

## NJ Criminal History Bill Goes Beyond 'Ban The Box'

By **Martin Bricketto**

*Law360, New York (December 18, 2013, 8:23 PM ET)* -- Closely watched New Jersey legislation that would limit criminal background checks on job candidates would be among the toughest in the country and impose significant new burdens on private sector employers during the hiring process, attorneys said.

Advanced by the Assembly Labor Committee in a 6-3 vote on Monday, the Opportunity to Compete Act is part of a national trend of "Ban the Box" measures, which take their name from the check box on job applications that ask whether applicants have been convicted of a crime. Supporters say that rehabilitated ex-offenders are unfairly blocked from getting their foot in the door and that such hurdles in the job market disproportionately impact racial and ethnic minorities.

"We know that eliminating barriers to employment is a key component of a sensible policy to promote growth and economic development," a sponsor of the measure, Assemblywoman Bonnie Watson Coleman, D-Mercer, said in a statement. "As a result of this bill, hundreds of thousands of New Jersey residents will have access to the American Dream — a chance to rise or fall on your own merit."

But the New Jersey bill would do more than prevent upfront inquiries about a candidate's criminal history. It would also create a series of administrative requirements governing the intricacies of how employers can use such information in their hiring decisions.

"It really prohibits you from considering anything before you've decided to hire the person and secondly it prohibits what you can consider to a significant degree," said Peter Frattarelli, chairman of Archer & Greiner PC's labor and employment department.

A central provision of the legislation, which state business groups widely oppose, would prohibit employers from conducting criminal background checks on applicants before a conditional job offer, which alone could be a significant adjustment for companies.

"Many companies do ask for criminal background information during the application stage because they feel they have a right and responsibility to know who they're hiring," said Michelle Seldin Silverman, a partner in Morgan Lewis & Bockius LLP's labor and employment practice. "They feel they have an obligation to keep the workplace and their customers safe."

"I think that being foreclosed from gathering this information in the hiring process would in and of itself be a big change for many employers, except those who are in jurisdictions that have already passed

these laws," she added.

Testifying Monday, Cornell William Brooks, an attorney who heads the New Jersey Institute for Social Justice, downplayed the bill's possible impact on employers and said background checks at that later stage have become common.

"This legislation does not represent a brand new way of doing things," Brooks told lawmakers. "This is the trend among businesses across the country."

The bill, A-3837, initially covered employers with five or more workers, but a modified version that the committee cleared changed that threshold to entities with 15 or more employees over 20 weeks. Similar legislation is pending in the state Senate.

Beyond dictating when criminal background checks can occur, the measure requires written consent for a check — an employer could take back the offer if an applicant refuses — and spells out what companies can and can't consider once they have a candidate's criminal history in hand.

Some crimes could always play into hiring decisions, including murder, sex offenses that net state prison time, robbery, aggravated assault and terrorism. But employers could only consider other first- through fourth-degree crimes within the last 10 years and disorderly persons offenses within five years, along with pending criminal charges. Crimes in the former two categories would also allow employers to consider older offenses.

"I think many businesses would consider that to not only be burdensome but also invasive upon their ability to make these determinations themselves as to whether an applicant's criminal background should or should not disqualify them for a particular job," Silverman said.

Additionally, employers would have to use an official "Criminal Record Consideration Form" to show they balanced the results of a background check against other factors, such as a candidate's rehabilitation, and also make a good faith effort to let an applicant address any concerns over his or her criminal history.

If a company wants to rescind an employment offer, it would have to send the candidate written notification along with the background check results and the Criminal Record Consideration Form. A candidate would then have a chance to respond, and an employer would have to reply with a final decision, though it wouldn't have to hold the job open during that exchange.

At least 64 states, counties and cities have passed similar measures to aid qualified job seekers with criminal histories, sponsors have said. But the New Jersey bill is different than most and has much in common with a municipal ordinance in Newark, N.J., that is one of the strictest in the country for private employers, according to Frattarelli.

The legislation is also broader than the laws of some other neighboring jurisdictions. For example, Philadelphia's Fair Criminal Records Screening Standards Ordinance allows employers to ask about prior criminal convictions after the first interview and ultimately provides more discretion over hiring decisions, according to Silverman.

"The process required is just nowhere near as onerous or rigid as that set forth in the Assembly bill," Silverman said.

While the New Jersey bill doesn't allow private causes of action, employers would still face penalties ranging from \$500 to \$7,500 for violations. The Division of Civil Rights in the state Department of Law and Public Safety would enforce the law.

Still, the inability of private parties to sue under the bill, its high standard for a company to be found liable for negligent hiring and the exclusion of smaller employers all represent protections for the state's business community, according to Brooks.

"This legislation has been carefully calibrated to respond to the needs of business," he said Monday.

The bill becoming law in its current form is far from certain. Besides the potential for more changes or plain inaction in the Legislature, Gov. Chris Christie, a Republican, has used his veto powers to reshape measures that targeted wage discrimination and banned employers from requiring job candidates to fork over their log-in credentials for social media sites.

"I'd be surprised, with this governor, that the bill would make it out in this format," Frattarelli said.

Watson-Coleman and a primary Senate sponsor of the legislation, state Sen. Sandra Cunningham, D-Hudson, could not immediately be reached for comment Wednesday.

--Editing by John Quinn and Chris Yates.