

New Jersey Enacts Final Regulations Regarding "Ban the Box" Law

New Jersey's Department of Labor and Workforce Development issued its final regulations regarding the "Opportunity to Compete Act" (OTCA), also known as New Jersey's "Ban the Box" law on December 7, 2015.

The Department's Regulations provided guidance on the following:

- **Multi-state employers' employment application:** Employers that are located in several states, and who use a single employment application, may ask about an applicant's criminal history, provided that immediately preceding the criminal record inquiry, they specifically instruct the New Jersey applicant not to answer this question.
- **DUI/DWI records:** DUI/DWI records are considered "criminal records" under the OTCA, and therefore employers are prohibited from inquiring about these records at the initial interview.
- **Online searches:** An internet search is an "oral or written inquiry" under the OTCA, therefore employers are prohibited from doing an online search of a prospective employee's criminal history.
- **Covered employer:** An "employer" is defined to mean 15 or more employees, whether or not they work in New Jersey.
- **Independent Contractors:** According to the Department, an employer shall use the "ABC Test" to determine whether a person is an "applicant for employment" as defined by the OTCA, which looks at 1) the agency relationship between the employer and applicant, 2) the applicant's usual course of business and 3) whether the applicant is normally engaged in an independently-established trade or profession. The employer's failure to satisfy one prong is sufficient to establish an employment relationship.
- **Internships/Apprenticeships:** The regulations now include these two classifications in the OTCA's definition of "applicant for employment" and thus are covered by the statute.
- **Employee Leasing Agency/Job Placement Agency:** The Department determined that the agency would either have to conduct its own initial interview on behalf of the client company (as "co-employers"), or each would have to conduct separate initial interviews (as separate employers), depending on the fact-specific nature of the relationship between the agency and the employer.
- **Interview:** An "interview" means "any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing to discuss the employment being sought or the applicant's qualifications." It does not include emails or "the completion of a written or electronic questionnaire."

Comments: With these regulations, the Department has provided employers with necessary clarifications to assist them in OTCA compliance and help determine whether an applicant is protected by the "Ban the Box" law. Employers are encouraged to review their applications and procedures to ensure that they comply with these regulations.

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