"You Want It, You Take It, You Pay the Price": New Jersey's Failed Attempt to Take Care of Their Own With the Opportunity to Compete Act

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Recommended Citation
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"You want it, you take it, you pay the price":
New Jersey's failed attempt to take care of their own with the Opportunity to Compete Act

Steve Del Mauro

I. Introduction

The dreaded "box" on applications that asks about a candidate's criminal past has become the kiss of death for many people looking for a job, especially for the estimated 70 million adults in the United States who have been arrested or convicted of a crime.¹ Research shows that checking this box decreases the likelihood of a callback or an offer by close to 50 percent.² This barrier to employment, based on one's criminal record, is negatively perceived by many critics and the movement to eliminate the box altogether has gained massive recognition in recent years.

Proponents push for states, cities, and counties to enact laws that prohibit an employer from inquiring into an applicant's criminal history when making hiring decisions.³ They argue that hiring the previously convicted helps reduce recidivism and stimulates the economy in which they live.⁴ Research demonstrates that employers are more willing to hire a candidate after they have examined his or her qualifications more fully; extending an offer is especially more common after the applicant and employer engage in personal contact and a bond is

³ About | End Discrimination at Your Workplace, All of Us or None, http://bantheboxcampaign.org/?p=20.
formed. Further, employers who hire applicants with a criminal record often find the new employees to be valuable and hardworking.

Ban-the-box policies have exhibited great success in areas which have enacted them. For instance, Minneapolis found that removing the box on its applications and conducting background checks only after giving a conditional offer decreased administrative work for City staff and resulted in the hiring of over half the applicants with convictions. The city of Durham, North Carolina also experienced strong, positive results from the enactment of its ban-the-box policy. In fact, 96 percent of candidates recommended for hire who had a criminal history received the position, despite their past.

New Jersey Governor Chris Christie signed into law the Opportunity to Compete Act (“OCA”) on August 11, 2014. Many embrace the law and firmly “believe it is time to remove the scarlet letter from those who serve their time. In this land of opportunity, it is time to give people a second chance.” Although the OCA is an honest attempt to assist those with criminal convictions in obtaining a job in the state of New Jersey, the law’s provisions reveal an increased

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6 Brad Friedlander, *Give criminals another employment shot*, Crain’s Cleveland Business (May 21, 2012, 4:30 AM), http://www.cainscleveland.com/article/20120521/SUB1/305219985&template=mobile#ATHS (“In my experience, people to with criminal records are often model employees. They are frequently the most dedicated and conscientious. A lot of doors are shut to them, so when someone gives them an opportunity, they make the most of it.”).
9 Id.
burden on employers and applicants alike with little to no benefit for either part in return. This Note argues that the OCA should either be completely eliminated or amended to achieve the purpose creators originally intended. To make even a dent in the current stigma against persons with criminal histories, the law should cover more employers within the state, act as a floor by which covered employees abide, and require employers to consider mitigating factors when making their ultimate employment decision.

Section II of this Note will discuss the background of ban-the-box legislation. Specifically, who began the movement and the reasoning behind its support. It then provides a current landscape of what states, cities, and counties have ban-the-box guidelines in place. Additionally, this section will explain how the New Jersey Opportunity to Compete Act came to fruition. It describes the parties involved in the creation of the bill and the concerns creators grappled with during the drafting process.

Section III of this Note will provide an in-depth analysis of the OCA. This section will explain what the law demands and who is covered by it. It also details certain positions that are exempt from the OCA’s rules depending on the circumstance. In addition, this section will describe the heavy burden the OCA places on covered employers. Updating applications and amending advertisements are just a few of the tedious tasks they must accomplish. Finally, this section discusses the limited liability employers will endure with the enforcement of this law and why applicants may be, just as before, left with the short end of the stick.

Finally, Section IV compares the OCA to ban-the-box laws and ordinances from other prominent cities and states. For example, it will describe the harsh consequences for violators of

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Baltimore, Maryland’s Ordinance. Next, this section will propose changes to the OCA that can make the law more effective in assisting applicants with criminal records in finding a job. By expanding the scope of the law, more employers will be forced to delay their criminal background inquiries. In the interim, an employer may find someone they like and decide to hire them regardless of their criminal history. Additionally, the OCA should not be retroactively preemptive but instead act as a floor by which all covered employers must abide. That way, employers have discretion to enforce stricter rules if they chose – allowing cities like Newark and Atlantic City to keep their already effective ordinances in place. Finally, regardless of when the criminal background inquiry is made, employers should consider, in their hiring decision, other mitigating factors such as how long ago the offense occurred and whether the applicant has sought rehabilitation.

II. I ain’t a boy, no I’m a convicted man, and I believe in the Promised Land

A. Ban-the-Box Movement Begins

All of Us or None, the civil rights movement consisting of formerly incarcerated people, began the Ban the Box campaign in 2004. The goal of the campaign is to eliminate an employer’s negative perception of people with criminal histories. This movement contends a decreased emphasis on what mistakes the applicant has made in the past will result in an increased focus on the applicant’s qualifications instead - providing a more fair opportunity

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15 Newark, N.J., Ordinance 12,1630 (Sept. 19, 2012); Atlantic City, N.J., Ordinance 83.
16 Supra note 3.
17 Id.
amongst the unemployed to achieve a full-time job. The first step is to end inquiries into an applicant’s criminal background.

The issue of recidivism is one that ban-the-box advocates hope to mend with this legislation. Recidivism is the term used to describe a person’s relapse into criminal behavior. For many ex-offenders, men in particular, prison can be a revolving door. Studies have shown, however, that “being employed substantially reduced the risk of all recidivism outcomes.” By preventing an employer from eliminating an applicant who has a criminal record before the interview, the hope is to allow the candidate the opportunity to prove his qualifications and form a connection with the employer. Once a connection is made and an employer can see the applicant for who she truly is, then the chances of being hired increase. It follows that once hired, an ex-convict has a much greater chance of assimilating back into the community and halting his/her criminal behavior.

There has been a large increase in the amount of background checks conducted by employers over the past decade; the popularity of this procedure is another reason advocates across the nation want to eliminate the “box.” For example, the Federal Bureau of Investigation released seventeen million criminal record histories for employment background checks in 2012, six times the amount issued in 2002. One explanation for the increase is that technology has

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18 Id.
made background checks cheaper and easier to obtain than ever before. 23 The surge in demand for background checks led to an influx of private companies who conduct them. This flooding of background check companies has driven down the price for such a service to as low as twenty dollars in some states. 24 A low hanging fruit is hard not to reach for and employers have no issue with using this cheap and available service.

Admittedly, the results of these background inquiries also affect an employer’s decision as to whether that particular applicant is suitable for the available position. In 2012, The Society for Human Resource Management conducted a survey of its members and found that 74 percent would find a nonviolent, felony conviction to be “very influential” in their final decision not to hire an individual. 25 Another poll found that 60 percent of employers were not willing to hire someone with a criminal record. 26 Currently, one in four Americans have a criminal record of some sort. 27 This large number of individuals bolsters the widespread demand for change among employers who carry a distaste for criminal histories.

Employers for many years have used criminal background checks as a way to discover whether a prospective employee poses a safety or security risk on the job. 28 Advocates for ban-the-box legislation argue that an employer’s reliance on these background checks leaves many

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23 Leslie Flint, An Increase in Employee Background Checks Strains an Already Weak (Flint), PRIVACY RIGHTS CLEARINGHOUSE (May 24, 2007), https://www.privacyrights.org/ar/LeslieFlint-BGChks.htm.
24 Id.
27 Supra note 3; see also AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON STATE, https://aclu-wa.org/second-chances.
capable and willing workers without a job. They further contend that being more open to hiring those with criminal histories can result in improving our economy. One report concluded that even with an ex-offender’s low productivity rate, the loss in output from these unemployed citizens cost the country somewhere between fifty-seven and sixty-five billion dollars in 2008.

Hawaii became the first state to “ban the box” in 1998. Not until recently, however, have other states, counties, and cities followed suit. For example, eleven counties and cities have “banned the box” within the first three months of 2014 alone. In an effort to support the movement, companies with a nationwide presence enacted corporate policies to eliminate questions about criminal history from their job applications. Efforts to establish statewide ban the box policies are also present in Texas, Ohio, and Georgia. Finally, efforts by All of Us or None are being made to spread “banning the box” into the non-profit sector as well.

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31 JOHN SCHMITT & KRIS WARNER, CENTER FOR ECONOMIC AND POLICY RESEARCH, EX-OFFENDERS AND THE LABOR MARKET 1, 14 (Nov. 2010).
34 NAT’L EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 1 (July 2014).
35 Brent Staples, Target Bans the Box, N.Y. TIMES (Oct. 29, 2013, 3:18 PM), http://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box/?_php=true&_type=blogs&_r=0 (discussing Target Corp.’s announcement that they are no longer asking about an employee candidate’s criminal history on their application for any job in the United States).
37 Supra note 3.
As the movement to “ban the box” gains speed, both state and federal organizations are doing what they can to advocate for the cause. On April 25, 2012, The Equal Employment Opportunity Commission (“EEOC”) issued its Enforcement Guidance titled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” In it, the EEOC urges employers to consider “the age and nature of crimes, as well as how the crimes relate to the specific responsibilities of the job.” These convictions are indications of the support ban-the-box legislation has on a national scale.

**B. New Jersey Joins the Frontier**

Efforts to establish statewide ban-the-box legislation in the garden state began in 2012. The movement was primarily spearheaded by advocates from the New Jersey Institute for Social Justice (“NJISJ”). Parties involved, however, were from all walks of life and even included the New Jersey Chamber of Commerce.

One major reason for reform was to improve the economic condition of the state. The 2014 Current Population Survey, Annual Social and Economic Supplement reported that the U.S. poverty rate decreased for the first time since 2006 to 14.5 percent. Although the report is promising for the nation as a whole, New Jersey’s poverty rate did not have such positive results.

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40 Id.


42 *New Jersey Governor Christie Signs Fair-Hiring Law, Ensuring Public and Private Employers “Ban the Box”, NATIONAL EMPLOYMENT LAW PROJECT*, http://nelp.3cdn.net/e8af6/1c9e49e162980_t7m6ibjvd.pdf (last visited Oct. 25, 2014). PRESS RELEASE.


in 2013. In New Jersey, the poverty rate grew from 10.8 to 11.4 percent in one year; increasing the number of New Jersey citizens living in poverty to 998,549.45 The unfortunate report sparked the fire to enact legislation that may hopefully get more citizens of New Jersey full-time jobs.

A statewide ban-the-box law should also be created because of the astounding success and approval that the legislation had within cities of New Jersey which already enacted it. Atlantic City’s former Mayor Lorenzo Langford “banned the box” on December 23, 2011.46 The ordinance only allowed a background check after an employer gave a conditional offer and required the employer to take into consideration an applicant’s rehabilitation efforts.47 Newark, New Jersey passed one of the most comprehensive ban-the-box ordinances in the nation on September 19, 2012.48 The ordinance forbid background checks before a conditional offer was made and had an expansive scope, applying to private employers, licensing, and housing.49 New Jersey Mayors all over the state applauded Atlantic City and Newark and expressed their desire to create a similar opportunity for all citizens of the state.50

46 Atlantic City, N.J., Ordinance No. 83; NATIONAL EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL HISTORIES 36 (September 2014).
47 Id.
49 Id.
Advocates in New Jersey did not act without serious consideration of the pros and cons first. Specifically, increased liability was a concern in enacting this law. This topic became a common subject of debate throughout the legislative process. On any given day, the New Jersey County Jail System holds fifteen thousand inmates. It follows from these statistics that an influx of Title VII, disparate impact claims could arise when an employer rejects an applicant due to their criminal history and as a result disproportionately affects one race. Employers also expressed concern that by limiting their use of criminal background checks, they are being placed at a higher risk for a negligent hiring lawsuit. Both of these claims are described in more detail in later portions of this Note.

The bill underwent several amendments. Originally, the bill forbid employers from inquiring into the criminal history of a candidate before that person received a conditional offer of employment. An employer, under the original draft, had to consider additional facts including rehabilitation and good conduct of the candidate following the criminal activity when making their hiring decision. As the amendments continued, however, several changes were made to give the employer more freedom. NJISJ described the process as “enormously

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52 Id. at 9.
54 Id. at 198 (citing Eric Krell, Criminal Background: Consider the Risks – And Rewards – Of Hiring Ex-Offenders, H.R. MAGAZINE, Feb. 1, 2012, at 44, 48).
56 Id.
57 See e.g. 2014 NJ A.B. 1999 (NS) (June 26, 2014) (permitting an employer to “inquire into and consider the criminal history of an applicant after the employer... selected the applicant as the employer’s first choice”).
business-sensitive” and explained their careful consideration “to business’s concerns.”

Ultimately, the fourth edition became the final edition.

Governor Christie signed the Opportunity to Compete Act into law on August 11, 2014. Capturing the essence of ban-the-box legislation, the Governor made clear that all efforts will be made to ensure “one mistake doesn’t result in a lifetime of economic hardship.”

III. The Opportunity to Compete Act: “Ain’t no mercy on the streets of this town.”

A. Employers Covered Under the Act.

The OCA forbids an employer from inquiring about an individual’s criminal history both in the application and during the first interview. This period of time is referred to as the “initial employment application process.” The General Assembly intended, in creating this law, to remove employment obstacles for people with criminal backgrounds and to help provide economic and social opportunity to a larger group of people within the state. Although the intentions of this law are noble, the actual impact it has on persons and entities within New Jersey is quite unsatisfactory. In reality, the OCA only applies to a limited number of employers who conduct business within the state and hardly assist applicants at all.

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60 D’onofrio, supra note 29.
61 Id.
The scope of the OCA only reaches those employers with fifteen or more employees over twenty calendar weeks.\textsuperscript{65} According to the Bureau of Labor statistics, about 700,000 jobs and 80-90 percent of employers are not included in this statute because they involve places with fewer than fifteen employees.\textsuperscript{66} This means that most of the employers in the state will be able to continue asking about one’s criminal history in the initial employment application process. Alternatively, persons who are seeking a full-time job have between an 80-90 percent chance of still seeing the “box” on an application after the OCA takes effect.

The list of employers exempt from the OCA does not end at those who employ less than fifteen employees. If the employment sought after is for a position in law enforcement, the judiciary, emergency management, homeland security, or corrections, then one’s criminal history is deemed relevant to the position and the employer can ask about the criminal history at any point in the application process.\textsuperscript{67} Further, an employer may inquire into an applicant’s criminal history inquiry at any point during the initial employment application process if the employer is part of a program designed specifically to promote the employment of persons who have been arrested or convicted.\textsuperscript{68}

The OCA also does not apply when the job is “for a position where a criminal history record background check is required by law, rule or regulation.”\textsuperscript{69} There are over 400 provisions in federal law providing that specific criminal backgrounds may prevent an applicant from

\textsuperscript{65} N.J. STAT. § 34:6B-13 (2015).
\textsuperscript{66} United States Bureau of Labor Statistics, \textit{Private industry by supersector and size of establishment: Establishments and employment, first quarter 2011, by state}, http://www.bls.gov/cew/ew11table4.pdf (because the data lists employers who have up to 10 and up to 20 employees, but not up to 15, the 700,000 estimate is made by including half the amount from the pool with 10 to 19 employees.
\textsuperscript{67} N.J. STAT. § 34:6B-16 (2015).
\textsuperscript{68} Id.
\textsuperscript{69} Id.
obtaining a job or license.\textsuperscript{70} An example is employment at a nuclear facility.\textsuperscript{71} The 400 provisions do not include the New Jersey laws that require the consideration of a candidate’s criminal history.\textsuperscript{72} This large amount of positions are thus outside the grasp of the OCA.\textsuperscript{73}

One specific situation exists where any employer can be exempt from withholding questions about an applicant’s criminal history. If at any point, a candidate discloses “any information regarding the applicant’s criminal record, by voluntary oral or written disclosure,” the employer is free to inquire about the applicant’s criminal history even during the initial employment application process.\textsuperscript{74} One argument for ban-the-box legislation is that applicants will get the chance to explain their criminal record in person.\textsuperscript{75} Checking the “box” on an application without providing an explanation can lead an employer to assume the worst. Thus, the first interview acts as the applicant’s chance to clear the air and correct any misconception the employer may have. However, the OCA can work against the applicant. Disclosure of a criminal record opens the flood gates and at that point, questions and inquiries about any detail of their criminal history is fair game. Additionally, “any information” is broad language. Even the smallest hint can be interpreted by an employer as a voluntary “disclosure” and thus grounds

\begin{footnotesize}
\textsuperscript{70} National Inventory of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/ (Last visited June 14, 2013) (after accepting the terms of use, click “federal,” then “Employment” under “Search by Consequence Category”).
\textsuperscript{72} See generally National Inventory of Collateral Consequences of Conviction, http://www.abacollateralconsequences.org/ (Last visited June 14, 2013) (after accepting terms of use, click on the State of New Jersey for an extensive list of all New Jersey statutes relating to a person who has been convicted of a crime).
\textsuperscript{74} N.J. STAT. § 34:6B-14 (2015).
\end{footnotesize}
to begin a formal criminal background inquiry. What might be considered by a candidate to be an innocent response to a question during an interview or a simple answer on an application, may lead to releasing an employer from the bounds of the OCA. Applicants must be increasingly careful if they don’t want this to happen; subsequently the OCA adds problems for individuals with criminal histories and does not alleviate them.

Thinking outside the box, employers can still check on someone’s background without asking directly about a criminal record. An employer’s ability to ask for a list of references is not forbidden by this law. With these contacts an employer can learn a lot by asking questions about a candidate’s character or previous jobs, such as whether they got along with colleagues or were ever reprimanded for bad conduct by their superiors. Further, the OCA does not discuss situations where a reference brings up the applicant’s criminal history on her own accord. Although the employer cannot ask this until after the first interview is conducted, there is a chance that one of the persons on the reference list may provide such information without provocation. In that situation, an employer can gain insight into a candidate’s past while abiding by the OCA at the same time. Again, the applicant is burdened with an additional stress and the employer can avoid the time restraint the OCA applies to their criminal background inquiries.

B. Burdens to Bear

Not only is the scope of the OCA very narrow, but those select employers who must comply with the Act are additionally burdened. Notwithstanding, as the NJISJ explained, the two year process to enact this statute involved constant collaboration with businesses, it appears that not all of the rough edges were smoothed out. Frustration, high costs, and wasted time are

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76 Jill Cohen, Answering Your Questions on NJ’s ‘Ban-The-Box’ Law, LAW 360 (Sept. 12, 2014).
77 The New Jersey Opportunity to Compete Act: Myths and Realities, Opportunity to Compete Act: Encouraging fair employment application practices for people with criminal histories, NJISJ, available at
likely to be just a few of the many effects the OCA will have on business owners. Again, through a dissection of the language in the statute, we see potential for many problems.

The OCA introduces a laundry list of changes that must be made within a business to comply with the law. First, the Act forbids an employer from giving an applicant “any employment application that makes any inquiries regarding an applicant’s criminal record during the initial employment application process.” The law defines “employment application” broadly to include any “form, questionnaire or similar document or collection of documents that an applicant for employment is required by an employer to complete.” Every business nationwide who has an office in New Jersey now must edit the specific applications they provide for jobs in those offices. If a company uses a uniform application for all of their offices, it now must create one specifically for its New Jersey branches. A smaller business that has only one office in New Jersey may not have a difficult time fixing this issue. However, larger companies with several offices throughout the state have only a few months to ensure compliance. Alternatively, a company can decide to amend its national application and remove the “box” altogether, but this would require approval and adjustments in a must larger scale. Finally, it should be noted that because of the broad definition of “employment application,” forms other than a business’ specific application may need revision as well.

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81 An example would be Gold’s Gym; the franchise has establishments scattered throughout New Jersey but are usually managed by different people. Making sure all of these gyms have updated their applications, advertisements, and interview questions will be no easy task. For example, there are seven Gold’s Gym establishments within a 23 mile radius of Morristown, New Jersey alone. See http://www.goldsgym.com/locate-a-gym/?query=New%20Jersey&radius=50 (type in Morristown in “City” box and press search).
Manpower to edit the application form is not the only tedious and time consuming work that must be done. The OCA also demands that all advertisements within the state be stripped clean of any language that forbids a person from applying who has been arrested or convicted of a crime (unless the employer is one of those exempt from the Act.)\textsuperscript{82} “Advertisement” is also broadly defined and includes “any circulation, mailing, posting, or any other form of publication, utilizing media, promoting an employer or intending to alert its audience, regardless of size, to the availability of any position of employment.”\textsuperscript{83} Verifying that every advertisement in an entire state is compliant with this provision will be no easy task. It is likely than an entire team would have to be assigned for larger businesses who have several branches scattered throughout New Jersey - especially because of the various and unique ways one can advertise.\textsuperscript{84} Compliance costs for this provision will be especially high for smaller businesses because they likely do not have the human resource personnel to oversee such an effort.\textsuperscript{85} Thus, external hires may be necessary.\textsuperscript{86}

The advertisement restriction established by the OCA places an undue burden on employers. However, there still exists a way to use advertisements that dissuade someone with a criminal record from applying and still comply with the law; once again, applicants are not going to see a dramatic change. The OCA provides that this section does not prohibit an employer from placing an advertisement that describes specific qualifications such as “the holding of a current and valid professional or occupational license, certificate, registration, permit or other


\textsuperscript{83} N.J. STAT. § 34:6B-13 (2015).


\textsuperscript{85} Smith, supra note 36.

\textsuperscript{86} Id.
credential.” Stated previously, there are over 400 provisions in federal law alone that provide that specific criminal backgrounds may preclude an applicant for a job or license. Requiring a specific license or certificate for the available position, that would not be given to someone with a criminal background, is a viable and legal alternative to weed out applicants.

The OCA also forbids an employer from making “any oral or written inquiry regarding an applicant’s criminal record during the initial employment application process.” This includes not being able to ask a candidate during the initial interview whether she has a criminal record. Yet again, covered employers need to set aside time and money to comply with the law. This time, the cost will come from having to re-train their Human Resources Department (“HR”) on appropriate questions to ask during the first interview. Employers need to make sure that those responsible for hiring do not ask the interviewee about a criminal past. If an HR representative conducts interviews in multiple states for the employer, then there is an increased risk of human error; the interviewer may confuse state laws and ask a question that violates the OCA. To avoid this problem, management could be to write out the questions that the interviewer may and may not ask, depending on what location the available position is for. Even with this solution, employers cannot avoid the inevitable – the time and expense of retraining those within the firm who conduct the interviews.

90 See N.J. STAT. §34:6B-13 (2015) (defining “initial employment application process” to end after “an employer has conduct a first interview, whether in person of by any other means…”).
92 Id.
The enactment of this law likely, and should, add the cost of attorney’s fees to an employer’s list of expenses. Quite obviously “covered employers should become familiar with the terms of the new law and consider the various action items set out.”\textsuperscript{94} It is imperative to ensure the covered employer’s compliance department or attorney, should it not have a compliance department, reviews the OCA and provides a clear mechanism for compliance with its terms. Otherwise, the chance of a violation is near absolute. Additionally, having an attorney who is knowledgeable with this law will be useful should the law change in the future or should questions arise that require a quick answer.\textsuperscript{95} Finally, a broader assessment of the OCA and how it blends with other applicable laws must be guided by an attorney.\textsuperscript{96} For larger employers, this task may not be costly. For smaller businesses, however, this added expense can cause a serious setback.\textsuperscript{97} Either way, covered employers will have to comply.

The enactment of the OCA places a frustrating burden on entities other than employers and applicants. Specifically, cities and counties within the state of New Jersey who already have a local law or ordinance that bans the “box.” The law provides that “the provisions of this act shall preempt any ordinance, resolution, law, rule or regulation regarding criminal histories in the employment context.”\textsuperscript{98} Starting March 1, 2015, Newark’s noteworthy ordinance will be


\textsuperscript{95} Jill Cohen, \textit{Answering Your Questions on NJ’s ‘Ban-The-Box’ Law} (Sept. 12, 2014) Law 360.


\textsuperscript{98} N.J. STAT. § 34:6B-17 (2015).
discarded and replaced with the OCA.\textsuperscript{99} The city’s ban-the-box ordinance prides itself on being very restrictive in terms of when an employer can inquire about an applicant’s criminal history and even forbids an employer from conducting such research until a conditional offer is made.\textsuperscript{100} Because the OCA does not have such a strict rule, Newark employers gain more flexibility. Job-seeking citizens of Newark, however, will have to discuss their potential criminal record at an earlier stage in the hiring process and may once again realize difficulties in finding a full-time job. The same issue of preemption holds true for Atlantic City as well.\textsuperscript{101} Hopefully, employers within these two cities can once again comply with a new set of hiring procedures under the OCA.

The most taxing burden on employers through the enactment of the OCA is wasted time. Postponing employers from discovering that an applicant has a criminal record will not change the weight an employer will give that fact when making a hiring decision. An employer can receive overwhelming amounts of applications for a single job; if a criminal history is one characteristic an employer will consider in not hiring an applicant, then conducting these blind interviews is a waste of resources. Forcing employers to devote time and money to interview all of these applicants, who they would likely reject upon learning of their history anyway, only makes the hiring process more hostile.\textsuperscript{102} Further, “in the interest of transparency, it is beneficial

\textsuperscript{99} \textit{Id.}; \textsc{national emp’t law project, ban the box: major u.s. cities and counties adopt fair hiring policies to remove unfair barriers to employment of people with criminal histories} 39 (September 2014).

\textsuperscript{100} Newark, N.J., Ordinance 12,1630 (Sept. 19, 2012).

\textsuperscript{101} Atlantic City, N.J., Ordinance 83 (Dec. 23, 2011); \textsc{national emp’T law project, ban the box: major u.s. cities and counties adopt fair hiring policies to remove unfair barriers to employment of people with criminal histories} 36 (September 2014).

for HR to know relevant information as early in the process as possible if the goal is to make informed decisions.\textsuperscript{103}

The OCA does not only waste the employer’s time. An applicant’s effort and time spent applying and interviewing for a job can ultimately be pointless. Critics noted that “[i]ndividuals with prior criminal convictions may spend time applying and interviewing for positions which they are not qualified for due to their criminal conviction.”\textsuperscript{104} The OCA is intended to give persons with criminal records a better opportunity to find a full-time job.\textsuperscript{105} Instead, because employers cannot explain in their advertisements that they will not hire a candidate with a criminal history, and their application does not ask about it, applicants will spend time filling out job forms and interviewing when in reality they do not have a chance to receive an offer.\textsuperscript{106} This time spent could be used applying for jobs that they are actually qualified for. Parties on both ends of the deal will incur time spent away from other responsibilities because of this law.

C. Liability Under the OCA.

A major concern for employers with the enactment of ban-the-box legislation is increased liability.\textsuperscript{107} Specifically, employers are concerned that an increase in negligent hiring and Title VII, disparate impact lawsuits may result.\textsuperscript{108} In reality, however, disparate impact claims in the hiring context are almost always unsuccessful and negligent hiring suits can easily be avoided.

\textsuperscript{105} End Discrimination at Your Workplace, All of Us or None, http://bantheboxcampaign.org/?p=20.
\textsuperscript{106} See N.J. STAT. § 34:6B-14 to 15 (2015).
\textsuperscript{108} Id.
Further, the OCA does not place much additional liability on a covered employer at all. Consequently, victims of a violation of this law are left without legitimate recourse.

Increased claims under the tort of negligent hiring is a common fear among covered employers, but should not be one.109 This tort confronts the risk of exposing the public to potentially dangerous people. Current law in New Jersey holds an employer liable for the injury caused to third persons, even for actions outside the scope of employment, when they "knew or had reason to know of the... dangerous attributes [criminal history] of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons."110 The rule also requires that "through the negligence of the employer in hiring the employee, the latter's... dangerous characteristic proximately caused the injury."111 The fear of negligent hiring suits stems from the increased chance that employers will hire someone who has a criminal record without knowing that fact because their applications can't ask about it and the topic is not covered during the initial interview, which may be the only interview conducted in some situations. Further, because an employer cannot screen applicants initially through a criminal background check, it may be the case that some employers skip that step altogether.

An employer should not be concerned about increased litigation from this tort because of the OCA. There are ways a covered employer can still ensure that applicants they consider for employment are not subjecting them or third parties to risk. First, applications should include an inquiry into why the candidate left their former employer.112 Those who were previously fired

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109 Id.
111 Id.
will rarely ever disclose that fact and if they do, it is likely sugar-coated.\textsuperscript{113} Including this inquiry up-front can serve as a powerful tool to highlight an applicant’s potentially risky behavior. Additionally, this part of the application will give the covered employer a better idea as to why this person is applying and their employment track record.

Another way to comply with the OCA and dodge lawsuits under negligent hiring is to conduct the background check after the initial interview. The law only prohibits a covered employer from engaging in a background inquiry \textit{initially}, but all bets are off after that first interview is completed.\textsuperscript{114} Because of technological advances, a background check is common and easy to obtain.\textsuperscript{115} Also, as discussed earlier, there are alternatives to a background check that an employer can use during the “initial application process” that achieves a similar end. Reaching out to references the candidate provides and asking simple questions, directed towards the candidate’s character, may lead to information about the candidate’s past.\textsuperscript{116} Contacting the listed references will also help the employer discover if a candidate lied about anything on the application.\textsuperscript{117}

Employers are also faced with the concern of a Title VII, disparate impact claim because of their decision to reject an applicant due to criminal history. Title VII states that “it shall be an unlawful employment practice for an employer... to fail or refuse to hire or to discharge any individual... because of such individual’s race, color, religion, sex, or national origin.”\textsuperscript{118}

Although the criminally convicted are not a protected class under Title VII, when discrimination

\textsuperscript{113} \textit{Id.}
\textsuperscript{114} N.J. STAT. § 34:6B-14 (2015).
\textsuperscript{117} \textit{Id.}
based on criminal convictions disproportionately affects a certain protected class grounds may exist for a Title VII action.\textsuperscript{119} Fortunately for employers, however, many convicts do not fit into a protected class so they are unable to bring forth the claim.\textsuperscript{120} Additionally, even if the ex-offender does qualify as a protected class member, disparate impact theory suits have been extremely unsuccessful since the late 1980s.\textsuperscript{121}

Employers were also concerned that this law would “establish a standard of behavior for employers” and if they deviated from this standard, litigation would arise under other statutes like the Conscientious Employee Protection Act (“CEPA”).\textsuperscript{122} Fortunately, the OCA does a great job at limiting liability for employers. Specifically regarding the common concern of creating a standard or using a violation as proof in another cause of action, the Act “specifies that the law does not establish a standard of behavior with respect to any other law, and that evidence of an employer’s violation of the act is not admissible in any legal proceeding.”\textsuperscript{123} Covered employers can take a deep breath because this provision eliminates the fear of a violation coming back to haunt them in a big way.

Additionally, the OCA benefits employers because this law prohibits a person from bringing a private cause of action against them for violating, actually or allegedly, the terms of

\textsuperscript{119} Alexandra Harwin, Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records, 14 BERKELEY J. AFR.-AM. L. & POL’Y 2, 4-5 (2012); see e.g. Green v. Missouri Pac. R.R. Co., 523 F.2d 1290, 1298-99 (8th Cir. 1975) (holding that a railroad company is liable under Title VII because their policy to not consider for employment any applicant who has been convicted of a crime other than a minor traffic offense has a disparate impact on Black candidates).


\textsuperscript{121} Harwin, supra note 119, at 12 – 13.

\textsuperscript{122} New Jersey Civil Justice Institute, New Jersey’s Ban the Box Liability Language a Model for the Nation, POLITICKERNJ (Aug. 11, 2014), http://www.politickernj.com/79066/new-jersey-s-ban-box-liability-language-modelnation (referencing N.J. STAT. 34:19 (2015)).

\textsuperscript{123} Id. (citing N.J. STAT. § 34:6B-18 (2015)).
the statute.\textsuperscript{124} Litigation can be an extremely taxing event for a business, big or small.\textsuperscript{125} This provision eliminates any concern covered employers may have about affording a large, private action should they violate the OCA. While a big relief for employers, the OCA leaves applicants with limited options should they be injured by a violation of this law.

In situations where an employer does violate the OCA by inquiring into the applicant’s criminal record during the initial employment process, the penalties are a simple slap on the hand. Liability is strictly limited to civil penalties, the first violation comes with a fine up to $1,000, the second can reach $5,000, and any penalties after two peak at $10,000.\textsuperscript{126} Penalties are usually designed to deter a certain action. These, however, are unlikely to scare off unwanted behavior in the hiring process because of how minute the fines are.

IV. “They carry it with them every step that they take”: Can we set them free?

A. The OCA Compared to Similar Legislation in Other Areas.

New Jersey is but one of many other states, counties, and cities across the United States who have banned the “box.”\textsuperscript{127} Depending on where you reside, the applicable ban-the-box legislation can vary immensely. The following analysis will compare and contrast the OCA to some prominent ban-the-box laws and ordinances. Ultimately, this Act can be considered very lenient and favorable to employers when compared to other areas.

\begin{footnotesize}
\textsuperscript{124} \textit{N.J. Stat.} \textsuperscript{ } \textsection 34:6B-18 (2015).
\textsuperscript{125} Paula Hannaford-Agor \& Nicole L. Waters, \textit{Estimating the Cost of Civil Litigation}, Court Statistics Project, Volume 20, Number 1 (Jan 2013) \textsuperscript{*7}, available at http://www.courtstatistics.org//-/media/Microsites/files/CSP/DATA%20PDF/CSPH_online2.ashx. The median cost of litigation for employment law issues is $88,000.
\textsuperscript{126} \textit{N.J. Stat.} \textsuperscript{ } \textsection 34:6B-19 (2015).
\textsuperscript{127} \textsc{National Emp’t Law Project, Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies To Remove Unfair Barriers To Employment Of People With Criminal Histories} \textsuperscript{1} (September 2014).
\end{footnotesize}
Baltimore, Maryland officially enacted their Fair Chance Ordinance on May 15, 2014.\textsuperscript{128} The city’s ban-the-box rules are considered middle-of-the-road in terms of who the Ordinance applies to and when an employer can begin the criminal history inquiry.\textsuperscript{129} It applies to all employers with ten employees or less and prohibits any inquiry into an applicant’s conviction history until after the employer has made a conditional offer.\textsuperscript{130} The most unique, and harsh, aspect of this ordinance is the penalties for employers who violate the provisions.\textsuperscript{131} A violation is a misdemeanor and can also include a fine up to $500 or 90 days imprisonment.\textsuperscript{132} Additionally, the Baltimore Community Relations Commission may award “back pay, reinstatement, attorney’s fees, and compensatory damages, including damages for emotional distress and expenses incurred in seeking other employment.”\textsuperscript{133} The intense consequences that come with a violation in Baltimore are in stark contrast to what is at stake for a covered New Jersey employer, who just has to pay $1,000 for the first offense.\textsuperscript{134}

On one end of the spectrum, is San Francisco, California’s Fair Chance Ordinance, enacted on February 4, 2014.\textsuperscript{135} The ordinance forbids employers, both public and private, from inquiring into an applicant’s conviction history or an unresolved arrest until after the first interview or after a conditional offer of employment.\textsuperscript{136} Additionally, there is an extensive list of

\begin{itemize}
\item \textsuperscript{129} Id.
\item \textsuperscript{130} NATIONAL EMP’T LAW PROJECT, \textit{BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL HISTORIES} 22 (September 2014).
\item \textsuperscript{131} Id.
\item \textsuperscript{132} BALTIMORE, MD., CODE 11 §14-16 (2014).
\item \textsuperscript{134} N.J. STAT. § 34:6B-19 (2015).
\item \textsuperscript{135} NATIONAL EMP’T LAW PROJECT, \textit{BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL HISTORIES} 16 (September 2014).
\item \textsuperscript{136} S.F., CAL., CODE, art. 49 § 4904(c) (2014).
\end{itemize}
previous transgressions that an employer can never inquire into or require disclosure of.\(^{137}\) For example, a covered employer may never inquire into or require disclosure of a conviction that is more than seven years old.\(^{138}\) Compared to the OCA, not only is this ordinance more limiting on what information an employer can obtain, but it also applies to many more entities. The prohibition on conviction history inquiries also apply to city contractors, subcontractors and affordable housing providers.\(^{139}\) Ultimately, some critics find San Francisco’s ordinance to be so complex that it deters employers from bringing up the subject altogether.\(^{140}\)

Rhode Island enacted its statewide ban-the-box law on July 15, 2013.\(^{141}\) The law applies to all employers within the state who employ four or more individuals – much more employers than the OCA.\(^{142}\) The State does, however, allow for an employer to ask about an applicant’s criminal record during the first interview, just not before.\(^{143}\) One major risk in this State for employers is the fact that aggrieved individuals can bring a civil action and Rhode Island courts can award “a range of remedies including back pay, compensatory damages, punitive damages, and attorney’s fees and costs.”\(^{144}\) The risk of a civil action makes Rhode Island’s much stricter than New Jersey’s.\(^{145}\)

\(^{137}\) S.F., CAL., CODE, art. 49 § 4904(a)(1)-(6) (2014).

\(^{138}\) S.F., CAL., CODE, art. 49 § 4904(a)(5) (2014).

\(^{139}\) S.F., CAL., CODE, art. 49 § 4906 (2014); S.F., CAL., CODE, ch. 12T.4 (2014); NATIONAL EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL HISTORIES 17 (September 2014).


\(^{141}\) NATIONAL EMP’T LAW PROJECT, BAN THE BOX: MAJOR U.S. CITIES AND COUNTIES ADOPT FAIR HIRING POLICIES TO REMOVE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL HISTORIES 8 (September 2014).


\(^{143}\) R.I. STAT. § 28-5-7 (2014).

\(^{144}\) R.I. STAT. § 28-5-7 (2014).

\(^{145}\) See N.J. Stat. § 34:6B-18 (2015) (“Nothing set forth in this act shall be construed as creating, establishing or authorizing a private cause of action by an aggrieved person against an employer who has violated, or is alleged to have violated, the provisions of this act.”).
Effective since January 1, 2014, Minnesota's ban-the-box law prohibits employers from inquiring about a candidate's criminal history until the applicant has been selected for an interview or, if the position does not require an interview, until the employer extends a conditional job offer. Consequently, an employer can inquire about criminal history before the actual interview takes place, but he/she still must conduct the interview and allow the applicant to explain the situation. This State has even less strict penalties for violators than New Jersey. For a violation before January 1, 2015, a first time offender will be given a warning and a chance to correct their actions. If the employer does not remedy the violation, then a fine will be instituted; however, it will never exceed $500 per violation and regardless of how many violations occur in a calendar month, the employer will never be billed more than $500. For violations after December 31, 2014, the fines are contingent upon the amount of employees but at no point will an employer be fined in excess of $2,000 in one calendar month regardless of the amount of violations that occur within that time period.

B. Solution

The OCA needs to undergo reform to achieve the purpose of ban-the-box legislation. Citizens of New Jersey with a criminal history are left, even after enactment of this law, with less of a chance of gaining employment than their counterparts who have a clean record. Although it is important to keep businesses within the State happy, favor clearly leans on their side with the provisions of this law. New Jersey is thus left with two options to fix the problems with the OCA described in this Note: eliminate the OCA completely, or be proactive in efforts to amend

147 Minn. Stat. § 364.06 (2014).
148 Id.
149 Id.
provisions of this law to actually assist those previously convicted in finding work. The following proposed amendments will help strike a more appropriate balance between an employer’s power in the hiring process and the applicant’s right to compete for a full-time job.

First, the provisions of the OCA should apply to more employers within the state. It satisfies sound reasoning to allow exemptions for employers where a background check is required by law and for positions in law enforcement. However, when 80-90 percent of New Jersey employers are outside the scope of the OCA, this law will not make any substantial improvement in helping the criminally convicted obtain a job. The prohibition on criminal background inquiries during the initial employment application process must apply to employers who have less than fifteen employees. Only then, can the law reach enough employers within the state to give people a more fair competition in obtaining a job offer. Although applying this law to entities who hire four or more employees, like Rhode Island’s ban-the-box law, might be too encompassing, Congress should discuss finding a more appropriate median that would force more employers within arm’s length of the provisions of the OCA. Any burden added to employers will be outweighed by the increase in candidate from which they get to choose.

Second, the OCA’s preemptive power should not be retroactive. Specifically, this law should not preempt Newark’s and Atlantic City’s Ordinance that have already been in effect for

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151 United States Bureau of Labor Statistics, Private industry by supersector and size of establishment: Establishments and employment, first quarter 2011, by state, http://www.bls.gov/cew/ew11table4.pdf (because the data lists employers who have up to 10 and up to 20 employees, but not up to 15, the 700,000 estimate is made by including half the amount from the pool with 10 to 19 employees.
152 N.J. STAT. § 34:6B-13 (2015) (Defines an “employer” covered under the OCA to be “any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks…”).
153 See Rod Fliegel & Jennifer Mora, Rhode Island Enacts “Ban the Box” Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview (July 17, 2013), http://www.litler.com/publication-press/publication/rhode-island-enacts-ban-box-law-prohibiting-employment-application-cri; Expanding the OCA to contractors and fair housing providers would also be too expansive, see S.F., CAL., CODE, art. 49 § 4906; S.F., CAL., CODE, ch. 12T.4.
some time now.\textsuperscript{154} Instead, the OCA should act as the floor by which all covered employers must abide. If areas choose to enforce even stricter guidelines, above the minimum requirements, it should be allowed. Having a uniform law that applies to everyone within a State does have its advantages, to keep confusion at a minimum for example.\textsuperscript{155} However, these two cities in particular have a higher than normal population of citizens with a criminal record.\textsuperscript{156} The Ordinances currently in place are especially strict to adapt to reality; having to amend hiring practices within the cities' limits to allow background checks be inquired into and conducted earlier will be a huge setback for them. Additionally, Atlantic City and Newark are the only areas in New Jersey that would be different from the rest the state. Little confusion would follow if these two cities continued the enforcement of their ban-the-box provisions. If the purpose of the OCA is to assist those with criminal convictions in obtaining a job, then Congress should recognize that preempting Atlantic City’s and Newark’s Ordinances are doing the opposite. Two steps forward, one step back.

Third, it would be in the best interest of employers and applicants alike, if the OCA required the employer to consider mitigating factors when making their employment decision. San Francisco’s Ordinance requires that:

\begin{quote}
In making an employment decision based on an applicant’s or employee’s Conviction History, an Employer shall conduct an individualized assessment, considering only Directly-Related Convictions, the time that has elapsed since the Conviction or
\end{quote}

\textsuperscript{154} See N.J. STAT. § 34:6B-17 (2015) (states that the provision will preempt any ordinance already in effect that involves criminal histories in the employment context); Newark, N.J., Ordinance 12,1630 (Sept. 19, 2012); Atlantic City, N.J., Ordinance 83 .

\textsuperscript{155} Roy Maurer, Ban-the-Box Movement Goes Viral: Dozens of cities and state restrict employers from asking job applicants about criminal convictions, SHRM (Aug. 8/2014), http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/ban-the-box-movement-viral.aspx (a big problem of the lack of uniformity is the “dizzying number of variations on banning the box, not only from state to state, but city to city” quoting Angela Preston, vice president of compliance and general counsel at EmployeeScreenIQ).

Unresolved Arrest, and any evidence of inaccuracy or Evidence of Rehabilitation or Other Mitigating Factors.\textsuperscript{157}

Although such an in-depth assessment with various elements to consider may take away a lot of freedom employers have in their personal business judgments, the general idea behind what San Francisco is enforcing deserves mention. By having the employer consider the amount of time that has passed since the conviction and evidence of the applicant trying to improve through rehabilitation, the hiring party can find potential in a candidate who they likely wouldn't have otherwise.\textsuperscript{158} Additionally, this gives applicants a better chance of getting hired even after the employer conducts the background check and discovers a blemished record. While an employer should not simply be forced to ignore a conviction over seven years old, like San Francisco provides, it is important to foster the idea that mistakes can and will be forgiven so long as that person demonstrates a will to change.\textsuperscript{159}

Finally, the penalties afforded to violators of the OCA need to be more severe. As the law currently stands, employers with larger revenues will have no problem asking about an applicant's criminal history during the first interview or on their application because they may find $1,000 well worth the time and efforts they would otherwise have to spend complying with it.\textsuperscript{160} Harsher consequences for violators can foster a more serious attitude towards the effort to help the criminally convicted obtain a job.

V. Conclusion

The OCA forces employers to spend money, time, and effort on amending their initial application process within New Jersey to comply with its provisions. Because of several loop

\textsuperscript{157} S.F., CAL., CODE, art. 49 § 4904(f).
\textsuperscript{159} S.F., CAL., CODE, art. 49 § 4904(a)(5).
\textsuperscript{160} N.J. STAT. § 34:6B-19 (2015).
holes, however, the amendments seem pointless considering the same end can be achieved through alternative methods. The applicant with a criminal record will be misled with false representations about an improvement in their ability to obtain employment now that the dreaded "box" is removed from certain applications. In reality, most applicants with a criminal history will likely be in the same position as they were prior to March 1, 2015. To achieve the purpose of the ban-the-box movement, further amendments must be made to the OCA.