The Assembly Labor Committee reports favorably Assembly Committee Substitute for Assembly Bill No. 3837.

This committee substitute, entitled “The Opportunity to Compete Act,” supplements the State’s civil rights law to provide persons with criminal histories certain protections when seeking employment.

Specifically, this committee substitute prohibits an employer from conducting a criminal background check on job candidates during the pre-application and application process. Under the committee substitute, the application process begins when a candidate inquires about employment and ends when an 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 committee substitute.

The committee substitute 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, robbery, kidnapping, human trafficking, possession of weapons, burglary, aggravated assault, 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. The committee substitute further provides that if any of the candidate’s criminal history is subject to consideration by the employer due to the fact that it occurred within 10 years for crimes of the first through
fourth degree, or five years for disorderly persons offenses, then the employer may also consider any prior criminal history regardless of when it occurred.

Under the committee substitute, 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 an 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) any information, if provided to the employer by or on behalf of the candidate, pertaining to the degree of the candidate’s rehabilitation and good conduct, including any certificate of rehabilitation issued by any State or federal agency; (2) any information, if provided to the employer by or on behalf of the candidate, pertaining to the accuracy of the criminal record; (3) the amount of time that has elapsed since the conviction or release from custody; (4) the nature and circumstances surrounding the crime or crimes; and (5) the duties and settings of the job sought or held. The reasonable consideration of these factors is to be documented by the employer through the use of the form known as the Criminal Record Consideration Form.

The committee substitute 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 with 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; and (3) a completed copy of the Criminal Record Consideration Form.

A candidate who received an adverse employment decision has 10 business days after receipt of this written information to provide evidence to the employer related to the accuracy and relevance of the results of the criminal history inquiry. An employer may, but is not required to, hold the position open for the candidate. An employer who maintains an adverse employment decision after considering any additional information provided by the candidate is required to provide
to the candidate a written notice of the final decision within 45 days of receipt of the additional information.

The committee substitute provides that nothing provided therein is actionable by private parties. Employers are subject to civil fines for failure to comply with the provisions of the bill ranging from $500 to $7,500 depending on the number of employees the employer has and whether the employer has committed previous violations.

MINORITY STATEMENT
By Assemblymen Dancer, DiMaio & Space

While the sponsor of the committee substitute should be commended for her efforts to mitigate the issues that ex-convicts must confront in finding gainful employment, the committee substitute as currently written gives rise to a number of concerns among employers and threatens negative implications for New Jersey’s economy.

In making employment decisions, among the most important decisions they must make, employers should be able to gather all of the relevant information they need concerning a prospective employee. While reasonable limits on the scope of inquiry do and should exist, this committee substitute adds unneeded bureaucratic hurdles to a process that, for many employers, is already time consuming and costly. The committee substitute only exacerbates those time and cost issues without providing any counterbalancing benefit to employers. Furthermore, employers are concerned that the committee substitute requirements may expose them to unwarranted liabilities and other repercussions.

Additional burdens such as those proposed in this committee substitute serve to make New Jersey less competitive as a place in which to locate an enterprise, and drive up costs for those already operating here, especially small businesses. The result is a worse, not better, environment for job creation. The Legislature should instead work on improving that environment.