

ASSEMBLY COMMITTEE SUBSTITUTE FOR
ASSEMBLY, No. 3837

STATE OF NEW JERSEY
215th LEGISLATURE

ADOPTED DECEMBER 16, 2013

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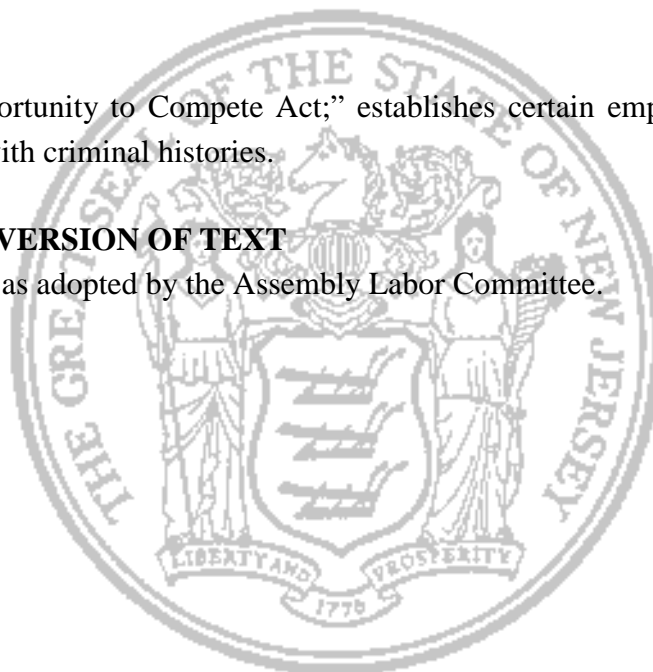
Assemblywomen Jasey and Tucker

SYNOPSIS

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

CURRENT VERSION OF TEXT

Substitute as adopted by the Assembly Labor Committee.



(Sponsorship Updated As Of: 12/20/2013)

1 AN ACT concerning employment rights of persons with criminal
2 histories and supplementing Title 10 of the Revised Statutes.

3

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

6

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

9

10 2. The Legislature finds and declares that:

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

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

19 c. Commercially-run criminal background checks commonly
20 contain errors and inaccuracies and even Federal Bureau of
21 Investigation (FBI) background checks are out of date 50 percent of
22 the time.

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

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

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

31 g. Research has shown that many individuals with criminal
32 histories pose no greater risk of future criminality than do people
33 with no criminal history and are equally qualified, reliable, and
34 trustworthy candidates for employment.

35 h. Securing employment significantly reduces the risk of
36 recidivism.

37 i. It is the intent and purpose of “The Opportunity to Compete
38 Act” to improve the economic viability, health, and security of New
39 Jersey communities and to assist people with conviction histories to
40 reintegrate into the community and to provide for their families and
41 themselves.

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

46 k. The nation’s largest public employer, the United States
47 government, and the nation’s largest private employer, Wal-Mart

1 Stores, Inc., have each implemented their own policies removing
2 barriers to the employment of persons with criminal histories.

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

6

7 3. As used in this act:

8 “Adverse employment decision” means the revocation of a
9 conditional offer of employment from a candidate, the termination
10 of employment, or the demotion of an employee.

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

15 “Application process” means the period beginning when the
16 candidate inquires about the employment being sought and ending
17 when an employer has extended a conditional offer of employment
18 to the candidate.

19 “Candidate” means any person whom an employer considers
20 when identifying potential employees, through any means,
21 including, but not limited to, recruitment, solicitation, or seeking
22 personal information, or any person who requests to be considered
23 for employment by an employer, or who requests information from
24 an employer related to seeking employment, and shall include any
25 person who currently is an employee of the employer.

26 “Conditional offer of employment” means an offer of
27 employment that is contingent only upon a criminal history inquiry.

28 “Conviction” means any sentence arising from a verdict or plea
29 of guilty or nolo contendere, including a sentence of incarceration, a
30 suspended sentence, a sentence of probation, or a sentence of
31 conditional discharge.

32 “Criminal Record Consideration Form” means the written,
33 standardized form set forth in section 17 of this act.

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

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

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

7 “Filled the position” means an offer of employment has been
8 both extended and accepted by another candidate.

9 “Inquiry” means any direct or indirect conduct intended to gather
10 information from or about a candidate or employee, using any mode
11 of communication, including but not limited to application forms,
12 interviews, and criminal history inquiries.

13 “Law enforcement agency” means any public agency, any police
14 force, department or division within the State of New Jersey, or any
15 county or municipality thereof, which is empowered by statute to
16 act for the detection, investigation, arrest, or conviction of persons
17 violating the criminal laws of this State.

18 “Law enforcement officer” means any person who is employed
19 as a member of any State, county or municipal law enforcement
20 agency, department, or division of those governments who is
21 statutorily empowered to act for the detection, investigation, arrest,
22 or conviction of persons violating the criminal laws of this State
23 and statutorily required to successfully complete a training course
24 approved by, or certified as being substantially equivalent to such
25 an approved course, by the Police Training Commission pursuant to
26 P.L.1961, c.56 (C.52:17B-66 et seq.).

27 “Notice of Rights” means the written, standardized form set forth
28 in section 18 of this act.

29 “Otherwise qualified” means any candidate who meets all other
30 criteria for a position.

31 “Pre-application inquiry” shall mean any inquiry in connection
32 with any decision regarding employment that precedes the
33 application process, including, but not limited to, any recruitment of
34 candidates, attempts to identify candidates, or solicitation of
35 candidates.

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

42 “Type 2 violation” means any violation of this act that is
43 preceded by another violation within the previous three years. Each
44 action that would constitute a Type 2 violation of this act shall
45 constitute a separate Type 2 violation.

- 1 4. a. An employer shall not conduct any pre-application inquiry
2 regarding any person's criminal history in connection with any
3 decision regarding employment.
- 4 b. An employer shall not make any inquiry regarding a
5 candidate's criminal history during the application process.
- 6 c. Inquiry into and consideration of the criminal history of a
7 candidate may take place after the candidate has been found
8 otherwise qualified and has received a conditional offer of
9 employment.
- 10 d. Notwithstanding subsections a., b., and c. of this section, if a
11 candidate discloses any information regarding the candidate's
12 criminal history by voluntary oral or written disclosure, the
13 employer may consider the disclosed criminal history pursuant to
14 section 5 of this act. In the event of a voluntary disclosure, the
15 employer also may make a reasonable, limited inquiry about only
16 the criminal history disclosed.
- 17 e. Any information obtained regarding a candidate's criminal
18 history, whether obtained through an inquiry or by any means other
19 than voluntary oral or written disclosure pursuant to subsection d.
20 of this section, shall not be considered in making an employment
21 determination until after a conditional offer has been made.
- 22 f. Prior to conducting any criminal history inquiry concerning
23 a candidate, the employer shall provide standard written notification
24 advising that, upon the written consent of the candidate, the
25 employer will conduct a criminal history inquiry and provide to the
26 candidate a copy of the Notice of Rights as set fourth in section 18
27 of this act. If the candidate declines to consent to a criminal history
28 inquiry, the employer may withdraw the conditional offer of
29 employment.
- 30
- 31 5. Except as provided in section 6 of this act, an employer shall
32 be permitted to consider, in connection with any decision regarding
33 employment, the following convictions and charges:
- 34 a. A conviction for any crime of the first through fourth degree
35 not specified in subsection d. or a conviction for conduct from
36 another jurisdiction which, if committed in this State, would
37 constitute a crime of the first through fourth degree, for 10 years
38 following release from custody or from the date of sentence if the
39 person was not sentenced to a term of confinement;
- 40 b. A conviction for a disorderly persons offense or a conviction
41 for conduct from another state which, if committed in this State,
42 would constitute a disorderly persons offense, for five years
43 following release from custody or from the date of sentence if the
44 person was not sentenced to a term of confinement;
- 45 c. Any pending criminal charges, which shall include cases that
46 have been continued without a finding until such time as the case is
47 dismissed; and

- 1 d. Convictions for:
- 2 (1) Criminal homicide, including murder, manslaughter, and
3 death by auto, as defined by N.J.S.2C:11-2;
- 4 (2) Attempted murder as defined by N.J.S.2C:5-1 and
5 N.J.S.2C:11-3;
- 6 (3) Arson and arson-related offenses as defined by N.J.S.2C:17-
7 1;
- 8 (4) Sex offenses as defined by subsection b. of section 2 of
9 P.L.1994, c.133 (C.2C:7-2);
- 10 (5) Robbery as defined by N.J.S.2C:15-1;
- 11 (6) Kidnapping as defined by N.J.S.2C:13-1;
- 12 (7) Human trafficking as defined by section 1 of P.L.2005, c.77
13 (C.2C:13-8);
- 14 (8) Possession of weapons during commission of certain crimes
15 as defined by section 1 of P.L.1998, c.26 (C.2C:39-4.1);
- 16 (9) Burglary in the second degree as defined by N.J.S.2C:18-2;
- 17 (10) Aggravated assault in the second or third degree as defined
18 by N.J.S.2C:12-1;
- 19 (11) Any crime listed in 18 U.S.C. Chapter 113B – Terrorism (18
20 U.S.C. s.2331 et seq.), and any crime listed in the "September 11th,
21 2001 Anti-Terrorism Act," P.L.2002, c.26 (C.2C:38-1 et seq.); and
- 22 (12) Any offenses of a nature substantially similar to an offense
23 set forth in paragraphs (1) through (11) of this subsection d.
24 committed in another jurisdiction, regardless of when they
25 occurred.
- 26
- 27 6. An employer shall not be permitted to consider when making
28 an employment decision, or require any candidate to disclose or
29 reveal, or to take any adverse action against any candidate on the
30 basis of:
- 31 a. Any arrest or criminal accusation made against the
32 candidate, which is not then pending against that person or which
33 did not result in a conviction;
- 34 b. Any record which has been erased or expunged, or any
35 record that has been the subject of an executive pardon, or any
36 record that has been otherwise legally nullified; or
- 37 c. Any adjudication of delinquency of a juvenile, any violation
38 of a municipal ordinance, or any record which has been sealed.
- 39
- 40 7. If any part of the candidate's criminal history may be
41 considered pursuant to section 5 of this act, then all prior disorderly
42 persons convictions and indictable offenses, or, if from any other
43 jurisdiction, convictions for conduct which, if committed in this
44 State, would constitute a disorderly persons conviction or indictable
45 offense, may be considered by the employer unless deemed
46 impermissible pursuant to section 6 of this act.

1 8. a. In reasonably evaluating a candidate for a position for
2 which a criminal history inquiry is conducted pursuant to this act,
3 the employer also shall collectively consider additional factors,
4 including but not limited to:

5 (1) any information, if provided to the employer by or on behalf
6 of the candidate, pertaining to the degree of rehabilitation and good
7 conduct, including a certificate of rehabilitation issued by any state
8 or federal agency, which includes, but is not limited to, certificates
9 issued pursuant to section 1 of P.L.2007, c.327 (C.2A:168A-7);

10 (2) any information, if provided to the employer by or on behalf
11 of the candidate, pertaining to the accuracy of the criminal record in
12 question;

13 (3) the amount of time that has elapsed since the conviction or
14 release from custody;

15 (4) the nature of and circumstances surrounding the crime or
16 crimes; and

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

18 b. If an employer makes an adverse employment decision after
19 conducting a criminal history inquiry, the employer shall certify in
20 writing its reasonable consideration of the factors set forth in
21 subsection a. of this section using the Criminal Record
22 Consideration Form set forth in section 17 of this act.

23
24 9. a. An employer who has any questions or concerns relating
25 to the candidate's criminal history and suitability for the position
26 sought or held based on a criminal history inquiry shall make a
27 good faith effort to discuss with the candidate these questions or
28 concerns and provide the candidate with an opportunity to explain
29 and contextualize any crime or offense, provide evidence of
30 rehabilitation, and rebut any inaccuracies in the criminal history.

31 b. An employer who makes an adverse employment decision
32 after complying with the requirements of subsection a. of this
33 section shall provide to the candidate in one package by registered
34 mail:

35 (1) written notification of the adverse employment decision;

36 (2) a copy of the results of the criminal history inquiry; and

37 (3) a completed copy of the Criminal Record Consideration
38 Form as set forth in section 17 of this act.

39
40 10. a. A candidate who receives an adverse employment
41 decision may, within 10 business days after receipt of the
42 documents required under subsection b. of section 9 of this act,
43 provide additional information or evidence to the employer related
44 to the accuracy or relevance of the results of the criminal history
45 inquiry, including information pertaining to any of the factors listed
46 in subsection a. of section 8 of this act. An employer may hold the

1 position open for a candidate but is not required to wait for the
2 response before filling the position.

3 b. If the employer receives additional information pursuant to
4 subsection a. of this section and has not yet filled the position at the
5 time of receipt, the employer shall consider the additional
6 information provided by the candidate.

7 c. An employer who maintains an adverse employment
8 decision after considering any additional information provided by
9 the candidate pursuant to subsections a. and b. of this section shall,
10 within 45 business days of receipt of the additional information,
11 provide the candidate with a written notice of final decision.

12

13 11. An employer shall keep on file for three years from the date
14 of completion a copy of the Criminal Records Consideration Form
15 completed pursuant to subsection b. of section 8 of this act.

16

17 12. The provisions of this act shall not apply to the following:

18 a. Any employment decision concerning a law enforcement
19 officer or a candidate for a position as a law enforcement officer;

20 b. When any federal or State law, regulation, or rule holds that
21 persons with criminal records are or may be deemed ineligible to
22 fill the position at issue, including but not limited to P.L.1999,
23 c.432 (C.15A:3A-1 et seq.), regarding nonprofit youth serving
24 organizations, or when any federal or State law, regulation, or rule
25 restricts an employer's ability to engage in specified business
26 activities based on the criminal records of its employees, except that
27 any adverse employment decision regarding a position subject to
28 this exemption that is based on a criminal history outside of the
29 enumerated offenses or time periods of the applicable federal or
30 State law, regulation, or rule, shall remain subject to subsection a.
31 of section 8 of this act; and

32 c. Any position designated by the employer to be part of a
33 program or systematic effort designed predominantly or exclusively
34 to encourage the employment of those with criminal histories.

35 It is the intent of the Legislature that the exemptions under this
36 section be narrowly construed.

37

38 13. a. Excepting any provision of any other federal or State law,
39 regulation, or rule that expressly requires or expressly permits the
40 consideration of criminal histories in employment decisions, or
41 when any federal or State law, regulation, or rule restricts an
42 employer's ability to engage in specified business activities based
43 on the criminal records of its employees, any and all use or
44 consideration of a candidate's or employee's criminal history by an
45 employer or prospective employer shall be conducted solely and
46 exclusively in accordance with the provisions of this act.

1 b. It is the intent of the Legislature to preclude and preempt,
2 for as long as this act shall remain in effect, any and all present or
3 future laws regarding the use of criminal histories in employment
4 decisions promulgated by any local government in this State.

5

6 14. a. No employer shall be found liable based on the exclusion
7 from consideration of the portions of a candidate's or employee's
8 criminal record deemed outside the scope of inquiry by sections 5
9 and 6 of this act.

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

14 c. This act shall not be actionable by private parties.

15

16 15. a. In connection with any employment position, it shall be
17 unlawful for an employer to produce or disseminate any
18 advertisement or posting that directly or indirectly references the
19 use or consideration of an applicant's criminal history, except that
20 nothing in this section shall preclude the expression of statutory,
21 regulatory, or rule-based eligibility restrictions applicable to the
22 position as described in subsections a. and b. of section 12 of this
23 act, so long as that expression is limited to the specified offenses
24 and time periods established by law.

25 b. In any action against an employer under this section, any
26 advertisement or posting shall be presumptive evidence that the
27 employer authorized the advertisement or posting.

28

29 16. a. The Division on Civil Rights in the Department of Law
30 and Public Safety shall enforce the provisions of this act. Any
31 complaint shall be filed with the Division on Civil Rights within
32 180 days of the alleged violation.

33 b. An employer who violates the provisions of this act shall be
34 liable for a civil penalty as follows:

35 (1) for an employer with 15 to 24 employees at the time of the
36 violation:

37 (a) a Type 1 violation shall be subject to a fine of up to \$500;

38 (b) a Type 2 violation shall be subject to a fine of up to \$750;

39 (2) for an employer with 25 to 74 employees at the time of the
40 violation:

41 (a) a Type 1 violation shall be subject to a fine of up to \$1,000;

42 (b) a Type 2 violation shall be subject to a fine of up to \$1,500;

43 (3) for employers with 75 to 149 employees at the time of the
44 violation:

45 (a) a Type 1 violation shall be subject to a fine of up to \$2,000;

46 (b) a Type 2 violation shall be subject to a fine of up to \$2,500;

- 1 (4) for employers with 150 to 249 employees at the time of the
 2 violation:
 3 (a) a Type 1 violation shall be subject to a fine of up to \$3,000;
 4 (b) a Type 2 violation shall be subject to a fine of up to \$4,500;
 5 and
 6 (5) for employers with 250 or more employees at the time of the
 7 violation:
 8 (a) a Type 1 violation shall be subject to a fine of up to \$5,000
 9 (b) a Type 2 violation shall be subject to a fine of up to \$7,500.
 10 c. The penalty prescribed in this section shall be collected and
 11 enforced by summary proceedings under the "Penalty Enforcement
 12 Law of 1999," P.L.1999, c.274 (C.2A:58-10 et seq.).
 13 d. Good faith shall be a valid defense to an employer's initial
 14 Type 1 violation.

15
 16 17. The Criminal Record Consideration Form shall appear as
 17 follows:

18	In compliance with "The New Jersey Opportunity to Compete Act," this		
19	form must be completed after any adverse employment decision is made		
20	based on the results of a criminal history inquiry, unless the decision was		
21	made in accordance with any other federal or State law, regulation, or rule, or		
22	the criminal history information was voluntarily disclosed prior to receiving		
23	a conditional offer of employment. Upon receipt of this form, the candidate		
24	or employee may dispute the results of the criminal history inquiry or		
25	respond with additional information within 10 business days, and the		
26	employer may, but need not hold the job open during this time.		
27			
28	Employers must keep a copy of this form in their records for three years from		
29	the date of completion.		
30			
31	Candidate/Employee Name (Print):		
32	_____		
33			
34	1. Has an adverse employment decision been made pertaining to the		
35	candidate or employee? An adverse employment decision may be the		
36	revocation of the conditional offer of employment (pertaining to either an		
37	external applicant or an internal promotional candidate), the termination of		
38	the employment, or the demotion of an employee.		
39			
40	Yes	No	
41			
42	2. Was a criminal history inquiry conducted on this candidate or		
43	employee?		
44			
45	Yes	No	
46			
47	3. Were the results of this criminal history inquiry the reason for the		
48	adverse employment decision?		
49			
50	Yes	No	
51			
52	4. Was consideration given to any information, if provided by the		
53	candidate, pertaining to the degree of rehabilitation and good conduct or		
54	inaccuracies in the criminal history?		
55			
56	Yes	No	N/A
57			

1	5.	Was consideration given to the amount of time that has passed since
2		the conviction or release from custody?
3		
4	Yes	No
5		
6	6.	Was the particular nature of the criminal record evaluated as it
7		relates to the duties and setting of the job?
8		
9	Yes	No
10		
11	Employer Name (Print):	
12	_____	
13		
14	Employer Signature:	
15	_____	
16		
17	Date: _____	
18		
19		

20
21 18. The Notice of Rights shall appear as follows:

22	What happens when my criminal record is checked by an
23	employer?
24	
25	“The New Jersey Opportunity to Compete Act” requires that
26	employers follow certain procedures when asking about your criminal
27	history. Any inquiry into your criminal history must occur after the
28	employer has given you a conditional offer of employment, unless any
29	federal or State law, regulation, or rule requires or permits the
30	consideration of certain criminal convictions when making employment
31	decisions.
32	
33	In connection with any decision regarding employment, an employer
34	may not consider:
35	1. Convictions for indictable offenses (which are like “felonies”) in
36	New Jersey (or similar crimes from other places) for which you were
37	sentenced or released from custody (whichever is more recent) more than
38	10 years ago;
39	2. Convictions for a disorderly persons offenses (which are like
40	“misdemeanors”) in New Jersey (or similar crimes from other places) for
41	which you were sentenced or released from custody (whichever is more
42	recent) more than five years ago;
43	3. Arrests that are not still pending;
44	4. Any records which have been erased, expunged, pardoned, or
45	otherwise legally nullified; or
46	5. Any juvenile adjudications of delinquency, any municipal
47	ordinance violations, or any records which have been sealed.
48	
49	However, if you have received a criminal sentence or been released
50	from custody for an indictable offense within the past 10 years or for a
51	disorderly persons offense within the past five years, an employer is
52	allowed to consider all of your criminal convictions, no matter how old.
53	Additionally, if you have ever been convicted of criminal homicide
54	(which includes murder and manslaughter), attempted murder, an arson-

1 related offense, a sex offense requiring registry, robbery, kidnapping,
2 human trafficking, certain weapons offenses, burglary, aggravated assault,
3 or a terrorism-related offense, then an employer may consider these
4 convictions no matter when they occurred and any other convictions you
5 may have.

6
7 If an employer asks about your criminal history, the employer also
8 must consider these factors:

9 1. Information that you provide about your rehabilitation and good
10 conduct, including any government-issued certificates of rehabilitation;

11 2. Information that you provide related to any inaccuracies in your
12 criminal record;

13 3. How much time has passed since the conviction or release from
14 custody; and

15 4. How the criminal history relates to your suitability for the job.

16
17 If the employer has any questions or concerns about your criminal
18 history, the employer must first make a good faith effort to discuss with
19 you any such questions or concerns your history may have raised. If the
20 employer then withdraws your conditional offer or makes any other
21 adverse employment decision, you will receive a copy of the results of the
22 criminal history inquiry and a completed Criminal Record Consideration
23 Form notifying you of the employer's consideration of your criminal
24 history.

25 You will have 10 BUSINESS DAYS to respond to the employer. In
26 your response you may: (1) challenge the accuracy of the results of the
27 criminal history inquiry and (2) present additional evidence of
28 rehabilitation or other information for the employer to consider. An
29 employer may hold the position open but is not required to do so.

30
31 If you believe that the employer has not followed these procedures,
32 please call the Department of Law and Public Safety, Division on Civil
33 Rights at 609-292-4605.

34
35 19. Section 13 of this act shall take effect the first day of the
36 first month next following the date of enactment, and the remainder
37 of this act shall take effect on the first day of the seventh month
38 next following the date of enactment. The Director of the Division
39 on Civil Rights may take any anticipatory administrative action in
40 advance as shall be necessary for the implementation of this act.