etc.
	explain, in light of the above questions, the decision for ng the conditional offer of employment.
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"Application process" means the period beginning when the candidate inquires about the employment being sought and ending when an employer has extended a conditional offer of employment to the candidate.

"Candidate" 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.

"Conditional offer of employment" means an offer of employment that is dependent on the successful completion of certain conditions, including, but not limited to, a criminal history inquiry, medical examination, and drug test.

"Conviction" means 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" shall mean a person who is hired for a wage, salary, fee, or payment to perform work for an employer, or who works without compensation for, on average, fifteen or more hours per week, but excludes any person employed in the domestic service of any family or person at the person's home.

"Employer" means any person, company, corporation, firm, labor organization, or association which has five or more employees and does business, employs persons, or takes applications for employment within this State, including by the State, any county, municipality, or any instrumentality thereof. The term shall include job placement and referral agencies and other employment agencies, but exclude the United States or any of its political subdivisions.

"Employment" means any occupation, vocation, job, or work with pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency, or any form of vocational or educational training with pay, or any work without pay that is done for, on average, fifteen or more hours per week. The physical location of the prospective employment must be in whole, or substantial part, within this State.

"Filled the position" means an offer of employment has been both extended to and accepted by another candidate.

"Inquiry" means any direct or indirect conduct intended to gather information from or about an applicant, candidate, or employee, using any mode of communication, including but not limited to application forms, interviews, and criminal history inquiries.

"Notice of Rights" means the following written standardized form:

What happens when my criminal record is checked by an employer?

New Jersey's Opportunity to Compete Act requires that employers follow certain procedures when asking about your criminal history. Any inquiry into your criminal history must occur after the employer has given you a conditional offer of employment.

New Jersey's Opportunity to Compete Act does not apply when any federal or State law or regulation explicitly requires or permits the consideration of specific criminal convictions when making employment decisions

In connection with any decision regarding employment, an employer may not consider:

Convictions for most crimes of the first through fourth degree in New Jersey or a substantially similar crime committed in another jurisdiction, for which you were sentenced or released from custody more than ten years ago;

Convictions for a disorderly persons offense in New Jersey or a substantially similar offense committed in another jurisdiction for which you were sentenced or released from custody more than five years ago;

Arrests that are not pending;

Any records which have been erased, expunged, or are the subject of an executive pardon, or otherwise have been legally nullified; or

Any juvenile adjudication of delinquency, any municipal ordinance violations or any records which have been sealed.

However, if you have received a criminal sentence or been released from custody for a crime of the first through fourth degree within the past ten years or for a disorderly persons offense within the past five years, an employer is allowed to consider all of your criminal convictions. Additionally, if you have ever been convicted of murder, attempted murder, an arson-related offense, a sex offense requiring registry, or a terrorism-related offense, then an employer may consider that conviction no matter when it occurred.

If an employer asks about your criminal history, the employer also must consider these factors:

Information about your rehabilitation and good conduct, including but not limited to any government-issued certificates of rehabilitation;

Information related to any inaccuracies in your criminal record;

How much time has elapsed since the crime or offense and release from custody; and

How the criminal record relates to your suitability as an employee.

If the employer has any questions or concerns about your criminal history, the employer must first make a good faith effort to discuss with you any such questions or concerns your record may have raised. If the employer then withdraws your conditional offer or makes any other adverse employment decision, you will receive a copy of the results of the criminal history inquiry and written notice of the employer's reasons for revoking the conditional offer.

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You will have 10 BUSINESS DAYS to respond to the employer. In your response you may: (1) challenge the accuracy of the results of the criminal history inquiry and (2) present additional evidence of rehabilitation or other factors that the employer must consider. An employer may hold the position open but is not required to wait for your response.

An employer may not ask about your criminal history before you have been given a conditional offer of employment and may not advertise restrictions based on criminal history unless those restrictions are mandated by state or federal law.

If an employer asks about your criminal history, that information must remain confidential.

If you believe that the employer has not followed these procedures, please call the Office of the Attorney General, Division on Civil Rights at 609-292-4605.

"Otherwise qualified" means any candidate who meets all other criteria for a position.

"Pre-application inquiry" shall mean any inquiry in connection with any decision regarding employment that precedes the application process, including, but not limited to, any recruitment of candidates, attempts to identify candidates, or solicitation of candidates.

"Type 1 violation" means either an initial violation of this act or a violation that is not preceded by another violation within the previous three years. All actions within the application process for the same position shall together be considered a single Type 1 violation, notwithstanding that each would otherwise constitute a violation on its own.

"Type 2 violation" means any violation of this act that is preceded by another violation within the previous three years. Each action that would constitute a Type 2 violation of this act shall constitute a separate Type 2 violation.

- 4. a. An employer shall not conduct any pre-application inquiry regarding any person's criminal history in connection with any decision regarding employment.
- An employer shall not make any inquiry regarding a candidate's criminal history during the application process.
- c. Inquiry into and consideration of the criminal history of a candidate may take place after the candidate has been found otherwise qualified and has received a conditional offer of employment.
- d. Notwithstanding subsections a. and b. of this section, if a candidate discloses any information regarding the candidate's criminal history by unsolicited voluntary oral or written disclosure, the employer may consider the disclosed criminal history.
- e. Any information obtained regarding a candidate's criminal history, whether obtained through an inquiry or by any means other

- than voluntary oral or written disclosure pursuant to subsection d. of this section, shall not be considered in making an employment determination until after a conditional offer has been made.
 - f. Prior to conducting any criminal history inquiry concerning a candidate, the employer shall provide standard written notification advising that, upon the written consent of the candidate, the employer will conduct a criminal history inquiry and provide to the candidate a Notice of Rights.

- 5. An employer shall be permitted to consider in connection with any decision regarding employment:
- a. A conviction of murder or attempt to commit murder pursuant to N.J.S.2C:11-1; arson pursuant to N.J.S.2C:17-1; a sex offense requiring registration pursuant to subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2) that is punishable by a term of imprisonment in a State correctional facility; and terrorism pursuant to P.L.2002, c.26 (C:2C:38-1 et seq.) regardless of when the conviction occurred;
- b. A conviction of any crime of the first through fourth degree not specified in subsection a. or conduct which, if committed in another jurisdiction would constitute a crime in this State, for 10 years following release from custody or from the date of sentence if the person was not sentenced to a term of confinement except as provided in section 6 of this act;
- c. A conviction of a disorderly persons offense, or conduct which, if committed in another jurisdiction would constitute a disorderly persons offense in this State, for five years following release from custody or from the date of sentence if the person was not sentenced to a term of confinement; and
- d. Any pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed.

- 6. An employer shall not be permitted to consider when making an employment decision, or require any candidate to disclose or reveal, or to take any adverse action against any candidate on the basis of:
- a. any arrest or criminal accusation made against the candidate, which is not then pending against that person or which did not result in a conviction;
- b. any record which has been erased or expunged, or any record of an executive pardon, or other record legally nullified; or
- c. any adjudication of delinquency of a juvenile, any violation of a municipal ordinance, or any record which has been sealed.

7. a. In evaluating a candidate for a position for which a criminal history inquiry is conducted pursuant to this act, the

employer also shall consider additional factors, including but not limited to:

- (1) any information, if provided, pertaining to the degree of rehabilitation and good conduct, including a certificate of rehabilitation issued by any State or federal agency, which includes, but is not limited to, certificates issued pursuant to section 1 of P.L.2007, c.327 (C.2A:168A-7);
- (2) the accuracy of the criminal record in question produced by the candidate, or produced on behalf of the candidate, to the employer;
- (3) the amount of time that has elapsed since the conviction or release from custody; and
- (4) the nature and circumstances surrounding the crime and its relationship to the duties of the position sought or held.
- b. Employers shall document in writing their reasonable consideration of the factors set forth in subsection a. of this section.
- c. Employers shall use the Applicant Criminal Record Consideration Form, which specifies how an employer shall consider the above factors in reaching an adverse employment decision and how to document that decision.

- 8. a. An employer who has any questions or concerns relating to the candidate'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 candidate these questions or concerns and provide the candidate an opportunity to explain and contextualize any crime or offense, provide evidence of rehabilitation, and rebut any inaccuracies in the criminal history.
- b. An employer who makes an adverse employment decision after the complying with the requirements of subsection a. of this section shall provide the candidate in one package by registered mail:
 - (1) written notification of the adverse employment decision;
 - (2) a copy of the results of the criminal history inquiry;
- (3) a completed copy of the Applicant Criminal Record Consideration form provided for in subsection c. of section 6 of this act; and
 - (4) a second copy of the Notice of Rights.

9. a. A candidate who receives an adverse employment decision may, within ten business days after receipt of the notices required under subsection b. of section 7 of this act, provide additional information and evidence to the employer related to the accuracy and relevance of the results of the criminal history inquiry, including information pertaining to any of the factors listed in subsection a. of section 7 of this act. An employer may hold the position open for a candidate but shall not be required to wait for the response before filling the position.

- b. If the employer receives additional information pursuant to subsection a. of this section and has not yet filled the position at the time of receipt, the employer shall consider the additional information provided by the candidate.
 - c. An employer who maintains an adverse employment decision after considering any additional information provided by the candidate pursuant to subsection a. of this section shall:
 - (1) complete Part B of the Applicant Criminal Record Consideration Form; and
 - (2) within 45 business days of receipt of the additional information, provide the candidate with a second copy of the Applicant Criminal Record Consideration Form, as supplemented pursuant to paragraph (1) of subsection c. of this section, and a written notice of final decision.

- 10. a. In connection with any decision regarding employment, any information obtained by an employer that pertains to a candidate's criminal history shall:
 - (1) remain confidential;
- (2) only be shared with individuals that the employer has determined to have a need to know the contents for the purpose of evaluating or supervising candidates in a manner consistent with this act;
- (3) not be used, distributed, or disseminated by the employer for any use other than those permitted under this act; and
- (4) not be used, distributed, or disseminated by the employer to any other entity or individual, except as required by law.
- b. Nothing in this section shall be construed to prevent an employer from keeping the entirety of an employee's criminal record in the employee's confidential employee file.

11. An employer shall keep on file for three years from the date of completion a copy of the Applicant Criminal Records Consideration Form completed pursuant to subsection c. of section 7 of this act and, if applicable, a copy of the supplemental Applicant Criminal Records Consideration Form completed pursuant to subsection b. of section 8 of this act.

- 12. a. This act shall not apply:
- (1) When any federal or State law or regulation requires or permits the consideration of a candidate's criminal history for the purposes of employment or prohibits individuals with a specific type of criminal history from obtaining a specific type of employment, provided the exemption is limited to those offenses or types of offenses that federal or State law or regulation requires or permits the employer to consider; and

- 1 (2) To any position designated by the employer to participate in a 2 program or obligation designed specifically to encourage the 3 employment of persons with criminal histories.
 - b. It is the intent of the Legislature that the exemptions under this section be narrowly construed.

- 13. a. Excepting any provision of any other federal or State law or regulation that expressly requires or expressly permits the consideration of criminal histories in employment decisions, any and all use or consideration of an applicant's or employee's criminal history by an employer or prospective employer shall be conducted solely and exclusively in accordance with the provisions of this act.
- b. It is the intent of the Legislature to preclude and preempt, for as long as this act shall remain in effect, any and all present or future laws regarding the use of criminal histories in employment decisions promulgated by any local government in this State.

14. An employer shall not be found liable under the doctrine of negligent hiring based solely on the exclusion from consideration of the portions of a candidate's criminal record deemed outside the scope of inquiry established under section 5 of this act.

- 15. a. In connection with any position for employment, it shall be unlawful for any employer to produce or disseminate any advertisement that expresses, directly or indirectly, any limitation on eligibility for employment arising from a candidate's criminal history unless those limitations are mandated by federal or State law. In any action against an employer under this section, any such advertisement shall be presumptive evidence that the employer authorized the advertisement.
- b. In connection with any position for employment, it shall be unlawful for any employer to produce or disseminate any advertisement that expresses, directly or indirectly, that final employment is contingent upon a criminal background check, regardless of the employer's use or consideration of criminal histories in employment decisions.

- 16. a. The Division on Civil Rights in the Office of the Attorney General shall enforce the provisions of this act.
- b. An employer who violates the provisions of this act shall be liable to a civil penalty as follows:
- (1) for an employer with five to 24 employees at the time of the violation:
- (a) a Type 1 violation shall be subject to a fine of up to \$500;
 - (b) a Type 2 violation shall be subject to a fine of up to \$750;
- 47 (2) for an employer with 25 to 74 employees at the time of the violation:

- 1 (a) a Type 1 violation shall be subject to a fine of up to \$1,000;
 - (b) a Type 2 violation shall be subject to a fine of up to \$1,500;
 - (3) for employers with 75 to 149 employees at the time of the violation:
 - (a) a Type 1 violation shall be subject to a fine of up to \$2,000;
 - (b) a Type 2 violation shall be subject to a fine of up to \$2,500;
 - (4) for employers with 150 to 249 employees at the time of the violation:
 - (a) a Type 1 violation shall be subject to a fine of up to \$3,000;
 - (b) a Type 2 violation shall be subject to a fine of up to \$4,500; and
 - (5) for employers with 250 or more employees at the time of the violation:
 - (a) a Type 1 violation shall be subject to a fine of up to \$5,000;
 - (b) a Type 2 violation shall be subject to a fine of up to \$7,500.
 - c. The penalty prescribed in this section shall be collected and enforced by summary proceedings under the "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).

17. This act shall take effect on the first day of the seventh month following enactment but the Director of the Division on Civil Rights may take such anticipatory administrative action in advance thereof as shall be necessary for the implementation of this act.

STATEMENT

This bill, entitled "The Opportunity to Compete Act," would supplement the State's civil rights law to provide persons with criminal histories certain protections while seeking employment.

Specifically, this bill would prohibit an employer from conducting a criminal background check on job candidates during the pre-application and application process. Under the bill, the application process begins when a candidate inquires about employment and ends when a employer has extended a conditional offer of employment. The pre-application period precedes the application period and includes recruitment and solicitation of candidates.

Once a candidate has been found to be qualified and has received a conditional offer of employment, an employer is authorized to inquire about and consider a candidate's criminal history. Before an inquiry into the candidate's criminal history is made, the employer must provide the candidate written notice of the inquiry and obtain the candidate's consent to it. The candidate also shall be provided with a written "Notice of Rights" outlining the protections that the candidate is entitled to under the bill.

The bill authorizes an employer to consider in its employment decision convictions for certain serious crimes regardless of when the crime occurred. These crimes include murder or attempted murder, arson, a sex offense for which the offender served time in State prison and is required to register as a sex offender, and terrorism. An employer may only consider other crimes of the first through fourth degree if the crime was committed within the last 10 years. An employer also may consider convictions for a disorderly persons offense that occurred within the last five years and pending criminal charges until the case is dismissed.

Under the bill, when making an employment decision, an employer may not consider or require any candidate to disclose or reveal any arrest or criminal accusation made against the candidate which is not then pending against that person or which did not result in a conviction. Records which have been erased or expunged, records of an executive pardon, or legally nullified records may not be considered by an employer, nor may the employer consider a adjudication of delinquency of a juvenile, any violation of a municipal ordinance, or any record which has been sealed.

When an employer is deciding whether to hire a candidate, the employer must consider the results of any criminal history inquiry in combination with such as factors as: (1) the degree of the candidate's rehabilitation and good conduct, including any certificate of rehabilitation issued by any State or federal agency; (2) the accuracy of the criminal record; (3) the amount of time that has elapsed since the conviction or release from custody; and (4) the nature and circumstances surrounding the crime and its relationship to the duties of the position sought or held. The reasonable consideration of these factors are to be documented in writing by the employer through the use of a written standardized form known as an Applicant Criminal Record Consideration Form.

The bill requires employers to make a good faith effort to discuss with the candidate any questions or concerns related to the candidate's criminal history and provide the candidate an opportunity to explain and contextualize any crime or offense, provide evidence of rehabilitation, and rebut any inaccuracies in the criminal history.

If an employer makes an adverse employment decision, such as rescinding an offer of employment, after a discussion of a candidate's criminal history, the employer must provide the candidate in one package by registered mail: (1) written notification of the adverse employment decision; 2) a copy of the results of the criminal history inquiry; (3) a completed copy of the Applicant Criminal Record Consideration Form, and (4) a second copy of the Notice of Rights.

A candidate who received an adverse employment decision has ten business days after receipt of this written information to provide

1	evidence to the employer related to the accuracy and relevance of
2	the results of the criminal history inquiry. An employer may, but is
3	not required to, hold the position open for the candidate. An
4	employer who maintains an adverse employment decision after
5	considering any additional information provided by the candidate is
6	required to complete an additional section of the Applicant Criminal
7	Record Consideration Form, and within 45 days provide this to the
8	candidate along with written notice of the final decision.
9	Employers are subject to civil fines for failure to comply with
10	the provisions of the bill ranging from \$500 to \$7,500 depending on
11	the number of employees the employer has and whether the
12	employer has committed previous violations.