



BAN THE BOX

The idea behind “Ban the Box” legislation is simple – forbid employers from asking for information about applicants’ criminal records on initial job applications in order to remove obstacles to employment for people with prior criminal records and thus help to reduce recidivism rates. Unfortunately, attempts to enact this well-intentioned regulation clash with New Jersey’s broader legal landscape in a way that threatens to greatly increase New Jersey employers’ liability risk.

As a means of regulating the state’s businesses, the judicial system is not only a blunt instrument, it is also an extraordinarily unpredictable and expensive instrument. Unfortunately, New Jersey courts have read an implied cause of action into many regulatory statutes that create a right without expressly forbidding litigation to enforce the right. If ban the box legislation does not include language expressly stating that no new civil action is being created by the legislation, the courts will likely allow applicants to sue employers for alleged non-compliance with any ban the box provision.

In addition to ruling out civil actions under legislation enacting a ban the box, it is critical that the bill also protect the exercise of business judgment in making hiring decisions, with a provision clarifying that an alleged violation of ban the box shall not be the basis for a private cause of action under any existing statute.

The most significant liability concern is that a plaintiff could use an alleged violation of ban the box as a foundation for a separate civil action based on existing law – specifically the NJ Law Against Discrimination (LAD), or the NJ Civil Rights Act (CRA), both of which are powerful pieces of legislation that are given expansive interpretation by the courts and provide for attorneys’ fees and court costs.

- Case law interpreting the LAD allows for a cause of action where a practice has a disparate impact based on race and is not justified by business necessity. The danger is that to the extent this bill establishes that denial of employment due to criminal records has a disparate impact on race, and defines and restricts the scope of business necessity justifications, as a matter of law, an employer’s failure to follow the requirements of this bill would subject him to a civil suit under the LAD for disparate impact discrimination.
- The CRA provides for civil action based on the “deprivation” of any “substantive rights . . . secured by the . . . laws of this State.” Under the terms of this bill, the right to have one’s criminal convictions considered only in statutorily prescribed fashion would appear to be a “substantive right . . . secured by the laws of this State.” An adverse employment decision resulting from the violation of said right would therefore provide the basis for an action against an employer under the CRA.

The impact of banning the box must be considered in the context of New Jersey’s entire legal structure, because violations of one law can affect liability under other laws. Ban the box and other straightforward policy initiatives should not put the courts in a position where they are serving as an inefficient and expensive super-regulatory system.

The New Jersey Civil Justice Institute therefore opposes ban the box legislation that goes beyond banning the box and increases the risk that businesses in the state will face burdensome litigation.