

## New Jersey Adopts Ban-the-Box Regulations

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On December 7, 2015, the New Jersey Department of Labor and Workforce Development (“DOL”) adopted regulations (“Regulations”) regarding the state’s [Opportunity to Compete Act](#) (“OTCA”), also referred to as New Jersey’s “ban-the-box law.”

The OTCA, which became effective March 1, 2015, generally prohibits employers from making any oral or written inquiry regarding an applicant’s criminal record until after the applicant’s first interview—i.e., the “initial application stage.” (Please see the Epstein Becker Green [Act Now Advisory](#) titled “[New Jersey’s Ban-the-Box Legislation Is Signed Into Law](#)” for a summary of the OTCA.)

The Regulations differ slightly from the proposed regulations, which were submitted for notice and comment on March 16, 2015. This Advisory highlights the Regulations, including the DOL’s responses to the comments that it received. The Regulations, which are codified at New Jersey Administrative Code, Title 12, Chapter 68 (N.J.A.C. 12:68), can be accessed through [the Office of Administrative Law website](#).

### Employment Applications for Multistate Employers

The DOL agreed with commenters that employers with multistate operations should be permitted to use in all states a single employment application containing instructions to New Jersey applicants not to answer specific questions that may be prohibited by the OTCA. The DOL therefore added to the Regulations a clarifying provision addressing violations that states:

Nothing set forth in this section shall be construed to prohibit an employer who does business, employs persons, or takes applications for employment in at least one state other than New Jersey, from including an inquiry regarding criminal record on an employment application, so long as immediately preceding the criminal record inquiry on the employment application it states that an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer this question.

The DOL also agreed that an employment application may contain a statement to the effect that the applicant may be subject to a criminal background check as a condition of employment.

### **Driving While Intoxicated (“DWI”) or Driving Under the Influence (“DUI”) Inquiries**

The DOL disagreed with a commenter that DWI/DUI or motor vehicle violations are exempt from the definition of “criminal record.” Thus, like other criminal records, such violations may not be inquired about during the “initial employment application process.”

### **Internet and Other Public Records Searches**

The DOL interprets the OTCA to prohibit employers from engaging in Internet searches, or searches through other public records, concerning an applicant’s criminal record before the conclusion of the “initial employment application process.” In its response to comments, the DOL stated that to interpret the law to permit such searches would render the OTCA “meaningless.”

### **Employee Threshold**

The OTCA applies to employers with 15 or more employees. The DOL uses the counting formula used by the New Jersey Family Leave Act (“NJFLA”) and the Family and Medical Leave Act. As with the NJFLA, employees working outside New Jersey are included in the count.

### **Apprentices and Interns**

The OTCA’s definition of “employee” includes interns and apprentices. The DOL interprets the definition as covering **unpaid** interns and apprentices.

The Regulations broadly define “intern” to mean “an individual, as a student or recent graduate, working as a trainee to gain practical experience in an occupation.”

The Regulations define an “apprentice” specifically to mean “an individual who is registered in good standing in an apprenticeship program approved or certified by the Office of Apprenticeship within the United States Department of Labor.”

### **Employee Staffing Companies and Job Placement Firms**

In its response to comments, the DOL provides guidance regarding application of the OTCA to companies that use “job placement and referral agencies and other employment agencies.” The DOL states that, when a company uses a temporary help service, which supplies its employees to a client company, the client company is not restricted from inquiring about the criminal record of persons assigned to work at the client company’s site. This is because, in this context, the staffing company, not the client company, is the employer of the individual.

Where, however, a client company uses a job placement firm to recruit applicants, the OTCA does apply to the client company, *even if* the employment agency completed an initial employment process and conducted its own criminal background check of referred candidates. This is because, the DOL explains, in the OTCA context, the employment agency is **an** employer, but not **the** employer.

### **Definition of “Interview”**

Under the OTCA, the “initial employment application process” ends “when an employer has conducted a first interview, whether in person or by any other means. . . .” The Regulations define “interview” to mean

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. “Interview” shall not mean the exchange of emails or the completion of a writing or electronic questionnaire.

As confirmed by the DOL, “once a single live contact between the employer and the job applicant concludes, then the first interview is complete[.]” regardless of whether the applicant has additional subsequent interviews on the same day.

### **Inquiries Following Voluntary Disclosure**

The OTCA permits employers to make inquiries about an applicant’s criminal records history during the initial application process if the applicant has made a voluntary disclosure. The Regulations make clear that, following such disclosure, the employer may make such inquiries to “anyone,” not just the applicant.

### **What New Jersey Employers Should Do Now**

New Jersey employers should take the following actions:

- Revise New Jersey-only job applications to remove questions concerning an applicant’s criminal convictions.
- Modify multistate applications to clarify that applicants for positions in New Jersey should not respond to questions seeking criminal background information.
- Train recruiters and others who conduct interviews not to ask about an applicant’s criminal history until after the initial job interview (or until after a voluntary disclosure by the applicant).
- Refrain from performing Internet or other public searches of an applicant’s criminal background until after the applicant’s initial interview.

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