

Newark's Municipal Council "Bans the Box" by Restricting Criminal Background Checks on Applicants and Employees

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On September 19, 2012, the Newark Municipal Council passed Ordinance #12-1630, which prohibits any employer with five or more employees in Newark from asking job candidates before or during the application process about their criminal history (i.e., "bans the box"). The Newark Ordinance also places certain limits on inquiries into the criminal history of an employee or candidate *after* the candidate has received a conditional offer of employment.

The Newark Ordinance's stated purpose is to remove barriers to gainful employment for more than 1,700 individuals who return to Newark from state prison every year and an additional 1,400 Newark residents released from Essex County Correctional Facility every month. Underlying the Newark Ordinance is the belief that the prevalence of criminal background checks on applicants and employees has impeded the successful reintegration of formerly incarcerated people into their community and had a disproportionately negative impact on racial and ethnic minorities (such as Blacks and Latinos).

The Newark Ordinance is part of a growing trend at the federal, state, and local levels of government to limit employers in conducting criminal background checks on their applicants and employees. Massachusetts and Philadelphia recently enacted "ban-the-box" laws (joining Hawaii) prohibiting *private* employers from asking about convictions on applications, with the U.S. Congress, New Jersey, and other states and localities proposing similar legislation. Furthermore, New Jersey, along with other states and localities, advanced bills similar to New York's Correction Law, which generally limits the use and scope of criminal background checks for purposes of employment.

To understand the full scope of rights and protections provided by the Newark Ordinance, which **takes effect November 18, 2012**, this alert addresses who is subject to and affected by its provisions, as well as unlawful practices, enforcement mechanisms and remedial schemes detailed therein.

Coverage

The coverage of the Newark Ordinance is expansive. The term "employer" is defined as any person, company, corporation, firm, labor organization, or association with five or more employees which does business, employs persons, or takes applications for employment within the City of Newark. The term "employer" expressly includes job placement and referral agencies and other employment agencies.

The Newark Ordinance also defines "employment" to mean any occupation, job or employment, with or without pay, including temporary or seasonal work, contracted work, contingent work, and work through the services of a temporary or other employment agency. The Ordinance further provides that the physical location of the prospective employment must be in whole or substantial part within the City of Newark.

The Newark Ordinance defines a "candidate" as 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 that an employer consider him or her for employment.

Impermissible Criminal Background Inquiries Defined

The Newark Ordinance prohibits employers from conducting any criminal history inquiry regarding any person, or any inquiry regarding a candidate's criminal history prior to or during the application process. It also is unlawful for an employer to limit eligibility for employment arising from a candidate's criminal history in any advertising. Under the Ordinance, any such advertisement is presumptive evidence that the employer authorized it.

Employers also may not conduct any inquiry into or take any adverse action against any candidate or employee on the basis of:

- any arrest or criminal accusation made against the candidate or employee, which is not then pending against that person and which did not result in a conviction;

any records which have been erased, expunged, the subject of an executive pardon, or otherwise legally nullified; and

- any adjudications of juvenile delinquency or any records which have been sealed.

Permissible Criminal Background Inquiries Defined

The Newark Ordinance permits an inquiry into and consideration of a candidate's criminal history only *after* the candidate has received a conditional offer of employment. Before running a criminal background check, however, the employer must make a good faith determination that the relevant position is of such sensitivity that a criminal history inquiry is warranted, as well as adhere to additional requirements set forth in the Ordinance. It also should be noted that if the candidate voluntarily discloses any information regarding his or her criminal history by unsolicited voluntary written or oral disclosure, the employer may discuss the criminal history disclosed.

Scope of Permissible Inquiries

For inquiries permitted by the Newark Ordinance, an employer may inquire about

- indictable offense convictions, for eight (8) years following the sentencing thereof, including termination of any period of incarceration;
- disorderly persons convictions or municipal ordinance violations, for five (5) years following the sentencing thereof, including termination of any period of incarceration; and
- pending criminal charges, including cases that have been continued without a finding until such time as the case is dismissed.

Furthermore, subject to the aforementioned parameters,

- prior disorderly persons and indictable offense conviction records are to be available for the entire period that the subject's last available conviction record is available under the Ordinance; and
- an employer may inquire about convictions for murder, voluntary manslaughter, and sex offenses requiring registry under N.J.S.A. Title 2C Chapter 7 punishable by a term of incarceration in state prison, regardless of the length of time that has passed since the disposition thereof.

Required Considerations

An employer is to consider the following six factors in evaluating the results of any criminal history inquiry regarding a candidate or employee (conducted in accordance with the limitations set forth elsewhere in the Ordinance):

(1) the nature of the crime and its relationship to the duties of the position sought or held;

(2) any information pertaining to the degree of rehabilitation and good conduct, including any information produced by the candidate or employee, or produced on his or her behalf;

(3) does the prospective job provide an opportunity for the commission of a similar offense(s)?;

(4) are the circumstances leading to the offense(s) likely to reoccur?;

(5) how much time has elapsed since the offense(s) and how did you factor that into the employment decision?; and

(6) any certificate of rehabilitation issued by any state or federal agency, including but not limited to certificates issued pursuant to N.J.S.A. 2A:168A-7.

An employer is to document in writing its consideration of these factors. An employer also must use the Applicant Criminal Record Consideration Form, which specifies how an employer should document the decision to revoke a conditional offer. Further, an applicant who has a conditional offer revoked subsequent to a criminal record inquiry must receive a copy of the Applicant Criminal Record Consideration Form.

Notice

Prior to conducting any criminal history inquiry about a candidate or employee, the employer also must provide standard written notification:

- advising that, upon the written consent of the candidate or employee, the employer will conduct a criminal history inquiry;

advising that, following any adverse decision by the employer regarding employment, the candidate or employee will have the right and opportunity to present evidence as required by the Ordinance; and

- attaching a copy of the Ordinance.

If, after conducting a criminal history inquiry, the employer makes an adverse employment decision, including, but not limited to, the refusal, rescission, or revocation of the offer of a position with the employer or termination of employment, the employer must, within a reasonable period of time:

- notify the candidate or employee of the adverse employment decision;
- provide the candidate or employee with a photocopy of the results of the criminal history inquiry, indicating the particular conviction(s) that relate(s) to the position's responsibilities and furnishing a copy of the Applicant Criminal Record Consideration Form;
- provide the candidate or employee with a written notice of rejection, specifically stating the reasons for the adverse decision and including the employer's consideration of the abovementioned factors; and
- advise the candidate or employee of the opportunity for review under the Ordinance, including how the candidate or employee may present evidence related to the employer's consideration of the abovementioned factors, and what kinds of evidence may be presented.

A copy of all the required notices must be sent in one package by registered mail to the candidate or employee.

Opportunity for Review

The candidate or employee has ten (10) business days after receipt of the required notices to respond to the employer regarding the results of the criminal history inquiry. The employer must provide the candidate or employee with an opportunity to present information and evidence related to the accuracy and/or relevance of the results of the criminal history inquiry, including information pertaining to any of the abovementioned factors. The employer must review all information and documentation received from the candidate or employee prior to taking any final decision regarding employment.

An employer is to document in writing the information and evidence provided under the Ordinance, the employer's consideration of this information and evidence, and the employer's final action, specifically stating the reasons for the final action taken. The employer must, within a reasonable period of time, notify the candidate or employee of the final action and provide the candidate or employee a copy of the writings required under the Ordinance.

Confidentiality

Any information obtained by an employer that pertains to a candidate's or employee's criminal history must:

- remain confidential;
- only be shared with individuals that have a need to know the contents for the purpose of evaluating candidates or employees in a manner consistent with the Ordinance, except as dictated by law;
- not be used, distributed, or disseminated by the employer for any use other than those permitted under the Ordinance;
- not be used, distributed, or disseminated by the employer to any other entity or individual, except as dictated by law; and
- be removed from the candidate or employee's permanent human resources or personnel file upon commencement of employment.

Exemptions

The prohibitions of the Newark Ordinance do not apply:

- where any federal or state law or regulation requires the consideration of applicant candidate or employee's criminal history for the purposes of employment, provided the exemption is limited to those offenses or types of offense that federal or state law or regulation requires the employer to consider; or
- to any positions designated by the employer to participate in a federal, state, or local government program or obligation designed to encourage the employment of those with criminal histories.

The Council expressly stated that exceptions under the Ordinance must be interpreted narrowly.

Enforcement

Under the Ordinance, the Mayor of Newark must designate an office or agency of the City to enforce it. The Ordinance provides the following penalties for violations:

- A "Type 1 violation" is either an initial violation of the Ordinance or a violation not preceded by another violation within the previous three years. All actions within the application process for the same position together constitute a single Type 1 violation, notwithstanding that each would otherwise constitute a violation on its own. A Type 1 violation is subject to a fine of up to \$500.
- A "Type 2 violation" is any violation of the Ordinance preceded by another violation within the previous three years. Each action that would constitute a Type 2 violation of the Ordinance is a separate Type 2 violation. Each Type 2 violation is subject to a fine of up to \$1,000.

Best Practices

- Remove the "box" on applications asking applicants about their criminal history;
- Eliminate advertisements that limit an applicant's eligibility for employment based on criminal history;
- Do not ask applicants or employees for disclosure of their criminal history unless it is determined that the relevant position is of such sensitivity that a criminal history inquiry is warranted;
- Train hiring managers about appropriate use of criminal history in hiring, promotion, and separation;
- Adhere to "required considerations" before taking adverse action against applicants or employees based on their criminal history; and
- Keep information about applicants' and employees' criminal history confidential.

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If you have any questions or concerns regarding the Newark Ordinance or related laws and proposed laws, please contact the lawyers at Proskauer.

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