

[First Reprint]

ASSEMBLY COMMITTEE SUBSTITUTE FOR
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STATE OF NEW JERSEY
216th LEGISLATURE

ADOPTED JUNE 23, 2014

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SYNOPSIS

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

CURRENT VERSION OF TEXT

As amended by the Senate on June 26, 2014.

(Sponsorship Updated As Of: 6/27/2014)

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

4

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

7

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

10

11 2. The Legislature finds and declares that:

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

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

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

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

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

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

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

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

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

41 j. It is the intent and purpose of “The Opportunity to Compete
42 Act” to improve the economic viability, health, and security of New
43 Jersey communities and to assist people with criminal records to

EXPLANATION – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

Matter enclosed in superscript numerals has been adopted as follows:

¹Senate floor amendments adopted June 26, 2014.

1 reintegrate into the community, become productive members of the
2 workforce, and to provide for their families and themselves.

3

4 3. As used in this act:

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

9 “Applicant for employment” means any person whom an
10 employer considers when identifying potential employees, through
11 any means, including, but not limited to, recruitment, solicitation,
12 or seeking personal information, or any person who requests to be
13 considered for employment by an employer, or who requests
14 information from an employer related to seeking employment, and
15 shall include any person who currently is an employee of the
16 employer.

17 “Criminal record” means information collected by criminal
18 justice agencies on individuals consisting of identifiable
19 descriptions and notations of arrests, detentions, indictments, or
20 other formal criminal charges, and any disposition arising
21 therefrom, including acquittal, sentencing, correctional supervision,
22 release or conviction, including, but not limited to, any sentence
23 arising from a verdict or plea of guilty or nolo contendere, including
24 a sentence of incarceration, a suspended sentence, a sentence of
25 probation, or a sentence of conditional discharge.

26 “Employee” ¹~~means~~ shall mean¹ a person who is hired for a
27 wage, salary, fee, or payment to perform work for an employer, but
28 excludes any person employed in the domestic service of any family
29 or person at the person’s home, any independent contractors, or any
30 directors or trustees. The term also shall include interns and
31 apprentices.

32 “Employer” means any person, company, corporation, firm,
33 labor organization, or association which has 15 or more employees
34 over 20 calendar weeks and does business, employs persons, or
35 takes applications for employment within this State, ¹~~and means~~
36 including¹ the State, any county or municipality, or any
37 instrumentality thereof. The term shall include job placement and
38 referral agencies and other employment agencies, but excludes the
39 United States or any of its departments, agencies, boards, or
40 commissions, or any employee or agent thereof.

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

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

4 “Initial employment application process” means the period
5 beginning when an applicant for employment first makes an inquiry
6 to an employer about a prospective employment position or job
7 vacancy or when an employer first makes any inquiry to an
8 applicant for employment about a prospective employment position
9 or job vacancy, and ending when an employer has conducted ¹[an]
10 a first¹ interview ¹[and determined the applicant is qualified]¹,
11 whether in person or by any other means¹ [, and selected the] of an¹
12 applicant ¹[as the employer’s first choice to fill the position] for
13 employment¹.
14

15 4. a. Except as otherwise provided in section ¹[8] 6¹ of this
16 act:

17 (1) ¹[an] An¹ employer shall not require an applicant for
18 employment to complete any employment application that makes
19 any inquiries regarding an applicant’s criminal record during the
20 initial employment application process.

21 (2) ¹[an] An¹ employer shall not make any oral or written
22 inquiry regarding an applicant’s criminal record during the initial
23 employment application process.

24 b. Notwithstanding the provisions of subsection a. of this
25 section, if an applicant discloses any information regarding the
26 applicant’s criminal record, by voluntary oral or written disclosure,
27 during the initial employment application process, the employer
28 may make ¹[a reasonable, limited inquiry regarding only the
29 criminal history disclosed.

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

34 d.] inquiries regarding the applicant’s criminal record during the
35 initial employment application process.

36 c.¹ Nothing set forth in this section shall be construed to prohibit
37 an employer from requiring an applicant for employment to
38 complete an employment application that makes any inquiries
39 regarding an applicant’s criminal record after the initial
40 employment application process has concluded or from making any
41 oral or written inquiries regarding an applicant’s criminal record
42 after the initial employment application process has concluded. The
43 provisions of this section shall not preclude an employer from
44 refusing to hire an applicant for employment based upon the
45 applicant’s criminal record, ¹unless the criminal record or relevant
46 portion thereof has been expunged or erased through executive

1 pardon,¹ provided that such refusal is consistent with ¹[sections 5
2 and 6 of this act as well as any]¹ other applicable laws, rules and
3 regulations.

4
5 ¹[5.a. An employer shall not be permitted to consider when
6 making an employment decision, or require any applicant to disclose
7 or reveal, or to take any adverse employment action against any
8 applicant on the basis of:

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

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

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

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

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

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

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

39 (3) arson and arson-related offenses as defined by N.J.S.2C:17-
40 1;

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

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

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

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

47 (8) possession of weapons during commission of certain

1 crimes as defined by section 1 of P.L.1998, c.26 (C.2C:39-4.1);
2 (9) burglary as defined by N.J.S.2C:18-2;
3 (10) aggravated assault as defined by N.J.S.2C:12-1;
4 (11) any crime listed in 18 U.S.C. Chapter 113B – Terrorism,
5 and any crime listed in the "September 11th, 2001 Anti-Terrorism
6 Act," P.L.2002, c.26 (C.2C:38-1 et seq); and
7 (12) any offenses of a nature substantially similar to an offense
8 set forth in paragraphs (1) through (11) of this subsection b.
9 committed in another jurisdiction, regardless of when they
10 occurred.】¹

11

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

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

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

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

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

24 b. An employer who has any questions or concerns relating to
25 the applicant's criminal history and suitability for the position
26 sought or held based on a criminal history inquiry shall make a good
27 faith effort to discuss with the applicant these questions or concerns
28 and, while the position remains open, consider any information
29 provided by the applicant.】¹

30

31 ¹【7.】5.¹ Unless otherwise permitted or required by law, an
32 employer shall not knowingly or purposefully publish, or cause to
33 be published, any advertisement that solicits applicants for
34 employment where that advertisement explicitly provides that the
35 employer will not consider any applicant who has been arrested or
36 convicted of one or more crimes or offenses. The provisions of this
37 section shall not apply to any advertisement that solicits applicants
38 for a position in law enforcement, corrections, the judiciary,
39 homeland security, or emergency management, or any other
40 employment position where a criminal history record background
41 check is required by law, rule or regulation, or where an arrest or
42 conviction by the person for one or more crimes or offenses would
43 or may preclude the person from holding such employment as
44 required by any law, rule or regulation, or where any law, rule, or
45 regulation restricts an employer's ability to engage in specified
46 business activities based on the criminal records of its employees.
47 Nothing set forth in this section shall be construed as prohibiting an

1 employer from publishing, or causing to be published, an
2 advertisement that contains any provision setting forth any other
3 qualifications for employment, as permitted by law, including, but
4 not limited to, the holding of a current and valid professional or
5 occupational license, certificate, registration, permit or other
6 credential, or a minimum level of education, training or
7 professional, occupational, or field experience.

8
9 ¹**[8.] 6.**¹ The provisions of ¹subsection a. of section 4 of¹ this act
10 shall not ¹**[apply]** prohibit an employer from requiring an applicant
11 for employment to complete an employment application that makes
12 any inquiries regarding an applicant's criminal record during the
13 initial employment application process or from making any oral or
14 written inquiries regarding an applicant's criminal record during the
15 initial employment application process¹ if:

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

19 b. The employment sought or being considered is for a position
20 where a criminal history record background check is required by
21 law, rule or regulation, or where an arrest or conviction by the
22 person for one or more crimes or offenses would or may preclude
23 the person from holding ¹**[that]** such¹ employment as required by
24 any law, rule or regulation, or where any law, rule, or regulation
25 restricts an employer's ability to engage in specified business
26 activities based on the criminal records of its employees¹**[**, except
27 that any adverse employment decision regarding a position
28 subject to this exemption that is based on a criminal history
29 outside of the enumerated offenses or time periods of the applicable
30 federal or State law, regulation, or rule shall remain subject to
31 section 6 of this act¹**]**; or

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

37
38 ¹**[9.] 7.**¹ a. The governing body of a county or municipality
39 shall not adopt any ordinance, resolution, law, rule or regulation
40 regarding criminal histories in the employment context, except for
41 ordinances adopted to regulate ¹**[county or]**¹ municipal operations.

42 b. The provisions of this act shall preempt any ordinance,
43 resolution, law, rule or regulation adopted by the governing body of
44 a county or municipality prior to the effective date of this act
45 regarding criminal histories in the employment context, except for
46 ordinances adopted to regulate ¹**[county or]**¹ municipal operations.

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

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

9 c. **[8.]**¹ The penalties set forth in section ¹**[11.]** **9**¹ of this act shall
10 be the sole remedy provided for violations of this act. Nothing set
11 forth in this act shall be construed as creating or establishing a
12 standard of care or duty for employers with respect to any law other
13 than this act. Evidence that an employer has violated, or is alleged
14 to have violated, the provisions of this act, shall not be admissible
15 in any legal proceeding with respect to any law or claim other than
16 a proceeding to enforce the provisions of this act. Nothing set forth
17 in this act shall be construed as creating, establishing or authorizing
18 a private cause of action by an aggrieved person against an
19 employer who has violated, or is alleged to have violated, the
20 provisions of this act.

21

22 ¹**[11.]** **9.**¹ Any employer who violates this act shall be liable for
23 a civil penalty in an amount not to exceed \$1,000 for the first
24 violation, \$5,000 for the second violation, and \$10,000 for each
25 subsequent violation collectible by the Commissioner of Labor and
26 Workforce Development in a summary proceeding pursuant to the
27 "Penalty Enforcement Law of 1999," P.L.1999, c.274 (C.2A:58-10
28 et seq.).

29

30 ¹**[12.]** **10.**¹ This act shall take effect the first day of the seventh
31 month next following the date of enactment, but the Commissioner
32 of Labor and Workforce Development may take any anticipatory
33 administrative action in advance as shall be necessary for the
34 implementation of this act.