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CORPORATE COUNSELOR PRACTICE ALERT

THE NEW JERSEY "OPPORTUNITY TO COMPETE ACT" TAKES EFFECT ON MARCH 1, 2015 RESTRICTING EMPLOYERS FROM INQUIRING INTO JOB APPLICANTS' CRIMINAL HISTORIES AND PROVIDING CIVIL PENALTIES FOR VIOLATIONS – IS YOUR COMPANY PREPARED?

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On March 1, 2015, New Jersey's "Opportunity to Compete Act" ("OTCA") takes effect. As explained in the legislative findings section of the OTCA, it is the intent of the OTCA to remove obstacles impeding employment opportunities for persons with criminal records. Employers in the State of New Jersey that fit within the OTCA's scope – those that employ 15 or more employees over 20 calendar weeks per year – should take heed of this new legislation, given that employers may become subject to significant civil monetary penalties for violating the OTCA.

What the OTCA does, in essence, is prohibit employers from inquiring about a job applicant's criminal history in an initial interview, and from stating in an employment advertisement that the employer will not consider persons with criminal histories. Consistent with the purpose of the OTCA, these prohibitions are apparently designed to prohibit employers from automatically disqualifying potential job applicants based on their past criminal histories.

Once the initial application process is completed, the Act does not preclude the employer from thereafter inquiring about the applicant's criminal history. Thus, once the applicant passes the initial application process, without being automatically excluded due to his or her criminal history, the employer may then inquire about the applicant's criminal history. Given this, the OTCA should not be construed as *prohibiting* an employer from inquiring about an applicant's criminal history, but rather should be seen as *delaying* when an employer may make such an inquiry until after the potential employee has been given an opportunity to actually apply for the job.

The OTCA does not apply to all employers. In addition to excluding employers with less than 15 employees from its scope, the OTCA recognizes that persons with criminal histories may not be employed in certain types of employment, such as the judiciary, law enforcement, or the like. The OTCA explicitly carves such employers from the OTCA's prohibitions. The OTCA explicitly specifies, however, that it is applicable to "job placement" and "referral agencies."

Employers who violate the OTCA can be held liable for a civil penalty of $1,000 for the first offense, $5,000 for the second offense, and $10,000 for each offense thereafter. The OTCA specifies that the aforesaid civil penalty is the sole remedy for violations of the OTCA; that the OTCA should not be construed as establishing a standard of care for employers; that evidence of a violation of the OTCA shall not be admissible in any proceeding, other than a proceeding addressing a violation of the OTCA; and that the OTCA does not create a private cause of action.

In light of the impending effective date of the OTCA, it would be wise for in house counsel to review his or her company's employment application materials, and remove any criminal history inquiries contained in initial application documents. Likewise, in house counsel should also interview and/or retrain employees involved in the employment application process to refrain from verbally requesting criminal history information in the initial application and interview. Otherwise, the employer may become involved in an enforcement action and be required to pay significant civil penalties.

If we can be of any assistance with respect to the newly-enacted Opportunity to Compete Act, or with any aspect of employment law, please feel free to contact us.