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.
**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 Opportunity to Compete Act.”

2. The Legislature finds and declares that:
   a. Removing obstacles to employment for people with criminal records provides economic and social opportunities to a large group of people living in New Jersey, increasing the productivity, health, and safety of New Jersey communities.
   b. Criminal background checks by employers have increased dramatically in recent years, with estimates of 90 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checks commonly contain errors and inaccuracies and even Federal Bureau of Investigation (FBI) background checks are out of date 50 percent of the time.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. Employment advertisements in New Jersey frequently include language regarding criminal records that either explicitly precludes or strongly dissuades people from applying.
   f. Individuals with criminal records represent a group of job seekers ready and able to contribute and add to the workforce.
   g. Research has shown that many individuals with 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.
   h. Securing employment significantly reduces the risk of recidivism.
   i. It is the intent and purpose of “The Opportunity to Compete Act” to improve the economic viability, health, and security of New Jersey communities and to assist people with conviction histories to reintegrate into the community and to provide for their families and themselves.
   j. Currently, at least 64 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.
   k. The nation’s largest public employer, the United States 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.

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

3. As used in this act:

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

“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.

“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 contingent only upon a criminal history inquiry.

“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.

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

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

“Employer” means any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within this State, including 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 departments, agencies, boards, or commissions, or any employee or agent thereof.
“Employment” means any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency, or any form of vocational apprenticeship, or any internship. 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 and accepted by another candidate.

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

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

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

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

“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.

b. 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., b., and c. of this section, if a candidate discloses any information regarding the candidate’s criminal history by voluntary oral or written disclosure, the employer may consider the disclosed criminal history pursuant to section 5 of this act. In the event of a voluntary disclosure, the employer also may make a reasonable, limited inquiry about only the criminal history disclosed.

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 copy of the Notice of Rights as set fourth in section 18 of this act. If the candidate declines to consent to a criminal history inquiry, the employer may withdraw the conditional offer of employment.

5. Except as provided in section 6 of this act, an employer shall be permitted to consider, in connection with any decision regarding employment, the following convictions and charges:

a. A conviction for any crime of the first through fourth degree not specified in subsection d. or a conviction for conduct from another jurisdiction which, if committed in this State, would constitute a crime of the first through fourth degree, for 10 years following release from custody or from the date of sentence if the person was not sentenced to a term of confinement;

b. A conviction for a disorderly persons offense or a conviction for conduct from another state which, if committed in this State, would constitute a disorderly persons offense, for five years following release from custody or from the date of sentence if the person was not sentenced to a term of confinement;

c. Any pending criminal charges, which shall include cases that have been continued without a finding until such time as the case is dismissed; and
d. Convictions for:

(1) Criminal homicide, including murder, manslaughter, and death by auto, as defined by N.J.S.2C:11-2;
(2) Attempted murder as defined by N.J.S.2C:5-1 and N.J.S.2C:11-3;
(3) Arson and arson-related offenses as defined by N.J.S.2C:17-1;
(4) Sex offenses as defined by subsection b. of section 2 of P.L.1994, c.133 (C.2C:7-2);
(5) Robbery as defined by N.J.S.2C:15-1;
(6) Kidnapping as defined by N.J.S.2C:13-1;
(7) Human trafficking as defined by section 1 of P.L.2005, c.77 (C.2C:13-8);
(8) Possession of weapons during commission of certain crimes as defined by section 1 of P.L.1998, c.26 (C.2C:39-4.1);
(9) Burglary in the second degree as defined by N.J.S.2C:18-2;
(10) Aggravated assault in the second or third degree as defined by N.J.S.2C:12-1;
(12) Any offenses of a nature substantially similar to an offense set forth in paragraphs (1) through (11) of this subsection d. committed in another jurisdiction, regardless of when they occurred.

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 that has been the subject of an executive pardon, or any record that has been otherwise 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. If any part of the candidate’s criminal history may be considered pursuant to section 5 of this act, then all prior disorderly persons convictions and indictable offenses, or, if from any other jurisdiction, convictions for conduct which, if committed in this State, would constitute a disorderly persons conviction or indictable offense, may be considered by the employer unless deemed impermissible pursuant to section 6 of this act.
8. a. In reasonably evaluating a candidate for a position for which a criminal history inquiry is conducted pursuant to this act, the employer also shall collectively consider additional factors, including but not limited to:

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

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

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

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

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

9. 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 with 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 complying with the requirements of subsection a. of this section shall provide to 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 as set forth in section 17 of this act.

10. a. A candidate who receives an adverse employment decision may, within 10 business days after receipt of the documents required under subsection b. of section 9 of this act, provide additional information or evidence to the employer related to the accuracy or relevance of the results of the criminal history inquiry, including information pertaining to any of the factors listed in subsection a. of section 8 of this act. An employer may hold the
position open for a candidate but is not 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 subsections a. and b. of this section shall,
within 45 business days of receipt of the additional information,
provide the candidate with a written notice of final decision.

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

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

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

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

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

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,
regulation, or rule that expressly requires or expressly permits the
consideration of criminal histories in employment decisions, or
when any federal or State law, regulation, or rule restricts an
employer’s ability to engage in specified business activities based
on the criminal records of its employees, any and all use or
consideration of a candidate’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. a. No employer shall be found liable based on the exclusion from consideration of the portions of a candidate’s or employee’s criminal record deemed outside the scope of inquiry by sections 5 and 6 of this act.

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

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

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

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

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

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

(1) for an employer with 15 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;

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

(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.


d. Good faith shall be a valid defense to an employer’s initial Type 1 violation.

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

<table>
<thead>
<tr>
<th>Candidate/Employee Name (Print):</th>
</tr>
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<tbody>
<tr>
<td></td>
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1. Has an adverse employment decision been made pertaining to the candidate or employee? An adverse employment decision may be the revocation of the conditional offer of employment (pertaining to either an external applicant or an internal promotional candidate), the termination of the employment, or the demotion of an employee.

   Yes    No  

2. Was a criminal history inquiry conducted on this candidate or employee?

   Yes    No  

3. Were the results of this criminal history inquiry the reason for the adverse employment decision?

   Yes    No  

4. Was consideration given to any information, if provided by the candidate, pertaining to the degree of rehabilitation and good conduct or inaccuracies in the criminal history?

   Yes    No    N/A  

Employers must keep a copy of this form in their records for three years from the date of completion.
5. Was consideration given to the amount of time that has passed since the conviction or release from custody?  
Yes No  
6. Was the particular nature of the criminal record evaluated as it relates to the duties and setting of the job?  
Yes No  
Employer Name (Print):  
____________________________________  
Employer Signature:  
_____________________________________  
Date:_______________________________  

18. The Notice of Rights shall appear as follows:  

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

“The New Jersey 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, unless any federal or State law, regulation, or rule requires or permits the consideration of certain criminal convictions when making employment decisions.  

In connection with any decision regarding employment, an employer may not consider:  
1. Convictions for indictable offenses (which are like “felonies”) in New Jersey (or similar crimes from other places) for which you were sentenced or released from custody (whichever is more recent) more than 10 years ago;  
2. Convictions for a disorderly persons offenses (which are like “misdemeanors”) in New Jersey (or similar crimes from other places) for which you were sentenced or released from custody (whichever is more recent) more than five years ago;  
3. Arrests that are not still pending;  
4. Any records which have been erased, expunged, pardoned, or otherwise legally nullified; or  
5. Any juvenile adjudications 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 an indictable offense within the past 10 years or for a disorderly persons offense within the past five years, an employer is allowed to consider all of your criminal convictions, no matter how old. Additionally, if you have ever been convicted of criminal homicide (which includes murder and manslaughter), attempted murder, an arson-
related offense, a sex offense requiring registry, robbery, kidnapping, human trafficking, certain weapons offenses, burglary, aggravated assault, or a terrorism-related offense, then an employer may consider these convictions no matter when they occurred and any other convictions you may have.

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

1. Information that you provide about your rehabilitation and good conduct, including any government-issued certificates of rehabilitation;
2. Information that you provide related to any inaccuracies in your criminal record;
3. How much time has passed since the conviction or release from custody; and
4. How the criminal history relates to your suitability for the job.

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 history 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 a completed Criminal Record Consideration Form notifying you of the employer’s consideration of your criminal history.

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 information for the employer to consider. An employer may hold the position open but is not required to do so.

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

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