



New Jersey Ordinance Impacts Employers' Use of Criminal History Records

November 18th, 2012 is the effective date for the City of Newark's ordinance (#12-1630) that will dramatically impact employers' job advertisements and use of criminal history records when making employment decisions. The below requirements are in addition to the Fair Credit Reporting Act (FCRA) processes and in some way mirror the Equal Employment Opportunity Commission's (EEOC) guidance on the use of arrest and conviction records. You can read the text of the Ordinance [here](#).

Who does this affect?

The ordinance will apply to "any person, company, corporation, firm, labor organization, or association which has five (5) or more employees and does business, employs persons, or takes applications for employment within the City of Newark, including the City of Newark and any City department, agency, board, or commission, or any employee or agent thereof." Note the broad nature of this definition. The ordinance does, however, also state under their definition of "employment" that this pertains when "the physical location of the prospective employment must be in whole or substantial part, within the City of Newark." The ordinance covers paid and non-paid work as well as vocational and educational training.

What is prohibited?

- The ordinance prohibits employers from:
 - Conducting a criminal history check:
 - On any person pre-application; and
 - On candidates, unless the employers follow strict procedures described below.
 - Making adverse employment decisions based on:
 - Arrest information that is no longer pending and did not result in a conviction;
 - Records that have been erased, expunged, the subject of an executive pardon, or otherwise legally nullified; and
 - Sealed juvenile records.
 - Producing or disseminating any advertisement that expresses, directly or indirectly, any limitation on eligibility for employment based on a candidate's criminal history.

What are the Criminal History Inquiry Practices?

- An employer can conduct a criminal history check if they first make a good faith determination that the position is of such sensitivity that a check is warranted, the candidate has already received a conditional offer of employment, the employer notifies and obtains the person's written consent to conduct the check, and the employer has notified the person of any statutory rights if an adverse decision results from the check; or
- Employers cannot inquire regarding a candidate's criminal history during the application process. However, if a candidate discloses criminal history information voluntarily and unsolicited, the employer may discuss the criminal history disclosed.
- Employers must advise candidates that following any adverse decision regarding employment the candidate or employee will have the right and opportunity to present evidence challenging same if based on a criminal history and describing the types of evidence that may be presented.

What inquiries can an employer make regarding criminal history?

An employer can inquire about:

- Convictions up to 8 years after sentencing;
- Disorderly persons convictions or municipal ordinance violations up to 5 years after sentencing;
- Pending criminal charges until the case is dismissed; and
- Murder, voluntary manslaughter, and sex offenses (no time limit).

Are there any exceptions?

The prohibitions in the ordinance do not apply if:

- Any federal or state law or regulation requires the consideration of criminal history for employment.

LEGAL UPDATE



- The position has been designated by the employer to participate in a federal state, or local government program or obligation that is designed to encourage the employment of those with criminal histories.

What do employers need to consider in reviewing criminal history in hiring decisions?

- Employers must consider the following factors and document such consideration in writing using the Applicant Criminal Record Consideration form, when evaluating a candidate's or employee's criminal history:
 - The nature of the crime and its relationship to the duties of the person's job;
 - The person's degree of rehabilitation and good conduct;
 - Whether the employment would provide the person with an opportunity to commit a similar offense;
 - Whether the circumstances that led the person to commit the offense may be likely to reoccur;
 - The length of time since the offense occurred; and
 - The existence of a certificate of rehabilitation by any state or federal agency.

What do employers need to follow if they decide to take an adverse employment decision?

- After a criminal history check, if the employer makes an adverse employment decision, the employer must, within a reasonable period of time:
 - Notify the person of the adverse employment decision;
 - Provide a copy of the criminal history results that indicates which convictions relate to the person's responsibilities and a copy of the Applicant Criminal Record Consideration form;
 - Provide written notice of rejection, specifically stating the reasons for the decision;
 - Advise the person of the opportunity to review the employer's decision; and
 - Send a copy of all the required notices in one package to the person by registered mail.
- The person will have ten (10) business days after receiving the required notice of an adverse employment decision to respond to the results of the criminal history check.
 - This may include presenting evidence about the accuracy or relevance of any criminal history information.
 - The employer is required to document and review any information submitted by the person prior to making a final decision. Such employer documentation, which should include the specific reasons for the final action, must be provided to the person within a reasonable period of time after the final decision is made.

Are there any other requirements?

- Confidentiality
 - Employers are required to keep any criminal history information confidential and share only with individuals on a need to know basis.
 - Information obtained by an employer that pertains to a candidates or employees criminal history must be removed from the individual's permanent human resources or personnel file upon commencement of employment.
- Advertisements – It will be unlawful to produce or disseminate any advertisement that expresses, directly or indirectly, any limitation on eligibility for employment based on a candidate's criminal history.

Provided by the law firm Arnall Golden Gregory LLP – not meant to be legal advice and for educational purposes only – if you would like more information please contact Montserrat Miller, Partner at Arnall Golden Gregory LLP, at Montserrat.miller@agg.com or 202.677.4038.

Contact Accurate Background

For additional questions, please contact Accurate Background at (800) 216-8024.