

VOLUME 47, ISSUE 23

ISSUE DATE: DECEMBER 7, 2015

**RULE ADOPTIONS**

**LABOR AND WORKFORCE DEVELOPMENT  
DIVISION OF WAGE AND HOUR COMPLIANCE**

*47 N.J.R. 3034(a)*

**Adopted New Rules:** *N.J.A.C. 12:68*

**The Opportunity to Compete Act Rules**

Proposed: March 16, 2015, at *47 N.J.R. 601(a)*.

Adopted: November 2, 2015, by Harold J. Wirths, Commissioner, Department of Labor and Workforce Development.

Filed: November 2, 2015, as R.2015 d.178, **with non-substantial changes** not requiring additional public notice or comment (see *N.J.A.C. 1:30-4.3*).

Authority: *N.J.S.A. 34:1-20* and *34:1A-3(e)* and P.L. 2014, c. 32.

Effective Date: December 7, 2015.

Expiration Date: December 7, 2022.

**Summary** of Hearing Officer's Recommendation and Agency's Response:

A public hearing regarding the proposed new rules was held on April 7, 2015, at the Department of Labor and Workforce Development (Department). David Fish, Executive Director, Legal and Regulatory Services, was available to preside at the public hearing and to receive testimony. No one testified at the public hearing. Written comments were submitted directly to the Office of Legal and Regulatory Services. After reviewing the written comments, the hearing officer recommended that the Department proceed with the new rules with non-substantive changes not requiring additional public notice or comment (see *N.J.A.C. 1:30-4.3*).

**Summary** of Public Comments and Agency Responses:

Written comments were submitted by the following individuals. The number(s) in parentheses after each comment identifies the respective commenter(s) listed above.

1. Mark Diana, Esq., Evan Shenkman, Esq., and Christopher Elko, Esq., of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., in Morristown, New Jersey.
2. Stefanie Riehl, Assistant Vice President Employment and Labor, New Jersey Business and Industry Association, Trenton, New Jersey.
3. Mary Ellen Peppard, Assistant Vice President Government Affairs, New Jersey Food Council, Trenton, New Jersey.

4. Michael A. Egenton, Senior Vice President Government Relations, New Jersey State Chamber of Commerce, Trenton, New Jersey.

5. Deborah Smith Gregory, President, and Rick Robinson, Criminal Justice Chairperson, The Newark Branch of the National Association for the Advancement of Colored People, Newark, New Jersey.

6. Scott M. Welfel, Esq., Skadden Fellow/Staff Attorney, New Jersey Institute for Social Justice, Newark, New Jersey.

1. COMMENT: The commenter indicates that many employers with multi-state operations prefer to use a single employment application in all states, with instructions to applicants not to answer specific questions that may be prohibited by particular state laws. The commenter asks that the Department "confirm through the regulations that the Opportunity to Compete Act (OTCA) does not preclude an employer from including an inquiry on its employment application about criminal history if it also includes an instruction such as: 'Applicants for positions physically located, in whole or in substantial part, in New Jersey are instructed not to answer this question.'" (1 and 2)

RESPONSE: The Department agrees that providing the sort of clarification within the rules being suggested by the commenter would be appropriate. Consequently, the Department will on adoption add new *N.J.A.C. 12:68-1.3(h)*, stating the following: "[n]othing set forth in this section shall be construed to prohibit an employer who does business, employs persons, or takes applications for employment in at least one state other than New Jersey, from including an inquiry regarding criminal record on an employment application, so long as immediately preceding the criminal record inquiry on the employment application it states that an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer this question." This change does not enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule. Consequently, the Department asserts that this modification is appropriate at adoption.

2. COMMENT: The commenter observes that *N.J.S.A. 34:6B-13* and proposed *N.J.A.C. 12:68-1.2* define the term "criminal record" to mean "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, [page=3035] 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." The commenter asks that the Department "confirm through the regulations that the OTCA's prohibitions on criminal record inquiries do not preclude inquiries concerning DWI/DUI or motor vehicle violations and records." (1)

RESPONSE: The Department cannot confirm this through a rule, because it is not so; which is say, to the extent that an inquiry concerning DWI/DUI or motor vehicle violations involves obtaining "information collected by criminal justice agencies on individuals" and to the extent that that information may "consist[] of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges," then making any such inquiry during the "initial employment application process" would constitute a violation of the OTCA.

3. COMMENT: The commenter asks that the Department "confirm through regulations that the OTCA does not prohibit an employer from conducting an internet or other public record search concerning an applicant's criminal record before the initial employment application process is complete." (1)

4. COMMENT: The commenter "strongly oppos[es]" the request for confirmation made in Comment Number 3, adding the following: "We ... request instead that the [Department] clarify that the OTCA prohibits an employer from conducting an internet or other public record search concerning an applicant's criminal record before the first interview. First, an internet search is an "oral or written inquiry" as the phrase is used by both *N.J.S.A. 34:6B-14(a)(2)* and proposed [*N.J.A.C.*] *12:68-1.3(b)*. An internet search requires that the searcher either type words into search box, which is a written inquiry, or that the user speak words into a voice search application, which is an oral inquiry. A public record search requires the searcher either to complete and submit a written document, which is a written inquiry, or to make a verbal request of custodian of the records, which is an oral inquiry.

Additionally, it would clearly contravene the intent of the OTCA to permit an employer to conduct an internet or public record search prior to or during the initial employment application process. A central purpose of the OTCA is to afford job applicants the opportunity to interview before the employer learns of their criminal records. The OTCA prohibits covered employers from inquiring about an applicant's record until the completion of the first interview to prevent covered employers from denying interviews to applicants solely due to the applicants' criminal records. Permitting employers to conduct internet or public record searches prior to the first interview would thwart the intended effect of the OTCA and render the law meaningless." (6)

RESPONSE TO COMMENTS 3 AND 4: The Department cannot confirm through rule that the OTCA does not prohibit an employer from conducting an internet or other public record search concerning an applicant's criminal record before the initial employment application process is complete, because it is not so; which is to say, *N.J.S.A. 34:6B-14* prohibits an employer from making *any* oral or written inquiry during the initial employment application process regarding an applicant's criminal record. Since the purpose of the OTCA is to permit those who possess a criminal record to engage in the "initial employment application process," without the prospective employer inquiring about and, thereby, obtaining information regarding, an individual's criminal record, to read the law so as to exempt internet and other public records searches concerning an applicant's criminal record would, as is observed in Comment Number 4, "render the law meaningless."

5. COMMENT: The commenter asks that the Department "confirm through the regulations that, after the initial employment application process has concluded, an employer is permitted to ask *all applicants* about their criminal record, and is not required to first engage in a deliberative process and conclude that the applicant meets the employer's minimum qualifications for the position or satisfy some other precondition." (1)

RESPONSE: Neither the OTCA, nor the rules proposed in accordance therewith, say anything about requiring an employer to engage in a deliberative process and conclude that the applicant meets the employer's minimum qualifications for the position sought or satisfy some other precondition. In fact, both the OTCA and the proposed rules expressly state that inquiries may be made by the employer regarding an applicant's criminal record the moment that the "initial employment application process" has concluded and that the employer is not prohibited from ultimately refusing to hire an applicant for employment based upon the applicant's criminal record. No confirmation "through the regulations" is necessary.

6. COMMENT: The commenter asks that the Department "confirm through the regulations that a covered employer must have 15 or more employees *in New Jersey*" in order to be covered under the OTCA. (1 and 2)

7. COMMENT: The commenter states that to interpret the definition of "employer" found at *N.J.S.A. 34:6B-13* to mean that in order to be covered under the OTCA an employer must have 15 or more employees *in New Jersey*, "would contravene the intent of the statute." Specifically, the commenter states the following:

"While *N.J.S.A. 34:6B-13* makes it clear that, to be covered, the *position* for which the job applicant is applying must be 'in whole, or substantial part, within [New Jersey],' the definition of 'employer' does *not* require that the '15 or more employees' work in whole, or substantial part, within New Jersey. The statute defines 'employer' as '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 ...' The conjunction 'and' separates two distinct requirements for an employer to be covered:

1. That the employer employs 15 or more employees over 20 calendar weeks; *and*
2. That the employer does business, employs persons, or takes applications for employment within New Jersey.

The use of the conjunction 'and' indicates that the two requirements are separate. The qualifying phrase 'within this State' appears only in the second requirement, and as such applies only to the acts of doing business, employing persons or taking applications... If the Legislature intended the law to cover only those employers who employed 15 or more employees within New Jersey, the definition would have clearly stated that an employer must employ '15 or more employees over 20 calendar weeks *within this State*.'

The commenter concludes, "[g]iven the uncertainty expressed by several of the commenters, we recommend that

[the Department] clarify that an employer need not employ 15 or more employees within New Jersey to be covered." (6)

RESPONSE TO COMMENTS 6 AND 7: The Department agrees with Comment Number 7 and on adoption will insert within the definition for "employer," the phrase, "whether those employees work inside or outside of New Jersey." Consequently, on adoption, the definition for the term "employer," will read, "means any person, company, corporation, firm, labor organization, or association, which has 15 or more employees over 20 calendar weeks, whether those employees work inside or outside of New Jersey, and does business, employs persons, or takes applications for employment within this State ..." This change does not enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule. Consequently, the Department asserts that this modification is appropriate at adoption.

8. COMMENT: The commenter asks that the Department "confirm through the regulations what definition or test will be used to determine if an applicant is an 'independent contractor,' and thus not subject to the prohibition on criminal records inquiries." (1)

RESPONSE: The test which would be applied to determine whether an individual is a covered "applicant for employment," as that term is defined within the OTCA, or an independent contractor, is what is commonly referred to as the "ABC Test" (see *N.J.S.A. 43:21-19(i)(6)*). To the degree that use of this test is complicated by the fact that what is being evaluated is prospective employment, rather than actual employment, any known statutory or regulatory test for independent contractor status would be similarly complicated; which is to say, for [page=3036] example, when evaluating under any one of several known tests for independent contractor status, including under prong "A" of the ABC Test, whether an individual has been and will continue to be free from control or direction over the performance of a service being performed by that individual and for which the individual is receiving remuneration, the fact that the individual being evaluated for this purpose is an applicant to perform the service, rather than one who is actually performing the service, could prove challenging. However, relative to prong "A" of the ABC Test, the Department could look to other similarly situated individuals who are currently performing the same or similar service for the employer. Furthermore, as to its application of the ABC Test overall, the Department would rely heavily, as it already does in its application of the ABC Test to traditional Unemployment/Disability insurance tax cases, on the "C" prong of the ABC Test, which requires that the individual being evaluated be customarily engaged in an independently established trade, occupation, profession, or business. It should be apparent even prior to performance of the service(s) whether the individual/ applicant is at that time "customarily engaged in an independently established trade, occupation, profession, or business." Since putative employers are required to satisfy all three prongs of the ABC Test in order to establish independent contractor status, and since failure to satisfy any one prong alone would result in a finding of employment, if the putative employer is unable to establish that the individual satisfies prong "C" of the ABC Test, then the individual would be considered an applicant for employment for the purpose of OTCA coverage.

9. COMMENT: The commenter asks that the Department "clarify through regulations" what definition or test will be used to determine if an applicant is an 'intern' or 'apprentice,' and thus subject to the prohibition on criminal record inquiries." (1 and 2)

10. COMMENT: The commenter states the following: "This [the regulatory definition of 'employee'] mimics the statutory definition, except that it clarifies that unpaid interns and apprentices are covered. While some might think that this is new, based on feedback we received, it is consistent with the statutory definition of 'employment' - which includes 'any form of vocational apprenticeship; or any internship' - not limited to paid positions. Therefore, this clarification is appropriate because it makes it clear, beforehand, rather than let businesses fall into a realm of uncertainty and not knowing." (4)

11. COMMENT: The commenter states the following:

"[The Department's] proposed definition of 'employee' tracks the statutory definition, except that it clarifies that unpaid interns and apprentices are covered employees. In the comments on PRN 2015-031 submitted on May 14, 2015, the New Jersey Chamber of Commerce expressed support for the clarification that the term 'employee' includes unpaid internships and apprenticeships. We concur with this interpretation." (6)

RESPONSE TO COMMENTS 9, 10, AND 11: The Department agrees that the proposed definition of the term "employee" is appropriate in that it mirrors the statutory definition for the term, with the one exception that it clarifies that both paid and unpaid interns and apprentices are included within the definition of "employee." As to the request in Comment Number 9 that the Department clarify through rules what definition or test will be used to determine if one is an "intern" or "apprentice," or more to the point, to determine whether one is an "applicant for employment," which means, in pertinent part, any person whom an employer considers when identifying potential "employees," which in turn, is defined within the OTCA to include "interns" and "apprentices," the Department will on adoption include the following two definitions within *N.J.A.C. 12:68-1.2*:

"Apprentice" means an individual who is registered in good standing in an apprenticeship program approved or certified by the Office of Apprenticeship within the United States Department of Labor.

"Intern" means an individual, as a student or recent graduate, working as a trainee to gain practical experience in an occupation.

This change does not enlarge or curtail either the scope of the proposed rule or those who will be affected by the rule. Consequently, the Department asserts that this modification is appropriate at adoption.

12. COMMENT: The commenter observes that *N.J.S.A. 34:6B-16* and proposed *N.J.A.C. 12:68-1.4* state that an employer is not prohibited from making any inquiries about an applicant's criminal history when, inter alia, "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 ..." The commenter asks that the Department "confirm through the regulations that when this exemption applies, an employer may inquire about an applicant's *entire* criminal record, not just those specific crimes or offenses that may be disqualifiers under the applicable law, rule or regulation." The commenter adds, "[f]or example, the New Jersey Alcoholic Beverage Control Act prohibits a liquor licensee from employing any individual who has been convicted of a 'crime involving moral turpitude,'" then inquires, "[c]an you confirm that a licensee is permitted to inquire about an applicant's entire criminal history, not merely specific crimes and offenses?" (1 and 2)

RESPONSE: The Department declines to make any change to the proposed rules on adoption on the basis that no change is necessary, since the word "any" which appears in the body of both the OTCA and the proposed rules, has a commonly understood meaning and the term "criminal record" is defined within both the law and the rules; which is to say, the law does not appear to contain any limitation on the nature of the inquiry which the employer may make once the exemption applies. The law simply states that where one of the exemptions applies, an employer is not prohibited from making any written or oral inquiries during the initial employment application process regarding an applicant's criminal record.

13. COMMENT: The commenter observes that *N.J.S.A. 34:6B-13* and proposed *N.J.A.C. 12:68-1.2* define the term "employer" to "include job placement and referral agencies and other employment agencies," adding, "[s]ome arrangements between staffing companies and worksite employers are intended to create a co-employment relationship for certain purposes, and some arrangements are not intended to create a co-employment relationship." The commenter asks that the Department, "confirm through the regulations that, regardless of whether a co-employment relationship is intended, if a staffing agency conducts an initial interview of an applicant and thereafter refers the applicant to a worksite employer for consideration, the worksite employer may inquire about the applicant's criminal record before or during its own interview with the applicant, that is, the worksite employer does not also have to wait until after it conducts its own interview to make a criminal record inquiry." (1)

RESPONSE: Within the staffing context there is only one statutorily recognized co-employment relationship; that is, between an employee leasing company (also known as a professional employer organization) and its client company. Specifically, within *N.J.S.A. 34:8-67*, the Legislature defines "employee leasing agreement" or "professional employer agreement" to be "an arrangement, under written contract, whereby: (1) an employee leasing company and a client company **co-employ** covered employees, and (2) the arrangement is intended to be, or is, ongoing rather than temporary in nature, and not aimed at temporarily supplementing the client company's work force" (emphasis added). Within *N.J.S.A. 34:8-43* et seq. - specifically, at *N.J.S.A. 34:8-43* - the Legislature defines the terms "employment agency," "booking agency," "career counseling service," "consulting firm," "job listing service," "prepaid computer job matching

service," and "temporary help service firm," the latter of which is the only one expressly identified as an employer (the definition states that a temporary help service firm means any person who operates a business which consists of **"employing individuals** directly or indirectly for the purpose of assigning the employed individuals to assist the firm's customers in the handling of the customers' temporary, excess or special work loads ..." (emphasis added).) Consequently, when dealing with a temporary help service arrangement, where the temporary help service firm is by statute **the** employer of the individual assigned to the client company to assist the client company in the handling of its excess or special work loads, the client company is not considered an "employer" as that term is defined within the OTCA and, therefore, the client company is not restricted under the OTCA or the rules promulgated by the Department in accordance therewith from inquiring about the criminal record of one [page=3037] who has been assigned by the temporary help service firm to work at the client company's site. When dealing with an employee leasing arrangement, where by statute the employee leasing company and the client company co-employ individuals, the employee leasing company and the client company are jointly responsible as co-employers for adhering to the restrictions contained within the OTCA. Thus, if the employee leasing company has completed an "initial employment application process" relative to a particular applicant, then the client company is not restricted under the OTCA or the rules promulgated by the Department in accordance therewith from thereafter inquiring about that applicant's criminal record. Regarding "job placement and referral agencies and other employment agencies," which are neither "employee leasing companies," nor "temporary help service firms," each such employment agency is **an** "employer," for the purpose of coverage under the OTCA, but under *N.J.S.A. 34:8-43*, no such employment agency is **the** employer. Consequently, where an individual is referred to or placed with an employer by any such employment agency (that is, neither an employee leasing company, nor a temporary help service firm), by virtue of the OTCA's express inclusion of such agencies within its definition of the term "employer," the employment agency is restricted as **an** employer under the OTCA and the rules promulgated by the Department in accordance therewith from inquiring about an applicant's criminal record until after it has completed the "initial employment application process;" however, the employer to which the employment agency refers or with which the employment agency places an individual, is still **the** employer of that individual. Consequently, even where the employment agency has already completed an "initial employment application process," the worksite employer would still be restricted under the OTCA and the rules promulgated by the Department in accordance therewith from inquiring about that applicant's criminal record until after the completion of its "initial employment application process."

14. COMMENT: The commenter observes that *N.J.S.A. 34:6B-13* and proposed *N.J.A.C. 12:68-1.2* define, "Initial employment application process" to be, "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, whether in person or by any other means of an applicant for employment." The commenter asks that the Department "confirm through the regulations that a 'first interview' is not limited to a 'real time' dialogue between the employer and applicant and can include any process where the employer gathers information from an applicant, such as a detailed written or electronic questionnaire." (1)

15. COMMENT: The commenter states the following:

"Currently, neither the statute nor the proposed regulations define the term 'interview,' although both state that the interview may be 'in person or by any other means.' Clarity on what constitutes an interview is essential to both employers as well as job applicants. The language 'by any other means,' was intended to allow for phone interviews or video chats - live, direct contact by the employer with the applicant. The term 'interview' was not intended to include the exchange of emails, where the correspondence is not live.

Principally, we are concerned with avoiding an interpretation of 'interview' to include a scenario where the applicant submits a job application via email, the employer writes back to acknowledge receipt and asks a single follow-up question, and the applicant responds. While we believe such a scenario falls clearly outside of the commonplace definition of the word 'interview' ... we believe it would benefit employers and job applicants for the regulations to clarify that such a scenario does not constitute an interview as understood by the OTCA.

After reviewing the definitions of 'interview' in 'ban the box' ordinances from four jurisdictions - San Francisco, Philadelphia, Buffalo, and Indianapolis, we propose that the New Jersey Department of Labor and Workforce Development define interview to mean the following:

'Interview' means any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications. 'Interview' shall not mean the exchange of emails." (6)

RESPONSE: The Department agrees with Comment Number 15, and will on adoption add to the rules the following definition of the term "interview":

"'Interview' means any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications. 'Interview' shall not mean the exchange of emails or the completion of a written or electronic questionnaire."

16. COMMENT: The commenter states the following:

"Subsection (c) of proposed regulation 12:68-1.3, governing the effect of voluntary disclosure of the applicant's criminal record by the applicant, essentially parrots the statutory language at *N.J.S.A. 34:6B-14(b)*, with one exception: whereas the statutory language states merely that, subsequent to a voluntary disclosure by the applicant, the employer 'may make inquiries,' the proposed regulation further states that the employer 'may make inquiries to anyone.' This additional phrase, 'to anyone,' should be removed from the final regulation.

The intent of the voluntary disclosure provision was to avoid a ridiculous situation where, during the first interview, the job applicant disclosed information about his or her criminal record to the employer, and the employer would then be precluded from asking follow-up questions. Such a preclusion would create awkward, confusing, unhelpful situations. As such, the voluntary disclosure provision was intended to allow the employer to make follow-up inquiries only *to the applicant*. We request that [the Department] remove the additional phrase 'to anyone' from the final regulation." (6)

RESPONSE: The intent of the Legislature in enacting a statute is to be gleaned in the first instance from the words used by the Legislature in the statute itself. In this instance, N.J.S.A. 34:6B-14b indicates, "[n]otwithstanding the provisions of subsection a. of this section, if an applicant discloses any information regarding the applicant's criminal record, by voluntary oral or written disclosure, during the initial employment application process, the employer may make inquiries regarding the applicant's criminal record during the initial employment application process." Inclusion by the Legislature of the phrases, "or written disclosure," and "during the initial employment application process," would appear to belie the commenter's assertion that the sole purpose of the "voluntary disclosure provision" was to address the situation where during the first interview the job applicant discloses information about his or her criminal record, allowing the employer to ask follow-up questions only during the interview and only of the applicant, so as to "avoid a ridiculous situation where, during the first interview, the job applicant disclosed information about his or her criminal record to the employer, and the employer would then be precluded from asking follow-up questions." If the Legislature had intended the "voluntary disclosure provision" to apply only during the interview and if the Legislature had intended for the exemption to permit only inquiries made to the applicant, then presumably the Legislature would have written the "voluntary disclosure provision" to read, "[n]otwithstanding the provisions of subsection a. of this section, if an applicant discloses any information regarding the applicant's criminal record, by voluntary oral disclosure during the first interview, the employer may make oral inquiries only of the applicant regarding the applicant's criminal record during the first interview." The Legislature did not do so. Consequently, the Department declines to make the change on adoption suggested by the commenter.

17. COMMENT: The commenter states the following:

"The proposed regulations provide that to be covered under the Act an employer must have 15 or more employees 'for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.' While we very much appreciate this clarification, it would also be helpful if the regulations included some standard for hours of service worked to be considered an employee. Many small employers hire workers [page=3038] on an as-needed, part-time basis during busy times and may not employ them for full days." (2)

18. COMMENT: The commenter states the following:

"The term '15 or more employees over 20 calendar weeks,' which is used as a limiting factor in the statutory definition of 'employer' is not defined in the statute in the sense that the statute doesn't say what calendar weeks - is it the past 20 calendar weeks, 20 calendar weeks this year, or over the past 12 months. The DOL defines the term to mean 15 or more employees for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year. The Department's use of this definition makes sense given that it is how employees are counted under both the New Jersey Family Leave Act (NJFLA) and the Federal Family and Medical Leave Act (FMLA).

In terms of how this definition affects businesses, businesses who are on the edge of coverage will not be used to the NJFLA and FMLA counting method, since the employee threshold under those laws is 50. Thus, it will be important to educate smaller businesses, especially since an employer could have 15 employees in the first 20 weeks of calendar year 2015 and would be covered for the remainder of 2015 and ALL of 2016, even if they don't have 15 employees at any point after those first 20 weeks of 2015." (4)

RESPONSE TO COMMENTS 17 AND 18: As to the request in Comment Number 17 that the Department, through regulation, "include some standard for hours of service worked to be considered an employee" for the purpose of meeting the 15 employee threshold for covered employment, there is no indication within the OTCA that the Legislature intended to apply an "hours of service worked" standard. To the contrary, the term "employee" is defined within the OTCA to mean "a person" who is hired for a wage, salary, fee, or payment to perform work for an employer, including interns and apprentices, but excluding those who perform domestic service in the home, independent contractors, directors and trustees. It does not say, "a person who is hired to work full-time." It does not say "a person who is hired to work at least 15 hours in a week." It says, "a person who is hired ... to perform work for an employer." To make the sort of change on adoption suggested within Comment Number 17 would, in the Department's opinion, be inconsistent with the OTCA and, therefore, outside the scope of our rulemaking authority.

Regarding Comment Number 18, the Department agrees that utilizing the method for counting employees already in use under the NJFLA and FMLA should make it easier to comply for employers who have been using that method for the years that the NJFLA and FMLA have been in existence.

19. COMMENT: The commenter stated the following:

"The proposed regulations state: 'A violation of this Act shall occur when an employer makes an oral or written inquiry to anyone ... during the initial employment application.' Shall we assume that with inclusion of the word 'anyone' in the proposed regulations (not included in the Act itself) an employer must hold off on starting the process of conducting a third party background check until after the first interview? We would appreciate clarification on that point." (2)

RESPONSE: As indicated in response to Comment Numbers 3 and 4, *N.J.S.A. 34:6B-14* prohibits an employer from making **any** oral or written inquiry during the initial employment application process regarding an applicant's criminal record. Since the purpose of the OTCA is to permit those who possess a criminal record to engage in the "initial employment application process," without the prospective employer inquiring about and, thereby, obtaining information regarding, an individual's criminal record, to read the law so as to exempt third-party background checks concerning an applicant's criminal record would, as is observed in the Response to Comment Number 4 relative to internet and public records searches, "render the law meaningless."

20. COMMENT: The commenter states that neither the OTCA, nor the proposed rules, address whether the initial employment applicant "can still contain language stating that an applicant may later be subject to a criminal background check as a condition of employment." The commenter seeks clarification on this point. (2)

RESPONSE: The OTCA and rules, in pertinent part, prohibit an employer from requiring 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." The OTCA and rules also state that (1) nothing in the Act or rules should 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 regarding an applicant's criminal record; and (2) nothing in the law or rules

should be construed to prohibit an employer from refusing to hire an applicant for employment based upon the applicant's criminal record. A statement on the employment application during the initial employment application process to the effect that the applicant "may later be subject to a criminal background check as a condition of employment" is not an inquiry regarding an applicant's criminal record, is not inconsistent with any provision of the OTCA and would, therefore, not be prohibited under either the OTCA or the rules.

21. COMMENT: The commenter states the following:

"This definition [that is, the definition of 'initial employment application process'] is the same [within the proposed new rules] as what is provided by the statute. However, we have received suggestions that [we] ask the Department to clarify if the 'first interview' which concludes the initial employment application process is meant to be taken at face value, or is meant to include more than one interview if, for example, the applicant has interviews with multiple people on the same day as part of the first interview process. Of course, we would prefer a literal definition - first interview means first interview, no matter how many are done the same day. On the other hand, if this isn't to be what the definition is, then the regulations should say so." (4)

RESPONSE: It is the Department's belief, as reflected in the definition for the term "interview" which the Department is adopting through this notice, that *any* live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications, would constitute an interview. As to the meaning of the word "first," the Department would be inclined to use the commonly understood meaning of that term; which is to say, once a single live contact between the employer and the job applicant concludes, then the first interview is complete. Thus, directly to the commenter's question, if there are multiple interviews scheduled on a given day, once the first of those interviews has concluded, the "initial employment application process" has concluded and the OTCA's prohibition against making inquiries regarding an applicant's criminal record would no longer apply. The intent of the OTCA would appear to be that a job applicant be guaranteed the right not to be questioned about or to have an employer inquire elsewhere about that applicant's criminal record until after the applicant has had an opportunity to complete a single live exchange, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications. Where the applicant has completed the first of a series of interviews on a given day without having been asked about his or her criminal record and without any other inquiries having been made by the prospective employer regarding the applicant's criminal record, it is the Department's belief that the purpose of the OTCA has been served and that any subsequent inquiry by the employer regarding the applicant's criminal record would run afoul of neither the OTCA, nor the rules.

22. COMMENT: The commenter states the following:

"It is beneficial in subparagraph (c), the regulation contains factors to assist in determining penalty. The factors seem fair. However, it seems unfair that the penalty is assessed only on notice - meaning that the Director of Wage and Hour can assess a penalty without any sort of opportunity to be heard by the employer. This provision should provide a hearing process. The regulation seems to be based on a misperception that violations will be clear and objectively provable - and some will (for example, a large company posts a job ad that says no one with any arrests will be hired). However, many potential violations will not [page=3039] be clear or objective - was a question asked during an interview? Was an application with a prohibited question on it actually disseminated and used by the employer? The employer should be able to defend BEFORE the imposition of a penalty." (4)

RESPONSE: The manner of assessing penalties, with a right to appeal, which is set forth within *N.J.A.C. 12:68-1.5* and *1.6* is standard; which is to say, you can see the identical or near identical language used throughout Title 12 of the New Jersey Administrative Code. The meaning of that language is that under no circumstances would the Department seek to recover a penalty "assessed," until after a final administrative determination had been issued. That is, when the rules state that a penalty will be "assessed" upon written notification of the violation, the amount of the penalty and the opportunity to appeal the penalty assessment to the Commissioner, it simply means that the employer would receive a letter from the Director of the Division of Wage and Hour Compliance with all of the required information listed; that is, notice of the law(s) and/or rule(s) violated, the amount of the penalty and the right to file an appeal of that penalty to the Commissioner within 15 business days following receipt by the employer of the Director's letter. If the employer within 15 business days files an appeal to the Commissioner, then the Division would **not** make any effort to collect the penalty "assessed," until after the Commissioner has issued a final

administrative determination upholding the penalty assessment either on the written record or following a hearing before the Office of Administrative Law. If the employer does not file an appeal with the Commissioner within 15 business days following receipt by the employer of the penalty assessment letter from the Division Director, then the employer would be deemed to have waived his or her right to appeal and the Director's penalty assessment letter would become the Department's final administrative determination, which would then trigger efforts by the Division to collect the penalty assessed. Again, this is standard administrative procedure. It is fully protective of the employer's due process rights in that no monies would be collected (and, therefore, no property deprivation would occur) until after there had been both notice and an opportunity to be heard.

23. COMMENT: The commenter states the following:

"Please address how the new law applies to an employee hired prior to the law enactment who applies for a different position within his or her company after enactment of the law. In this case, an employer may already have an application on file showing a conviction for a current employee. If the employee then applies for a different position within the company, the employer is already aware of the conviction prior to the initial employment application process." (3)

RESPONSE: The OTCA and the rules promulgated in accordance therewith prohibit an employer from requiring 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 and prohibits the employer from making any oral or written inquiries during the initial employment application process regarding an applicant's criminal record. Under the scenario presented by the commenter, the employer is already in possession of information regarding the applicant's criminal record, which information it had obtained prior to the effective date of the OTCA. Consequently, there would be no need to inquire with regard to the applicant's criminal record either on the employment application or during the first interview. In other words, if the employer is in possession of information regarding an applicant's criminal record which it had obtained prior to the effective date of the OTCA, rather than through an inquiry made subsequent to the effective date of the OTCA, then obviously, the possession of that information does not constitute a violation of either the OTCA or the rules promulgated in accordance therewith.

24. COMMENT: The commenter states:

"Please clarify and provide examples of circumstances where the exemption in the law applies if it would restrict an employer's ability to engage in specified business activities. Please clarify whether this exemption would extend to small businesses where employees are cross trained to do every task so that an employee may sometimes, but not always, be in a circumstance where his or her criminal conviction would restrict the employer's ability to engage in specified business activities." (3)

RESPONSE: In order to assert the exemption about which the commenter inquires with regard to a particular job vacancy, the employer would be required to point to a "law, rule or regulation" which states explicitly that the employer may not engage in a specified business activity (that is, a business activity specified within the law, rule or regulation) if it employs an individual with a criminal record to perform any or all of the job functions associated with that job vacancy. The Department declines to provide examples.

25. COMMENT: The Commenter states:

"Please clarify and provide examples of how the exemption provisions would work in conjunction with the advertisement prohibitions. We are unclear as to which types of circumstances would trigger the exemption." (3)

RESPONSE: The circumstances which would trigger the exemption from the "advertisement prohibitions" are expressly set forth at *N.J.A.C. 12:68-1.4(b)*. They are taken verbatim from the OTCA and are essentially identical to the exemption provisions of the OTCA which apply to the Act's prohibition against criminal record inquiries on the employment application and during the first interview. The Department declines to provide examples.

26. COMMENT: The commenter agrees with the Department's definition of the term "employment," including that portion of the definition which states that for the purpose of the 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 that 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. The commenter also agrees with the Department's definitions of the terms "a position in homeland security," "a position in the Judiciary," and "a position in law enforcement." (4)

RESPONSE: The Department thanks the commenter.

27. COMMENT: The commenter "has examined the proposed new rules and ... is in agreement with the restrictions that are set in place." (5)

RESPONSE: The Department thanks the commenter.

### **Federal Standards Statement**

The adopted 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.

**Full text** of the adopted new rules follows (additions to proposal indicated in boldface with asterisks **\*thus\***; deletions from proposal indicated in brackets with asterisks \*[thus]\*):

## 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:

"A position in corrections" 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.

[page=3040]"A position in emergency management" 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).

"A position in 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.

"A position in law enforcement" 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.

"A position in the judiciary" 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.

"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.

**"Apprentice" means an individual who is registered in good standing in an apprenticeship program approved or certified by the Office of Apprenticeship within the United States Department of Labor.\***

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

"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.

"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\*, **whether those employees work inside or outside of New Jersey,\*** 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 that 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.

"Fifteen 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.

"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.

**\*\*\*"Intern" means an individual, as a student or recent graduate, working as a trainee to gain practical experience in an occupation.**

**"Interview" means any live, direct contact by the employer with the applicant, whether in person, by telephone, or by video conferencing, to discuss the employment being sought or the applicant's qualifications. "Interview" shall not mean the exchange of e-mails or the completion of a written or electronic questionnaire.\***

#### 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, [page=3041] 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.

**\*(h) Nothing set forth in this section shall be construed to prohibit an employer who does business, employs persons, or takes applications for employment in at least one state other than New Jersey, from including an inquiry regarding criminal record on an employment application, so long as immediately preceding the criminal record inquiry on the employment application it states that an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer this question.\***

#### 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;
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; and
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*.