



## *New Jersey Job Applicants with Criminal Records: Rights During the Application Process*

### What Laws Govern How Employers Use Criminal Records During the Employment Application Process?

1. The Opportunity to Compete Act (**OCA**), a New Jersey state law also sometimes called “Ban the Box.”<sup>1</sup> (pages 2-3)
2. The Fair Credit Reporting Act (**FCRA**), a federal law.<sup>2</sup> (pages 4-5)
3. The New Jersey Fair Credit Reporting Act (**NJFCRA**), a New Jersey state law.<sup>3</sup> (pages 4-5)
4. Title VII of the Civil Rights Act of 1964 (**Title VII**), a federal law.<sup>4</sup> (page 6)

### Summary of Rights and Rules During the Employment Application Process:

1. **Job Advertisements:** An employer *may not* advertise that they will not consider any applicant with a record of arrest or conviction.<sup>5</sup> (**OCA**)
2. **Job Application:** Many employers *may not* ask about an applicant’s criminal record on the job application.<sup>6</sup> (**OCA**)
3. **Asking About Your Record:** An employer *may not* ask an applicant about the applicant’s criminal record *until after the first interview*, unless the applicant *voluntarily discloses* information earlier.<sup>7</sup> (**OCA**)
4. **Written Permission to Run a Background Check:** Before running a background check, an employer *must get written permission* from the applicant.<sup>8</sup> (**FCRA, NJFCRA**)
5. **Decisions Based on a Criminal Record:**
  - An employer must treat equally applicants of different races who have similar criminal records.<sup>9</sup> (**Title VII**)
  - An employer may not have a criminal record hiring policy that screens out black and Latino applicants at a higher rate unless the policy is job related and consistent with business necessity.<sup>10</sup> (**Title VII**)
  - An employer may not reject a job applicant based on an arrest or conviction that has been expunged.<sup>11</sup> (**OCA**)
6. **Before Rejecting an Applicant Based on a Background Check,** the employer must provide the employee a copy of the background check and a written description of the applicant’s rights under FCRA.<sup>12</sup> (**FCRA, NJFCRA**)
7. **If the Employer Rejects an Applicant Based on the Applicant’s Background Check,** the employer must inform the applicant via oral, written, or electronic notice: (federal **FCRA** only)
  - That the employer made the decision not to hire the applicant based on the report received from the background check agency.<sup>13</sup>
  - That the background check agency did *not* make the decision and is unable to provide the applicant specific reasons why the applicant was not hired.<sup>14</sup>
  - Of the name, address, and phone number of the agency that provided the background check to the employer.<sup>15</sup>
  - That the applicant has the right:
    1. To obtain a free copy of the background check from the background check agency within 60 days.<sup>16</sup>
    2. To dispute inaccurate information in the background check with the background check agency.<sup>17</sup>
8. **Information That May Not Be Reported in a Background Check** (federal **FCRA** only)
  - If you are applying for a position where the annual salary may reasonably be expected to equal \$75,000 or less, the background check company *may not* report or disclose arrests or charges not ending in conviction more than 7 years old.<sup>18</sup>
9. **If the Background Check is Inaccurate or Incomplete** (**FCRA, NJFCRA**)
  - Contact the background check agency and tell them you want to file a dispute<sup>19</sup> and provide them with documentation that the record is inaccurate.<sup>20</sup>
  - The agency will then have 30 days to (1) conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and (2) update its file accordingly.<sup>21</sup>
  - If the agency does not resolve the dispute in your favor, you have the right to file a “statement of dispute.”<sup>22</sup>



## **The Opportunity to Compete Act: Frequently Asked Questions**

File a Complaint with NJDOLWD: [http://lwd.dol.state.nj.us/labor/forms\\_pdfs/lsse/MW-31C.pdf](http://lwd.dol.state.nj.us/labor/forms_pdfs/lsse/MW-31C.pdf)

Inform NJISJ About Violations: \* <http://www.njisj.org/OCAviolation>

\*You should **BOTH** file a complaint and inform NJISJ

**When Did the Opportunity to Compete Act (OCA) Take Effect?** March 1, 2015.<sup>23</sup>

**Where Can I Read the Full Text of the OCA?** [http://www.njleg.state.nj.us/2014/Bills/PL14/32\\_.PDF](http://www.njleg.state.nj.us/2014/Bills/PL14/32_.PDF)

### **What Does the Opportunity to Compete Act Do?**

The OCA prohibits *many* employers (but not all) from asking about your criminal record on the paper job application.<sup>24</sup> It also prohibits many employers from asking you about your criminal record or running a background check until after they have interviewed you at least once.<sup>25</sup> (see page 3 for an explanation of covered employers/positions)

**When Can an Employer Ask About My Criminal Record or Run a Background Check?** After the first interview.<sup>26</sup>

### **What if I Voluntarily Disclose Information About My Record Before or During the First Interview?**

If you voluntarily disclose information about your record, the employer may *immediately* ask you additional questions about your record without waiting until after the first interview.<sup>27</sup>

### **Can an Employer Refuse to Hire Me Because of My Record?**

Yes, unless your *entire* record has been expunged.<sup>28</sup> The OCA does *not* prohibit an employer from refusing to hire you based on your record. However, Title VII of the Civil Rights Act of 1964 does give applicants some protection.<sup>29</sup> (see page 6)

**Does the OCA Apply to Advertisements for Jobs?** Yes. The OCA prohibits covered employers from stating in a job advertisement that they will not consider any applicant who has been arrested or convicted of one or more crimes or offenses.<sup>30</sup>

**Who Enforces the OCA?** The Department of Labor and Workforce Development: Division of Wage and Hour Compliance.<sup>31</sup>

### **How Do I File a Complaint Under the OCA?**

- **In Person:** Visit a One-Stop Career Center: <http://jobs4jersey.com/jobs4jersey/jobseekers/oscc/>
- **By Mail, Fax, or Email:**
  - Download Labor Law Complaint form MW-31C: [http://lwd.dol.state.nj.us/labor/forms\\_pdfs/lsse/MW-31C.pdf](http://lwd.dol.state.nj.us/labor/forms_pdfs/lsse/MW-31C.pdf)
    - Under the heading “**Complaint Details**,” check “Ban the Box” and provide a detailed explanation:
      - “The job application has a question asking about the applicant’s criminal record.”
      - “The job advertisement says that no one with a criminal record may apply.”
      - “The employer asked me about my criminal record during my first interview.”
      - “My record is expunged but the employer refused to hire me because of my record.”
    - **Attach** any documents to help support your complaint (i.e. the job application)
    - **Mail** your completed claim form to:
      - Division of Wage and Hour Compliance  
P.O. Box 389  
Trenton, NJ 08625-0389
    - **Fax** your completed claim form to: (609) 695-1174
    - **Email** your completed claim form to: [wage.hour@dol.state.nj.us](mailto:wage.hour@dol.state.nj.us)
  - To ask questions about the complaint process, call (609) 292-2305

**SEE REVERSE SIDE FOR AN EXAMPLE OF HOW TO COMPLETE THE COMPLAINT FORM.**

## Example of how to explain a violation of the OCA on the Labor and Workforce Development Complaint Form:

### Complaint Details

20. Explain why you believe the business in item #12 violated the law. Attach any documents that support your complaint.

- Ban the Box – Opportunity to Compete for Persons with Criminal Records N.J.S.A. 34:8B-1 et seq.
- Unemployed Need Not Apply – Prohibited Job Advertisements N.J.S.A. 34:6B-1 et seq.
- Health Benefits – Notice Required by Employer of Change N.J.S.A. 34:11A-16 et seq.
- Records Required Relative to Collection, Transportation of Solid Waste N.J.S.A. 34:11-68
- Other – Please explain.

The job application has a question asking about the applicant's criminal record

### May I File an Anonymous claim?

Yes. To file an anonymous claim, write "ANONYMOUS" in the name section of the claim form, and leave the address blank. You must file your claim by mail or fax; you cannot file your claim by email and remain anonymous.

### What Employers ARE Covered by the OCA?

To be covered, an employer must:

- do business, employ persons, or take applications for employment within New Jersey, AND
- employ 15 or more employees over 20 calendar weeks.<sup>32</sup>

This includes:

- Private employers
- State, county, and municipal governments and agencies
- Job placement, referral, and other employment agencies

### What Positions ARE Covered by the OCA?<sup>34</sup>

The position must be in whole or substantial part within the State of New Jersey

Covered positions include:

- any position to work for an employer for a wage, salary, fee, or payment to perform work (*subject to the exempted positions listed in the column to the right*)
- interns and apprentices (*even if unpaid*)
- temporary or seasonal positions
- work through the services of a temporary or other employment agency

### What Employers are NOT Covered by the OCA?

- The federal government or any federal agencies<sup>33</sup>

### What Positions are NOT Covered by the OCA?

- Directors or Trustees<sup>35</sup>
- Independent contractors<sup>36</sup>
- Positions in:
  - Domestic service at a home<sup>37</sup>
  - Law enforcement<sup>38</sup>
  - Corrections
  - The judiciary
  - Homeland security
  - Emergency management
- Positions where:<sup>39</sup>
  - a criminal background check is *required* by law
  - a law *disqualifies* applicants from the position based on the applicants' criminal records
  - a law restricts the ability of employers in that specific business or industry ability to hire employees with certain criminal records
  - For a full list of such laws, visit <http://www.abacollateralconsequences.org/search/?jurisdiction=33>
- Positions designated by the employer to encourage the employment of persons with criminal record<sup>40</sup>



## **New Jersey Job Applicants with Criminal Records: Protections Under Federal and New Jersey Fair Credit Reporting Acts**

**When do the Federal<sup>41</sup> and New Jersey<sup>42</sup> Fair Credit Reporting Acts Protect Me?** FCRA/NJFCRA apply only when the employer requests a background check from a third party “Consumer Reporting Agency.” A background check agency qualifies as a “Consumer Reporting Agency” if it *regularly* produces background checks/and or credit reports.<sup>43</sup>

**Do FCRA/NJFCRA Protect Me if the Employer Obtains a Background Check from the State Police or the FBI?** No. Government entities are not “Consumer Reporting Agencies,” and so FCRA would not apply in that situation.

### **What Are My Rights Under the Federal and New Jersey Fair Credit Reporting Acts?**

1. **Written Permission to Run a Background Check:** Before running a background check, an employer *must get written permission* from the applicant.<sup>44</sup> (FCRA, NJFCRA)
2. **Before Rejecting an Applicant Based on a Background Check,** the employer must provide the employee a copy of the background check and a written description of the applicant’s rights under FCRA.<sup>45</sup> (FCRA, NJFCRA)
3. **If the Employer Rejects an Applicant Based on the Applicant’s Background Check,** the employer must inform the applicant via oral, written, or electronic notice: (federal FCRA only)
  - That the employer made the decision not to hire the applicant based on the report received from the background check agency\*.<sup>46</sup>
    - \*However, an employer does *not* need to tell you which arrests or convictions their decision was based on. Also, employers usually request background checks *and* credit checks in one report; if so, they are not required to specify whether your criminal record or your credit score was the reason they did not hire you.
  - That the background check agency did *not* make the decision and is unable to provide the applicant specific reasons why the applicant was not hired.<sup>47</sup>
  - Of the name, address, and phone number of the agency that provided the background check to the employer.<sup>48</sup>
  - That the applicant has the right:
    1. To obtain a free copy of the background check from the background check agency within 60 days.<sup>49</sup>
    2. To dispute inaccurate information in the background check with the background check agency.<sup>50</sup>
4. **Information That May Not Be Reported in a Background Check** (federal FCRA only)
  - If you are applying for a position where the annual salary may reasonably be expected to equal \$75,000 or less, the background check company may not report or disclose arrests or charges not ending in conviction more than 7 years old.<sup>51</sup>
5. **If the Background Check is Inaccurate or Incomplete** (FCRA, NJFCRA)
  - Contact the background check agency and tell them you want to file a dispute<sup>52</sup> and provide them with documentation that the record is inaccurate.<sup>53</sup>
  - The agency will then have 30 days (subject to one extension of 15 days<sup>54</sup>) to (1) conduct a reasonable reinvestigation to determine whether the disputed information is inaccurate and (2) update its file accordingly.<sup>55</sup>
  - Within 5 business days of completing the investigation, the agency must notify you of the result.<sup>56</sup>
  - If the agency does not resolve the dispute in your favor, you have the right to file a brief “statement of dispute” with the agency.<sup>57</sup> Unless the agency determines the dispute was frivolous or irrelevant, the agency must clearly note in any subsequent background check it produces that the particular item is disputed by you, and include either your “statement of dispute” or a summary of your statement.<sup>58</sup>

## How Do I Enforce My Rights Under the Federal and New Jersey Fair Credit Reporting Acts?

If your rights under FCRA were violated, the best way to enforce your rights is to file a civil suit in state or federal court.<sup>59</sup> There are both state and federal government agencies that enforce the FCRA, and with which you can file a complaint, but they often look for *patterns of violations* rather than enforcing individual rights.

**What Government Agencies Enforce the Federal and New Jersey Fair Credit Reporting Acts?** The Federal Trade Commission (FTC) enforces FCRA<sup>60</sup> and the New Jersey Division of Consumer Affairs (DCA) enforces NJFCRA.<sup>61</sup>

### How Do I File a Complaint with the Federal Trade Commission?

- **Telephone:** 877-382-4357 (voice) or 866-653-4261 (TTY)
- **Internet:** <https://www.ftccomplaintassistant.gov/>
  - On the left side of the page, under “Select a Category Below,” select “Other”
  - On the right side of the page, select “Click here for more options”
  - Click “NO MATCH FOUND.”
  - In response to “How were you contacted?”, click “Other/Not Applicable”
  - On the right side of the page click “Continue”
  - On the page for “Complaint Detail Information,” fill out Company Representative First Name, Last Name, and Title/Position. Leave the other fields blank.
  - Fill out the Company Details and Your Information on the next two pages
  - In the “Comments” box, type a detailed description of the complaint. Possible complaints include:
    - *The employer ran my background check without my permission.*
    - *The employer did not provide me with a copy of my background check or my rights **before** telling me I would not be hired.*
    - *The employer did not provide me with the contact information for the background check agency.*
    - *The employer did not notify me of my right to dispute inaccurate information with background check agency.*
    - *The background check agency produced a background report that includes a 7-year-old charge for which I was not convicted.*
    - *The background check agency produced a background report that had errors.*
    - *The background check agency refused to fix the errors on the background report*
  - Click “Continue”
  - Click “Submit”
- **For More Information:** <http://www.consumer.ftc.gov/articles/pdf-0044-background-checks.pdf>

### How Do I File a Complaint with the New Jersey Division of Consumer Affairs?

#### ➤ **By Mail or Fax:**

- Download the DCA General Complaint Form: [https://www20.state.nj.us/lps/LPSCA\\_COMPL/docs/ocp.pdf](https://www20.state.nj.us/lps/LPSCA_COMPL/docs/ocp.pdf)
  - Determine whether it was the employer or the background check agency that violated your rights.
  - Fill out your personal information and the information of the company you are filing the complaint against. If both the background check agency and the employer violated your rights, fill out a separate complaint form for each.
  - For Question 1, “Nature of Complaint,” check “Other” and write “New Jersey Fair Credit Reporting Act”
  - Ignore Question 2 regarding Motor Vehicles, but complete Questions 3 and 4.
  - For Question 5, provide a detailed description of the complaint, as described in the FTC section above.
- **Mail** your completed claim form to:
  - Division of Consumer Affairs
  - P.O. Box 45025
  - Newark, NJ 07101
- **Fax** your completed claim form to: 973-648-6908



## *New Jersey Job Applicants with Criminal Records: Protection Under Title VII of the Civil Rights Act of 1964*

### **How Does Title VII Protect Job Applicants with Criminal Records?**

Title VII of the Civil Rights Act of 1964<sup>62</sup> does not directly prohibit discrimination against a job applicant based on the applicant's criminal record; Title VII only directly prohibits employment discrimination *based on race, color, religion, sex, or national origin*.<sup>63</sup> However, there are two scenarios in which an employment decision based on a criminal record could violate Title VII:

1. **Disparate Treatment:** Employers *may not* treat job applicants differently if they have (a) similar qualifications and (b) similar criminal records differently but (c) different racial or ethnic backgrounds.<sup>64</sup>  
*EXAMPLE: It is a violation of Title VII to reject a black applicant due a conviction for drug possession while hiring a similarly qualified white applicant with a conviction for drug possession.*
2. **Disparate Impact:** Employers *may not* have a general hiring policy regarding criminal records if that policy disqualifies black or Latino applicants at a higher rate than white applicants, *unless* the employer can show that (1) the policy is job related for the position in question and (2) the policy is consistent with business necessity.<sup>65</sup>  
*EXAMPLE: A bus company could reasonably reject applicants with recent, multiple convictions for Driving While Intoxicated, because that offense is related to the job of driving a bus. However, that same bus company would violate Title VII if it had a policy of rejecting all applicants with any felony conviction or all applicants with a conviction for an unrelated offense, such as petty shoplifting (if the policy disqualifies black or Latino applicants at a higher rate than white applicants).*

### **What Must an Employer Do to Show that a Hiring Policy is “Job Related and Consistent with Business Necessity?”**

The Equal Employment Opportunity Commission (EEOC) has stated that an employer must either:

1. Validate the criminal record screen for the position in question by demonstrating a connection between the criminal records screened and subsequent work performance,<sup>66</sup> or
2. Develop an individualized assessment that considers:<sup>67</sup>
  - a. The nature and gravity of the offense or conduct;
  - b. The time that has passed since the offense or conduct and/or completion of the sentence;
  - c. The nature of the job held or sought.

### **How Do I File a Complaint Under Title VII?**

- **In Person:** Visit the closest Equal Employment Opportunity Commission Office to file a complaint in person:  
One Newark Center, 21st Floor  
Raymond Blvd at McCarter Hwy (Rt.21)  
Newark, New Jersey 07102-5233  
Fax: 973-645-4524  
801 Market Street, Suite 1300  
Philadelphia, PA 19107-3127  
Fax: 215-440-2606
- **Mail** a letter describing your complaint to either of the above addresses.
- **Fax** a letter describing your complaint to: 973-645-4524 (Newark) *or* 215-440-2606 (Philadelphia).
- **Telephone:** 1-800-669-4000.

### **Read More About Title VII Violations Regarding Criminal Records:**

[http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)