

The following is a **draft** rule proposal for new rules at N.J.A.C. 12:68, which would implement P.L. 2014, c. 32, the Opportunity to Compete Act (also commonly referred to as the “Ban-the-Box” law). The draft rule proposal has been submitted by the Department of Labor and Workforce Development to the Office of Administrative Law (OAL) for publication in the March 16, 2015 issue of the New Jersey Register. Technical changes may occur upon approval by the OAL of the draft for publication; however, the substance of the proposal should not change. The final rule proposal which will appear in the New Jersey Register (and which will be posted on the Department’s website) will announce the date and location of a public hearing and the end date of the 60-day comment period during which individuals may submit written comments regarding the rule proposal to the Department for consideration. The rule proposal will also indicate the address to which individuals may submit those written comments.

The Department is posting the draft rule proposal on its website at this time as a courtesy to the regulated community, which will be required to comply with the Opportunity to Compete Act upon the Act’s effective date, March 1, 2015. Although the draft rule proposal is not binding, it is the Department’s hope that its publication in advance of March 1, 2015 will assist the regulated community in its efforts to comply with the Opportunity to Compete Act in that it should eliminate some confusion as to how the Department interprets the law and the method by which the Department intends to enforce the law.

The Department will be posting updates regarding the status of the rule proposal on this website, including the posting of the rule proposal on the date of its publication in the New Jersey Register, March 16, 2015.

LABOR AND WORKFORCE DEVELOPMENT

DIVISION OF WAGE AND HOUR COMPLIANCE

The Opportunity to Compete Act Rules

Proposed New Rules: N.J.A.C. 12:68

Authorized By: _____

Harold J. Wirths, Commissioner

Department of Labor and Workforce Development

Authority: N.J.S.A. 34:1-20 and 34:1A-3(e).

Calendar Reference: See Summary below for explanation of exception to the calendar requirement.

Proposal Number: PRN 2014 - _____

A public hearing on the proposed new rules will be held on the following date at the following location:

10:00 A.M. to 12:00 Noon

New Jersey Department of Labor and Workforce Development

John Fitch Plaza

2nd Floor Conference Room

Trenton, New Jersey

Please call the Office of Legal and Regulatory Services at (609) 292-2789 if you wish to be included on the list of speakers.

Submit written comments by _____ to:

David Fish, Executive Director

Office of Legal and Regulatory Services

NJ Department of Labor and Workforce Development

P.O. Box 110 – 13th Floor

Trenton, New Jersey 08625-0110

The agency proposal follows:

Summary

The Department is proposing new rules at N.J.A.C. 12:68-1.1 through 1.6 in order to implement P.L. 2014, c. 32 (the Act), which (1) prohibits an employer from requiring that an applicant for employment complete any employment application during the initial employment application process that makes any inquiries regarding an

applicant's criminal record, (2) prohibits an employer from making any oral or written inquiry during the initial employment application process regarding an applicant's criminal record, and (3) prohibits an employer from knowingly or purposefully publishing or causing to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses.

Proposed new N.J.A.C. 12:68-1.1 would set forth the purpose and scope of the chapter.

Proposed new N.J.A.C. 12:68-1.2 would include definitions of words and terms used throughout the chapter.

Proposed new N.J.A.C. 12:68-1.3 would address what constitutes a violation of the Act.

Proposed new N.J.A.C. 12:68-1.4 would address exemptions from the Act.

Proposed new N.J.A.C. 12:68-1.5 would concern the assessment of administrative penalties when there has been a violation of the Act.

Proposed new N.J.A.C. 12:68-1.6 would address the appeal process available to an employer against whom an administrative penalty has been levied for violation of the Act.

As the Department has provided a 60-day comment period for this notice of proposal, this notice is excepted from the rulemaking calendar requirements pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative social impact might be felt would derive in the first instance from the Act and not the proposed new rules. As to the remainder of the new rules, it is the Department's belief that they would have a positive social impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. Furthermore, the proposed new rules would have a positive social impact in that they would establish a regulatory framework for the assessment of penalties and processing of appeals where a violation of the Act has occurred, thereby enabling the Department to effectively enforce the law.

Economic Impact

As indicated in the Social Impact above, the vast majority of the proposed new rules either mirror the Act or are necessitated by the Act. Therefore, whatever negative economic impact might be felt would derive in the first instance from the Act, not the proposed new rules. That portion of the new rules which addresses the levying of penalties by the Department against those who violate the Act would, of course, have a negative economic impact upon those employers who run afoul of the Act. As to the remainder of the new rules, it is the Department's belief that they would have a positive economic impact in that they would minimize any possible confusion as to who is covered by, and what acts are prohibited under, the Act. It is the Department's hope that minimizing confusion as to these issues will avoid costs for those impacted by the Act of unnecessary litigation, which might otherwise result.

Federal Standards Statement

The proposed new rules do not exceed standards or requirements imposed by Federal law as there are currently no Federal standards or requirements applicable to the subject matter of this rulemaking. As a result, a Federal standards analysis is not required.

Jobs Impact

The Department does not anticipate that the proposed new rules would result in either the generation or loss of jobs.

Agriculture Industry Impact

The proposed new rules would impact the agriculture industry in precisely the same way that it would impact any other industry which consists of employers, as that term is defined within the Act; which is to say, covered agriculture industry employers would be required to comply with the Act and the proposed new rules, as would any other covered employer. Neither the Act, nor the proposed new rules, differentiate among covered employers based on industry type.

Regulatory Flexibility Analysis

The proposed new rules would prohibit all covered employers, including those which are small businesses, as that term is defined within the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., from (1) requiring that an applicant for employment complete any employment application during the initial employment application process that makes any inquiries regarding an applicant's criminal record, (2) from making any oral or written inquiry during the initial employment application process regarding an applicant's criminal record, and (3) from knowingly or purposefully publishing or causing

to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses. These prohibitions are expressly dictated by the Act. The Act covers as employers only those persons, companies, firms, labor organizations, or associations which have 15 or more employees over 20 calendar weeks and which do business, employ persons or take applications for employment within New Jersey. The proposed new rules would contain the same definition of the term “employer.” Also, the proposed new rules would include the size of the employer among the factors to be considered when determining what constitutes an appropriate administrative penalty for a particular violation. This is within the Department’s discretion under the Act.

Housing Affordability Impact Analysis

The proposed new rules would not evoke a change in the average costs associated with housing. The basis for this finding is that the proposed new rules pertain to discrimination against those with a criminal record in the advertisement by employers and screening of prospective employees for job vacancies within New Jersey. The proposed new rules do not pertain to housing.

Smart Growth Development Impact Analysis

The proposed new rules would not evoke a change in the housing production within Planning Areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan. The basis for this finding is that the proposed new rules pertain to discrimination against those with a criminal record in the advertisement by employers and screening of prospective employees for job vacancies

within New Jersey. The proposed new rules do not pertain to housing production, either within Planning Areas 1 or 2, within designated centers, or anywhere in the State of New Jersey.

Full text of the proposed new rules follows:

CHAPTER 68

THE OPPORTUNITY TO COMPETE ACT RULES

SUBCHAPTER 1 GENERAL PROVISIONS

12:68-1.1 Purpose and scope

- (a) The purpose of this chapter is to effectuate P.L. 2014, c. 32.
- (b) The chapter is applicable to all employers and applicants for employment, as those terms are defined in N.J.A.C. 12:68-1.2.

12:68-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings unless the context clearly indicates otherwise:

“15 or more employees over 20 calendar weeks” means 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.

“Act” means P.L. 2014, c. 32.

“Advertisement” means any circulation, mailing, posting, or any other form of publication, utilizing any media, promoting an employer or intending to alert its audience, regardless of size, to the availability of any position of employment.

“Applicant for employment” means any person whom an employer considers when identifying potential employees, through any means, including, but not limited to, recruitment, solicitation, or seeking personal information, or any person who requests to be considered for employment by an employer, or who requests information from an employer related to seeking employment, and shall include any person who currently is an employee of the employer.

“Commissioner” means the Commissioner of the Department of Labor and Workforce Development or his or her designee.

“Corrections, a position in” means employment with a State, county or municipal employer in the supervision of offenders pursuant to sentencing or other judicial disposition, or the supervision of alleged offenders awaiting and/or during formal adjudication; as in Corrections Officers employed by the State Department of Corrections or the Juvenile Justice Commission; County Corrections Officers, Juvenile Detention Officers; County Probation Officers, Parole Officers employed by the State Parole Board or the Juvenile Justice Commission; and any Sheriff, Undersheriff, or Sheriff’s Officer.

“Criminal record” means information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, release or conviction, including,

but not limited to, any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of conditional discharge.

“Department” means the Department of Labor and Workforce Development.

“Director” means the Director of the Division of Wage and Hour Compliance, within the Department of Labor and Workforce Development, or his or her designee.

“Emergency management, a position in” means employment with a State, county or municipal employer in the coordination of emergency planning, preparedness, risk reduction, response and recovery. For the purpose of this definition, the term “emergency” shall include, but not necessarily be limited to, acts of terrorism, sabotage or other hostile action, public disorder, industrial accidents, communication failures, fire, and natural disasters (such as hurricanes, floods, and earthquakes).

“Employee” means a person who is hired for a wage, salary, fee, or payment to perform work for an employer, but excludes any person employed in the domestic service of any family or person at the person’s home, any independent contractors, or any directors or trustees. The term also shall include interns and apprentices, whether paid or unpaid.

“Employer” means any person, company, corporation, firm, labor organization, or association which has 15 or more employees over 20 calendar weeks and does business, employs persons, or takes applications for employment within this State, including the State, any county or municipality, or any instrumentality thereof. The term shall include job placement and referral agencies and other employment agencies, but

excludes the United States or any of its departments, agencies, boards, or commissions, or any employee or agent thereof.

“Employment” means any occupation, vocation, job, or work with pay, including temporary or seasonal work, contingent work, and work through the services of a temporary or other employment agency; any form of vocational apprenticeship; or any internship. The physical location of the prospective employment shall be in whole, or substantial part, within this State. For the purpose of this definition, the physical location of the prospective employment shall be in substantial part within this State if the employer has reason to believe at the outset of the initial employment application process that the percentage of work hours which will be spent performing work functions within New Jersey by the successful candidate for prospective employment will equal or exceed 50 percent of the successful candidate’s total work hours.

“Employment application” means a form, questionnaire or similar document or collection of documents that an applicant for employment is required by an employer to complete.

“Homeland Security, a position in” means employment with the State Office of Homeland Security and Preparedness, or with any other State, county or municipal counter-terrorism agency.

“Initial employment application process” means the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes any inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview of an applicant for

employment, whether the interview has been conducted in person or by any other means.

“The Judiciary, a position in” means a Justice of the New Jersey Supreme Court, a Judge of the New Jersey Superior Court, a Judge of the New Jersey Tax Court, or a Municipal Judge.

“Law Enforcement, a position in” means employment (1) with a government employer, including but not limited to a police department or law enforcement agency in a State department, office, or commission, a County Sheriff's Office, County Prosecutor's Office, or the Divisions of Criminal Justice or State Police, the Juvenile Justice Commission, or the Office of the Insurance Fraud Prosecutor in the Department of Law and Public Safety, (2) in a position as a police officer, detective, criminal investigator or other law enforcement officer statutorily empowered to act for the detection, investigation, arrest or conviction of persons violating the criminal laws of this State. The phrase, “position in law enforcement,” shall also mean employment as a County Prosecutor or Assistant County Prosecutor in a County Prosecutor's Office or as an Assistant Attorney General or Deputy Attorney General in the Division of Criminal Justice or the Office of the Insurance Fraud Prosecutor.

12:68-1.3 Violations

(a) A violation of the Act shall occur when an employer requires an applicant for employment to complete any employment application during the initial employment application process that makes any inquiries regarding an applicant's criminal record.

(b) A violation of the Act shall occur when an employer makes any oral or written inquiry to anyone, including to the applicant, during the initial employment application process regarding an applicant's criminal record.

(c) Notwithstanding (a) or (b), above, if an applicant voluntarily discloses, either orally or in writing, during the initial employment application process, any information regarding the applicant's criminal record, the employer may make inquiries to anyone, including to the applicant, during the initial employment application process regarding the applicant's criminal record.

(d) Unless otherwise permitted or required by law, an employer shall not knowingly or purposefully publish, or cause to be published, any advertisement that solicits applicants for employment where that advertisement explicitly provides that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses.

(e) Nothing set forth in this section shall be construed to prohibit an employer, after the initial employment application process has concluded, from requiring an applicant for employment to complete an employment application that makes any inquiries regarding an applicant's criminal record or, after the initial employment application process has concluded, from making any oral or written inquiries to anyone, including to the applicant, regarding an applicant's criminal record.

(f) Nothing set forth in this section shall be construed to prohibit an employer from refusing to hire an applicant for employment based upon the applicant's criminal record, unless the criminal record or relevant portion thereof has been expunged or

erased through executive pardon, provided that such refusal is consistent with other applicable laws, rules and regulations.

(g) Nothing set forth in this section shall be construed to prohibit an employer from publishing, or causing to be published, an advertisement that contains any provision setting forth any other qualifications for employment, as permitted by law, including, but not limited to, the holding of a current and valid professional or occupational license, certificate, registration, permit or other credential, or a minimum level of education, training or professional, occupational, or field experience.

12:68-1.4 Exemptions

(a) The provisions of N.J.A.C. 12:68-1.3(a) and (b) shall not prohibit an employer, under any of the following circumstances, from requiring an applicant for employment to complete an employment application during the initial employment application process that makes any inquiries regarding an applicant's criminal record or from making any oral or written inquiries during the initial application process to anyone, including to the applicant, regarding an applicant's criminal record:

1. The employment sought or being considered is for a position in law enforcement, corrections, the judiciary, homeland security or emergency management, or

2. The employment sought or being considered is for a position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by

any law, rule or regulation, or where any law, rule or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees, or

3. The employment sought or being considered is for a position designated by the employer to be part of a program or systematic effort designed predominantly or exclusively to encourage the employment of persons who have been arrested or convicted of one or more crimes or offenses.

(b) The provisions of N.J.A.C. 12:68-1.3(d) shall not apply to any advertisement that solicits applicants for a position in law enforcement, corrections, the judiciary, homeland security, or emergency management, or any other employment position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by any law, rule or regulation, or where any law, rule, or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees.

12:68-1.5 Administrative penalties

(a) When the Director finds that an employer has violated the Act, the Director is authorized to assess an administrative penalty against the employer in the amounts that follow:

1. First violation – not more than \$1,000,
2. Second violation – not more than \$5,000,
3. Third and subsequent violations – not more than \$10,000.

(b) No administrative penalty shall be levied pursuant to this chapter unless the Director provides the alleged violator with written notification of the violation, the amount of the penalty, and the opportunity to appeal the penalty assessment to the Commissioner.

(c) In determining what constitutes an appropriate administrative penalty for a particular violation, the following factors shall be considered, where applicable:

1. The seriousness of the violation,
2. The past history of previous violations by the employer,
3. The good faith of the employer,
4. The size of the employer, and
5. Any other factors which are deemed to be appropriate under the circumstances.

12:68-1.6 Appeals

(a) When the Director assesses an administrative penalty under N.J.A.C. 12:68-1.5, the employer shall have the right to file an appeal with the Commissioner.

(b) An appeal must be received by the Commissioner within 15 business days following receipt by the employer of the notification described in N.J.A.C. 12:68-1.5(b).

(c) The Commissioner shall decide any appeal filed under (b) above on the written record or shall provide a hearing pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and 52:14F-1 et seq., and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.