

# EMPLOYMENT UPDATE

## MARTIN CLEARWATER & BELL LLP

### The Opportunity to Compete Act: New Jersey Issues “Ban-the-Box” Regulations

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On December 7, 2015, the New Jersey Department of Labor and Workforce Development (DOL) adopted a new set of rules providing clarification and guidance under The Opportunity to Compete Act (OTCA), more commonly known as the “Ban-the-Box” law.

The OTCA became effective on March 1, 2015, and generally prohibits employers from making “any oral or written inquiry” into an applicant’s criminal background during the “initial employment application process” (IEAP). After reviewing comments received regarding the proposed regulations, the DOL issued new regulations, clarifying key terms, definitions, provisions under the OTCA.

#### DEFINITIONS OF “EMPLOYERS” AND “EMPLOYEES”

- Under the expanded definition of “employer,” the law covers any person or entity, which has “15 or more employees [for each working day] over 20 calendar weeks [in the current or preceding calendar year], whether those employees work inside or outside of New Jersey, and does business, employs persons, or takes applications for employment within [New Jersey], any county or municipality, or any instrumentality thereof.”
- The regulations interpret the definition of “employee” to include almost all workers, including “interns and apprentices, whether paid or unpaid[,]” but excludes independent contractors, domestic workers, directors, or trustees.

#### DEFINITION OF “EMPLOYMENT”

- Under the OTCA, “employment” is deemed to be in New Jersey if “the physical location of the prospective employment shall be in whole, or substantial part, within [the] State.”
- The physical location is in “substantial part” within the State if “the employer has reason to believe at the outset of the initial employment application process that the percentage of work hours that will be spent performing work functions within New

Jersey . . . will equal or exceed 50 percent of . . . total work hours.”

#### EMPLOYMENT APPLICATIONS FOR MULTI-STATE OPERATIONS

- For multi-state operations with physical locations substantially in the State, a single employment application may be used, so long as the application includes a disclaimer, immediately preceding the criminal background inquiry, instructing New Jersey applicants not to complete that portion of the form.

#### THE “INITIAL EMPLOYMENT APPLICATION PROCESS”

- With respect to the “initial employment application process,” the key term around which several provisions revolve, the regulations clarify that an employer may not inquire into an applicant’s criminal background until after the IEAP has concluded.
- The IEAP begins when either the applicant or the employer first initiates contact regarding the position sought for employment and concludes upon completion of the initial interview for the position sought.

#### THE “INTERVIEW”

- An “interview” may consist of one, single, live and direct contact between the employer and the applicant. This contact may occur in person, by telephone, or via video conferencing, and must include a discussion about the position sought or the applicant’s qualifications for the position.
- Under the spirit and intent of the law, the initial interview should be conducted in good faith and be detailed enough to enable the employer to make a meaningful deliberation of the applicant’s qualifications for the position sought; hence, an abbreviated or otherwise superficial interview, conducted solely to satisfy the “initial interview” requirement, might not suffice.

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- If the position sought requires multiple interviews in the same day, the IEAP will conclude upon completion of the first interview conducted, regardless of whether there are other interviews scheduled for the same day.

- o However, it would be prudent to ensure that if an inquiry is made following the first interview, in a series of interviews scheduled for that day, the employer allows sufficient time to deliberate as to whether the applicant is at least minimally qualified for the position sought prior to inquiring.

- Finally, the DOL clarifies that there is no requirement to “confirm” the conclusion of the IEAP with the applicant. Once the initial interview is completed, the employer may freely inquire into the applicant’s criminal background.

## **INTERNET, PUBLIC RECORDS, AND OTHER SEARCHES**

- In response to comments regarding internet searches, public database searches, and third party inquiries of an applicant’s criminal background during the IEAP, the DOL reiterated the intent of the law – to provide all applicants with “the opportunity to interview before the employer learns of their criminal records” – and firmly stated that to allow any oral or written inquiry prior to the conclusion of the IEAP would “render the law meaningless.” Thus, any employer-initiated inquiry into the applicant’s criminal background, regardless of the method employed, is prohibited during the IEAP.

## **VOLUNTARY DISCLOSURES**

- If, however, the applicant makes a voluntary oral or written disclosure regarding his/her criminal background during the IEAP, the employer is free to inquire into the applicant’s criminal background during the IEAP. The regulations provide that, following the applicant’s voluntary disclosure, the employer “may make [such] inquiries to anyone, including to the applicant, during the [IEAP] regarding the applicant’s criminal record.”

## **STAFFING AND JOB PLACEMENT INDUSTRY**

- The DOL also provides guidance on the application of the OTCA in regards to the staffing and job placement industry. Based on the statutory definition of a “co-employment” relationship, the DOL clarifies the applicability of the OTCA to client companies utilizing the industry’s services.

- o Where a temporary help service supplies their employees to a client company, the client company is not restricted from inquiring into the criminal background of the employee assigned to the client company’s worksite. The DOL clarifies that, in this context, the staffing agency is the employer, not the client company; thus, the OTCA does not apply to the client company.

## **EXEMPTIONS**

- Under the regulations, the OTCA exempts employers if the employment sought falls within any exemptions below:

- o Positions in “law enforcement, corrections, the judiciary, homeland security, or emergency management”;

- o Positions 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”; or

- o Position is “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.”

## **PENALTIES AND APPEALS**

- The OTCA provides incremental penalties for violations:

- o First violation – not more than \$1,000;

- o Second Violation – not more than \$5,000; and

- o Third and subsequent violations – not more than \$10,000.

- Where applicable, the following factors are considered in determining the appropriate penalty for a violation:

1. The seriousness of the violation;

2. The past history of previous violations by the employer;

3. The good faith of the employer;

4. The size of the employer; and

5. Any other factors which are deemed to be appropriate under the circumstances.

- An employer may file an appeal, to be received by the Commissioner “within 15 days following receipt by the employer of the notification” of the violation. The Commissioner may decide an appeal on the “written record” or upon a full hearing.

*This advisory contains highlights of the regulations and is not intended to be legal advice. If you have any questions or concerns regarding the OTCA or other employment law-related questions, please contact Greg Reilly at (212) 916-0920 or [gregory.reilly@mcblaw.com](mailto:gregory.reilly@mcblaw.com) or Adam Guttell at (212) 916-0938 or [adam.guttell@mcblaw.com](mailto:adam.guttell@mcblaw.com).*