



Background Checks: An Overview and Considerations for New Jersey Nonprofits

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Introduction

Many nonprofits struggle with the issue of whether to conduct background checks, especially in view of the cost. For nonprofits working with vulnerable populations—such as children, the elderly, individuals with mental disabilities, and individuals confined to their residences—the impetus to conduct background checks is more compelling.

This article overviews the considerations New Jersey nonprofits, particularly youth serving organizations (YSOs), should weigh in deciding whether to conduct background checks; the options available; the federal and New Jersey laws and regulations governing criminal history background checks; and the factors to consider when reviewing the results of a criminal history background check.¹ Of particular note, this article discusses:

- The impact of the U.S. Equal Employment Opportunity Commission’s revised guidance, issued in April 2012, on employers using criminal conviction records in making employment decisions.
- The impact of The Opportunity to Compete Act (TOTCA) of 2015 on New Jersey employers, in terms of both conducting criminal history background checks and using criminal conviction records in making employment decisions.
- The requirements of the Fair Credit Reporting Act (FCRA), which, despite its name, applies to employers.

Please note: As used in this article, the term “workers” includes employees, volunteers, and independent contractors, as well as applicants for such work opportunities.

Throughout this article are references to the New Jersey Statutes Annotated (N.J.S.A.), which are at <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>, and the New Jersey Administrative Code (N.J.A.C.), which is at www.lexisnexis.com/hottopics/njcode.

¹ In view of the constantly involving nature of the rules governing background checks, this article has been updated eight times subsequent to its initial publication in 2009. In order to provide a fresh set of eyes for the seventh revision (released in August 2017), Christine Michelle Duffy asked Esther Y. Pak, Esq., then at the Proskauer Rose law firm, to review the 2015 edition of the article and provide suggested revisions. Christine and Pro Bono Partnership wish to thank Esther for Esther’s editorial suggestions, which, thankfully, were all nonsubstantive.

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Should We Conduct Background Checks?

Each nonprofit must make an individualized assessment of whether it should conduct background checks. Among others, the following factors should be weighed:

- Nature of operations, including:
 - Working with vulnerable populations (e.g., children, the elderly, individuals with mental disabilities, and individuals confined to their residences)
 - Knowledge of past problems the nonprofit and/or other similar organization have had with “bad actors”
- Nature of the position, such as:
 - Senior managers and/or personnel in the Finance, Human Resources, and Information Technology Departments—e.g., access to confidential info; ability to “cook the books”
 - Workers who have access to clients in settings where supervision is not available, such as when in-home services are provided to clients
 - Workers who are younger and thus might not have the maturity to make sound decisions in tempting situations
- Contractual obligation to conduct background checks. Some contracts require that workers assigned to a project be subjected to criminal history background checks and not be allowed to work on the project if they have been convicted of certain offenses. Being contractually obligated to conduct background checks that violate Title VII of the federal Civil Rights Act of 1964 or the New Jersey Law Against Discrimination (NJLAD) might not be a defense to liability should your

organization be sued under either law for discrimination. See the discussion below regarding the positions of the U.S. Equal Employment Opportunity Commission (EEOC) and the New Jersey Division on Civil Rights (NJDCR) on the use of criminal history background checks by employers.

- Legal obligation to conduct background checks. Certain laws require some nonprofits to conduct background checks and not allow workers convicted of certain offenses to be employed.² Be sure to read the discussion below

² A number of New Jersey laws either require or permit criminal history background checks—for example:

Required:

- Nurse aides in long-term care facilities, personal care assistants in assisted living facilities, medication aides, and homemaker/home health aides seeking certification from the New Jersey Department of Health and Senior Services or the New Jersey Division of Consumer Affairs [N.J.S.A. 26:2H-83 et seq., N.J.S.A. 45:11-24.3 et seq., and N.J.S.A. 53:1-20.9a]
- Licensed health care professionals (per the Health Care Professional Responsibility and Reporting Enhancement Act (also known as the “Cullen Act”), which is discussed later in this article) [N.J.S.A. 45:1-28 et seq.]
- Employees employed by an agency and applicants, employees, and household members of a community care residence, under a contract with or licensed by the Division of Developmental Disabilities in the New Jersey Department of Human Services, to provide services to department clients who have developmental disabilities or brain injuries; check of the Central Registry of Offenders Against Individuals with Developmental Disabilities also required [N.J.S.A. 30:6D-63 et seq. and N.J.A.C. 10:48a–1.1 et seq.]
- Employees of New Jersey State institutions or facilities for the mentally ill or developmentally disabled [N.J.S.A. 30:4-3.4 et seq. and N.J.S.A. 53:1-20.8]
- Employees and volunteers who are age 18 and older of child care centers licensed by the New Jersey Department of Children and Families [N.J.S.A. 30:5B-6.10 et seq.]
- Family members (18 and older), employees, and volunteers of family day care providers licensed by the New Jersey Department of Children & Families [N.J.S.A. 30:5B-25.5 et seq.]
- Staff members (including volunteers and consultants) of residential child care facilities regulated by the New Jersey Department of Children and Families; child abuse record history check also required [N.J.S.A. 30:4C-27.16 et seq. and N.J.S.A. 53:1-20.9d]

regarding the EEOC's position on criminal history background checks because the EEOC, in 2012, placed employers in a very difficult position of potentially

- Staff members (including volunteers and consultants) of adoption agencies regulated by the New Jersey Department of Children and Families; child abuse record history check also required [N.J.S.A. 9:3-40:2 et seq. and N.J.S.A. 53:1-20.9d]
- Employees of schools under the supervision of the New Jersey Department of Education that care for or are involved in the education of children under the age of 18 (permitted for volunteers) [N.J.S.A. 18A:6-7.1]
- Members of a Board of Education or a Charter School Board of Trustees [N.J.S.A. 18A:12-1.2 et seq. and N.J.S.A. 18A:36A-11.1]
- Staff members (including volunteers) of residential substance use disorder treatment facilities licensed by the New Jersey Department of Human Services [N.J.A.C. 10:161A-3.5, -23.2]
- Staff members (including volunteers) of outpatient substance use disorder treatment facilities licensed by the New Jersey Department of Human Services [N.J.A.C. 10:161B-3.5, -22.2]
- Modified livery transportation service driver and provider-supplied attendant regulated by the Division of Medical Assistance and Health Services in the New Jersey Department of Human Services [N.J.A.C. 10:50-1.10]
- Employees of state and local government agency and employees of contractors of such an agency with access to federal tax information [N.J.S.A. C.40A:9-2.1 and N.J.S.A. 52:18A-258]
- Drivers for transportation network companies (e.g., Uber) [N.J.S.A. 39:5H-17]

Permitted:

- Nonprofit youth serving organizations that (1) are exempt from federal income taxes, (2) in good-standing with their annual report filings in New Jersey, and (3) provide recreational, cultural, charitable, social, or other activities or services for persons younger than 18 years of age may request criminal history information on prospective and current employees and volunteers [N.J.S.A. 15A:3A-1 et seq.]
- An organization for purposes of determining a person's qualifications for employment, volunteer work, or other performance of services [N.J.S.A. 53:1-20.6 and N.J.A.C. 13:59-1 et seq.]
- Employees of nonpublic schools (K-12) [N.J.S.A. 18A:6-4.13]
- Peddlers and solicitors [N.J.S.A. 53:1-20.38]

violating Title VII if they comply with a state law that prohibits the employment of workers with criminal convictions in certain jobs without further performing an individualized assessment.

- Reducing the risk of an unsafe workplace by identifying workers with a history of violent crimes that reflects a propensity for workplace violence
- Reducing the risk of lawsuits for negligent hiring or retention
- Verifying that workers are who they say they are and have the requisite education, experience, and skills for their positions
- Obtaining a workforce of qualified and trustworthy workers
- Mere fact that a background check will be conducted might result in certain workers deciding not to apply

What Types of Background Checks Should We Conduct?

Some of the more common areas that an employer might check include:

- Criminal convictions³
- References and education verification
- Social security number trace and verification
- Credit history/bankruptcy filings
- Driving record⁴

³ As explained below, not all criminal history background checks are nationwide in scope. If a national check is needed, the nonprofit should select a vendor who can provide such information.

⁴ As discussed later in this article, New Jersey's The Opportunity to Compete Act (TOTCA) places restrictions on the timing for requesting criminal history records of applicants for employment. These restrictions potentially apply to DWI/DUI and motor vehicle violations. As such, employers should comply with TOTCA when requesting information relating to such violations.

- Terrorist database search—particularly relevant for nonprofits working overseas or where a contract requires such a search.⁵

Which items a nonprofit checks should be carefully tailored to its operations and the jobs in question. There should be a rational basis for why a worker is subjected to a

⁵ Nonprofits that facilitate international terrorism or other illegal activity can be subject to criminal liability. See the U.S. Department of the Treasury’s Office of Terrorism and Financial Intelligence’s web pages relating to this topic, at www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx, which include [FAQs](#), a [Risk Matrix for the Charitable Sector](#), and [Voluntary Best Practices For U.S.-Based Charities](#). Accordingly, if a nonprofit is going to do business internationally, before proceeding it should do due diligence on the international organizations it will be working with and their management teams, as well as any involved international consultants, to reduce the risk that the nonprofit might facilitate terrorism or other illegal conduct. Two databases worth checking are:

- U.S. Department of Treasury’s [Specially Designated Nationals and Blocked Persons \(SDN\) List](#), which shows (1) individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries and (2) individuals, groups, and entities, such as terrorists and narcotics traffickers, designated under programs that are not country-specific. Their assets are blocked and U.S. persons are generally prohibited from dealing with them.
- U.S. Department of Commerce’s [Foreign National Entity List \(FNEL\)](#), which shows the names of certain foreign persons, including businesses, research institutions, government and private organizations, individuals, and other types of legal persons, that are subject to specific license requirements for the export, reexport, and/or transfer (in-country) of specified items. Select the link for Supplement No. 4 to Part 744.

In addition, corruption is more rampant in certain countries, which warrants a heightened level of due diligence in those countries. Two widely accepted indices of corruption are:

- Basel Institute’s [Anti-Money Laundering \(AML\) Index](#) (scale from 0 (lowest risk) to 10 (highest risk)).
- Transparency International’s [Corruption Perceptions Index \(CPI\)](#) (scale from 0 (highly corrupt) to 10 (very clean)). Select the link for the most recent year, and then “Results.”

Countries that are subject to sanctions imposed by the United Nations and the European Union are listed at www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list and https://eeas.europa.eu/headquarters/headquarters-homepage/423/sanctions-policy_en. The United Kingdom has issued similar guidance, which is available at www.gov.uk/government/publications/financial-sanctions-consolidated-list-of-targets and www.gov.uk/guidance/current-arms-embargoes-and-other-restrictions.

particular type of screening. For example, if a worker does no driving for the organization, subjecting the worker to a driving record check makes little sense.

In addition, all workers that are similarly situated should be subjected to the same background checks. For example, if it is determined that applicants for positions involving in-home visits should be subjected to a criminal history background check, then such checks need to be performed with respect to all such applicants.

Should We Do the Background Checks Ourselves?

Doing proper backgrounds check can be time intensive, so a nonprofit needs to recognize that it will have to devote adequate personnel time to the process if it will do the checks internally *and* correctly.

If the nonprofit hires a vendor to perform background checks, the nonprofit will need to comply with the Fair Credit Reporting Act (FCRA), which sets forth detailed procedures to be followed, including obtaining advance written consent from the worker. Note that the written request for consent and the employee's written consent can be set forth in one form, but that form must not be part of any other document. In other words, the written request and the written consent cannot be part of an employment application or other form.

To learn more about the FCRA, see Pro Bono Partnership's publication [*Primer on Selected Federal, Connecticut, New Jersey and New York Privacy, Identity Theft and Information Security Laws Relevant to Charitable and Other Nonprofit Organizations.*](#) The section of the *Primer* that pertains to background checks conducted by third parties is set forth in **Appendix A** to this article.

Are There Any Risks Associated With Conducting Surf-the-Net Background Checks?

Yes. With the explosion of information available on the internet, some employers are conducting background checks using simple web searches. Employers need to be careful in doing so because such research might reveal information that cannot be used as a basis for an employment decision. For example, workers might mention on their personal blogs that they are cancer survivors or undergoing chemotherapy. If the persons involved in the hiring decision use that information in deciding not to hire a worker, they might have violated the laws barring discrimination based on disabilities. To avoid this risk, a nonprofit should designate a specific person who is not involved in the hiring decision to conduct the internet search, and that person should turn over to the hiring team only information that is directly relevant to workers' qualifications for employment.

Employers cannot require job applicants to turn over passwords or other access codes so that the employers can look at the workers' private social media web pages. To learn more about this prohibition, see Pro Bono Partnership's publication [New Jersey Enacts Social Media Protection Law](#).

A nonprofit should carefully consider the accuracy and completeness⁶ of information located on the internet.

How Do We Order a Criminal History Background Check?

Nonprofit youth serving organizations (YSOs) are allowed to order criminal history records through the New Jersey State Police. See **Appendix B** to this article for details. The State Police will also conduct criminal history background checks for non-YSOs as well, though the process is different.⁷ Note that the mandatory compliance requirements of the FCRA do not apply to background checks conducted for nonprofits by the State Police and/or the Federal Bureau of Investigations.⁸

There are many commercial vendors providing background checking services. It is important to investigate the options available and to select a reputable vendor. Asking other nonprofits about their experience with such vendors is a good idea.

Please note that a criminal history background check obtained through the New Jersey State Police will reveal just New Jersey State and possibly U.S. federal criminal records. If a nonprofit needs a more thorough background check, such as for convictions in other states, it will need to use the services of a commercial vendor.

⁶ In May 2014, the European Court of Justice (ECJ) ruled that "search engine[s] [are] obliged upon request to remove links from a person's name to third-party information if that information is 'inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes of the processing at issue.'" Peter Coy, [Europe's "Right to Be Forgotten" Ruling Is Unforgettably Confusing](#), BLOOMBERG BUSINESSWEEK (May 15, 2014) (includes link to the ECJ's opinion in [Google Spain SL v. Agencia Española de Protección de Datos](#), No. C-131/12 (E.C.J. May 13, 2014)). See also Margaret Sullivan, [Make No Mistake, But If You Do, Here's How to Correct It](#), N.Y. TIMES (Jan. 16, 2013) (noting that both *The New York Times* and *The Washington Post* have firm policies against "'unpublishing,' meaning removing a story entirely from the Web").

⁷ See N.J. State Police, *NJ Criminal History Records Information*, at www.njsp.org/criminal-history-records/index.shtml#ncer.

⁸ See Federal Trade Commission, [Advisory Opinion to Pickett](#) (July 10, 1998); Federal Trade Commission, [Advisory Opinion to Copple](#) (June 10, 1998).

What Do We Do With the Adverse Information We Receive From a Criminal History Background Check?

With regard to each criminal **conviction**,⁹ at a minimum, the following factors should be considered in relationship to the position being filled prior to making an individualized adverse employment decision:

- The nature and seriousness of the offense
- The time elapsed since the conviction and/or completion of the sentence
- Whether the offense was an isolated incident or part of a pattern of criminal conduct
- The age of the worker at the time of the conviction
- The circumstances under which the criminal offense occurred, including, for example, societal conditions, and whether those circumstances are likely to reoccur
- Information regarding the worker's rehabilitation, such as:
 - good conduct in prison
 - successful completion of a work-release program
 - constructive education obtained in or subsequent to prison
 - subsequent crime-free employment doing the same or similar types of work
 - subsequent attainment of state-required licenses and/or bonded status under a governmental bonding program
 - subsequent good conduct, and
 - recommendation letters from, for example, supervisors or teachers
- The length and consistency of employment history before and after the criminal conduct

⁹ As explained in the next FAQ, employers cannot consider arrests that have not resulted in convictions.

- The nature, duties, and responsibilities of the position applied for
- The relationship of conviction to position at issue (that is, the impact of the prior conviction on the worker's fitness to perform the duties and responsibilities of that position)
- Whether the position provides an opportunity for the commission of a similar offense.
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public
- Whether a law bars the worker's employment due to the conviction. Be sure to read the discussion below regarding the EEOC's position on criminal history background checks because the EEOC, in 2012, placed employers in a very difficult position of potentially violating Title VII of the Civil Rights Act of 1964 if they comply with a state law that prohibits the employment of workers with criminal convictions in certain jobs.

*The nonprofit should give the worker **an opportunity to explain** the circumstances of the conviction. It might turn out that the criminal history report the nonprofit received relates to a different person, incorrectly reported that the person was convicted, and/or is otherwise inaccurate.¹⁰*

¹⁰ According to the regulations of the New Jersey Division of State Police:

If criminal history record information [provided by the State Police] may be used to disqualify a person from obtaining or holding any position, employment or license or performing any services, whether compensated or uncompensated, the . . . person making such determination shall provide the subject of the request with adequate notice and opportunity to confirm or deny the accuracy of any information contained in the criminal history record. The subject of the request shall be afforded a reasonable period of time to correct or complete the record prior to a final determination or decision concerning the subject's eligibility for the position, employment or license. A person is presumed innocent of any pending charges or arrests for which there are no final dispositions indicated on the record.

N.J.A.C. 13:59-1.6(a). *Accord* N.J.A.C. 13:59-1.2(c); N.J.A.C. 13:59-1.6(b).

The Fair Credit Reporting Act (FCRA) has a similar provision that provides a job applicant a short period of time to dispute the accuracy of a criminal history report obtained by an employer from a third-party vendor. See **Appendix A** to this article for more information about the FCRA.

In addition, the nonprofit can ask the worker to provide the organization with a **certificate of rehabilitation**, which the worker can obtain, pursuant to the New Jersey Rehabilitated Convicted Offenders Act,¹¹ from the probation department or the court. The certificate will state whether the worker has achieved a degree of rehabilitation indicating that having the worker engage in certain employment would not be incompatible with the welfare of society.¹² The certificate is not binding on nonpublic employers, who may, in their sole and complete discretion, consider the certificate in making employment decisions.

*A nonprofit must treat background check results, especially criminal history reports, in a **confidential manner**. In particular, a nonprofit needs to make sure that background check results are:*

- *used only for the purposes for which they are permitted to be used;*
- *disseminated only on a strictly need-to-know basis; and*
- *completely destroyed (e.g., shredded) before discarding.*

¹¹ The text of the New Jersey Rehabilitated Convicted Offenders Act (as amended in 2009), N.J.S.A. 2A:168A-1 et seq., is available at www.nj.gov/corrections/pdf/OTS/FRARA/OtherResources/NJ%20Rehabilitated%20Convicted%20Offenders%20Act.doc.

Upon releases from prison, “every inmate leaving the custody of the New Jersey Department of Corrections will receive a ... [p]ortfolio containing information that may be beneficial to their reentry[, including] ... a temporary release photo ID, duplicate social security card [(where eligible)], birth certificate [(where eligible)], New Jersey Motor Vehicle Commission Non-Driver Photo ID [(where eligible)], final discharge paperwork, [and] a copy of current criminal charges” See N.J. Dept. of Corrections, [Fair Release and Reentry Act of 2009](#).

¹² For more information about a certificate of rehabilitation, which includes a “Certificate of Good Conduct” and/or a “Certificate Suspending Certain Employment, Occupational Disabilities or Forfeitures,” see N.J. State Parole Board, THE PAROLE BOOK, Section H (5th ed. 2012), at <https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/AdultParoleHandbook-5th%20Edition.pdf> or https://www.nj.gov/corrections/SubSites/OTS/OTS_FRARA.html; N.J. State Parole Board, Application Form, at <https://www.nj.gov/corrections/pdf/OTS/FRARA/ParoleHandbook/Certificate%20of%20Good%20Conduct%20Application.pdf>.

If We Are a Youth Serving Organization, Can We Refuse to Hire a Megan’s Law Sex Offender and Other Convicts?

Subject to two very limited exceptions, both nonprofit and for-profit **youth serving organizations** (YSOs) must never knowingly use the services of a *Megan’s Law* sex offender. Public Law 2009, Chapter 139,¹³ makes it unlawful for an “excluded sex offender” to hold a position or otherwise serve, in a paid or unpaid capacity, in a nonprofit or for-profit YSO. A violator is guilty of a crime of the third degree, which carries a penalty of three to five years imprisonment, a fine of up to \$15,000, or both.

In addition, a person who knowingly hires, engages, or appoints an excluded sex offender to serve in a YSO, in a paid or unpaid capacity, is guilty of a crime of the fourth degree, which carries a penalty of imprisonment of up to 18 months, a fine of up to \$10,000, or both.

As explained earlier in this article, some New Jersey laws require certain organizations, including YSOs, licensed or regulated by the State of New Jersey to conduct criminal history record background checks on its employees and/or volunteers, and these laws already include provisions that bar employment of some sex offenders. The 2009 law broadened the scope of criminal offenses that disqualify sex offenders from employment with YSOs and extended the mandatory disqualification of Megan’s Law sex offenders to **all** YSOs.

The 2009 law does not impose any additional obligations on YSOs to conduct criminal history record background checks on their employees and volunteers. Nonetheless, the 2009 law reflects a public policy that would encourage YSOs to conduct such checks.

An “excluded sex offender” is a person who has been convicted, adjudicated delinquent, or found not guilty by reason of insanity for committing one of a broad range of sexual offenses as defined in the sex offender registration law (Megan’s Law), which involves a victim who is a minor (under the age of 18).

For purposes of the 2009 law, a “YSO” is a sports team, league, athletic association, or any other corporation, association, or organization that provides recreational, educational, cultural, social, charitable, or other activities or services to persons under the age of 18.¹⁴ Such an organization does not include public and nonpublic schools

¹³ The text of Public Law 2009, Chapter 139 as enacted in 2009 is at www.njleg.state.nj.us/2008/Bills/PL09/139_.PDF. To see if there have been any subsequent amendments to the law, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>.

¹⁴ In *State v. S.B.*, 230 N.J. 62 (2017), at www.judiciary.state.nj.us/attorneys/assets/opinions/supreme/a_95_15.pdf, the New Jersey Supreme Court held that YSOs operated by religious organizations are subject to the 2009

within the jurisdiction of the New Jersey Department of Education – special rules already apply to these schools.

The 2009 law contains **two exceptions**. Unless otherwise barred by another law, the new law permits participation in a YSO by an excluded sex offender who is:

1. A minor in a YSO that provides rehabilitative or other services to juvenile sex offenders, or
2. Under Parole Board supervision and the Parole Board has given express written permission for the excluded sex offender to hold a position or otherwise participate in a YSO.

In addition to the 2009 law, Chapter 3A of the New Jersey Nonprofit Corporation Act¹⁵ permits, but does not require, nonprofit YSOs¹⁶ to not use the services of an employee or volunteer whose criminal history record background check reveals a record of conviction of any of the following crimes and offenses:

1. In New Jersey, any crime or disorderly persons offense:
 - (a) involving danger to the person, meaning those crimes and disorderly persons offenses set forth in N.J.S.2C:11-1 et seq. [(including criminal homicide, manslaughter, and murder)], N.J.S.2C:12-1 et seq. [(including assault, reckless endangering,

law. The Court noted: “With the 2009 enactment of the youth-serving-organization prohibition, the sponsor’s statement made it clear that the purpose of the amendment was to cast a wide net in order to ‘protect the children and youth of this State by prohibiting sex-offenders from holding positions in youth serving organizations.’ Any ambiguity would have been interpreted in a manner favoring the protection of children to effectuate the statute’s legislative intent.” 230 N.J. at 69-70 (citation omitted). In the case of a religious or nonreligious nonprofit that has just one program that is youth serving, the foregoing quote would buttress the conclusion that ***the prohibitions of the 2009 law apply to the entire nonprofit and not just its youth serving program.***

¹⁵ To read the sections of Chapter 3A, which went into effect in 2000, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> and click on two consecutive right-facing triangles that will appear in the navigation pane on the left side of the screen. Then scroll down to Title 15A and click on the right-facing triangle. Then scroll down to 15A:3A-1 to -5.

¹⁶ Chapter 3A defines a “nonprofit youth serving organization” as “a corporation, association or other organization established pursuant to [New Jersey law], but excluding public and nonpublic schools, and which provides recreational, cultural, charitable, social or other activities or services for persons younger than 18 years of age, and is exempt from federal income taxes.” N.J.S.A. 15A:3A-1.

stalking, and threats)], N.J.S.2C:13-1 et seq. [(including coercion, false imprisonment, human trafficking, kidnapping, and luring)], N.J.S.2C:14-1 et seq. [(including lewdness, Megan's Law sexual offenses,¹⁷ and sexual assault),] or N.J.S.2C:15-1 et seq. [(including carjacking and robbery)];

- (b) against the family, children or incompetents, meaning those crimes and disorderly persons offenses set forth in N.J.S.2C:24-1 et seq. [(including bigamy; endangering the welfare of a child or a disabled or elderly person; unlawful adoption; and willful nonsupport of a child, spouse, or other dependent)];
- (c) involving theft as set forth in chapter 20 of Title 2C of the New Jersey Statutes;
- (d) involving any controlled dangerous substance or controlled substance analog as set forth in chapter 35 of Title 2C of the New Jersey Statutes except paragraph (4) of subsection a. of N.J.S.2C:35-10.¹⁸

- 2. In any other state or jurisdiction, conduct which, if committed in New Jersey, would constitute any of the crimes or disorderly persons offenses described in [#1] above.¹⁹

Be sure to read the discussion in the next section, regarding the position of the U.S. Equal Employment Opportunity Commission (EEOC) on criminal history background checks, because the EEOC has placed employers in a very difficult position of potentially violating Title VII of the Civil Rights Act of 1964 if they comply with a state law that prohibits the employment of workers with criminal convictions in certain jobs without first performing an individualized assessment of whether a specific conviction should be disqualifying with respect to a specific worker and the specific job in question.

¹⁷ Because of the subsequent 2009 law, convictions relating to Megan's Law offenses are mandatory disqualifiers for employment or volunteerism with YSOs.

¹⁸ Paragraph (4) of subsection a. of N.J.S.2C:35-10 relates to possession of 50 grams or less of marijuana, including any adulterants or dilutants, or five grams or less of hashish.

¹⁹ N.J.S.A. 15A:3A-3 (footnotes added). Note that N.J.S.A. 2C is the New Jersey Code of Criminal Justice. To read the sections of N.J.S.A. 2C cited above, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> and click on two consecutive right-facing triangles that will appear in the navigation pane on the left side of the screen. Then scroll down to Title 2C and click on the right-facing triangle.

Don't the U.S. Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights Have Concerns About Criminal History Background Checks?

Yes. Both agencies are concerned that background checks might have an improper, disparate impact on minority groups. The U.S. Equal Employment Opportunity Commission (EEOC) has been actively challenging employers' background check policies.²⁰

According to the New Jersey Division on Civil Rights (NJDCR), employers *cannot* consider **arrests** that have not resulted in convictions. Therefore, in order to not violate the New Jersey Law Against Discrimination (NJLAD), New Jersey employers must not ask workers for their arrest histories or request such information from third parties (such as criminal history background check vendors). However, if a worker cannot start work by the date the employer need the worker's services because the worker is imprisoned pending trial, then the employer would not be obligated to consider the worker for hire at that time.

Both the NJDCR and the EEOC permit employers to consider **convictions**, subject to some limitations, as summarized by the EEOC as follows:

Under Title VII [of the Civil Rights Act of 1964], the law is settled that a categorical bar from employment for *all* individuals with ... conviction records has a disparate impact on African Americans and Hispanics/Latinos. Individualized decisions to exclude a particular applicant based on a conviction . . . record must be justified with respect to the responsibilities of the specific position. ***

Under Title VII, the employer *must* show that such an exclusion is job-related and consistent with business necessity for the position in question. *** To meet this standard, employers must make an individualized determination about whether an offense demonstrates unfitness for a particular position held or sought by the individual in question. With respect to conviction records, the relevant considerations to determine whether the offense demonstrates unfitness for the position are: (1) the nature and gravity of the offense or offenses; (2) the amount of time that has passed since the arrest or conviction and/or completion of

²⁰ See, e.g., EEOC Press Release, [BMW to Pay \\$1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit: Company's Criminal Background Policy Disproportionately Affected African-American Logistics Workers, EEOC Charged](#) (Sept. 8, 2015); EEOC Press Release, [Schenker Inc. to Pay \\$750,000 To Conciliate EEOC Class Investigation](#) (Oct. 26, 2016).

the sentence, where applicable; and (3) the nature of the job held or sought.²¹

In April 2012, the EEOC issued a revised edition of its [*Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*](#) (*Guidance Memo*).²² The *Guidance Memo* did not change the EEOC's approach in this area, though it does (1) consolidate and expand upon guidance from several earlier documents into one revised document, (2) provide revised illustrations of the application of the guidance in real-life situations, and (3) sets forth "best practices" for employer consideration.

²¹ EEOC Informal Discussion Letter, [*Title VII: Arrest and Conviction Records*](#) (Mar. 19, 2007). In its 2012 *Guidance Memo*, which is discussed in the next paragraph of the main text, the EEOC states that, with respect to the three considerations quoted above, a criminal records screen needs "to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question." [*Guidance Memo*](#), Section V.B.4. The EEOC also discusses arrest records in [*Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964*](#) (Sept. 7, 1990).

As explained earlier in this section, employers in New Jersey cannot consider arrests that have not resulted in convictions when making employment decisions.

²² The *Guidance Memo* is available at www.eeoc.gov/laws/guidance/arrest_conviction.cfm or www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf. The *Guidance Memo* was issued with an explanatory set of [FAQs](#). For a more detailed summary of the *Guidance Memo*, see the Sutherland Asbill & Brennan and D.C. Bar Pro Bono Program's [*EEOC Issues Updated Guidance Regarding an Employer's Use of Criminal Records When Making Employment Decisions*](#) (Nov. 2012).

In March 2014, the EEOC and the Federal Trade Commission (FTC) issued the following two joint publications: *Background Checks: What Employers Need to Know* (Mar. 2014), at www.eeoc.gov/eeoc/publications/background_checks_employers.cfm, www.eeoc.gov/eeoc/publications/upload/eeoc_ftc_background_checks_employers.pdf, www.ftc.gov/tips-advice/business-center/guidance/background-checks-what-employers-need-know, and www.ftc.gov/system/files/documents/plain-language/pdf-0142-background-checks-what-employers-need-know.pdf; and *Background Checks: What Job Applicants and Employees Should Know* (Mar. 2014), at http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm, https://www.eeoc.gov/eeoc/publications/upload/eeoc_ftc_background_checks_employees.pdf, <https://www.consumer.ftc.gov/articles/0157-background-checks>, and www.consumer.ftc.gov/articles/pdf-0143-background-checks-what-job-applicants-employees-need-know.pdf.

The FTC and the Consumer Financial Protection Bureau (CFPB) enforce the Fair Credit Reporting Act (FCRA), which is discussed at length in **Appendix A** to this article.

One aspect of the revised *Guidance Memo* is worthy of particular note. The EEOC has highlighted a new unwillingness to be deferential to **state laws** (including licensing requirements) that prohibit the employment of workers with certain convictions. According to the EEOC, “if an employer’s exclusionary policy or practice is *not* job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.”²³ In other words, an employer must not adopt a blanket bar to employment based on the state law, but instead must still evaluate whether a worker is barred from employment based on *an individualized assessment* of whether the worker’s prior criminal history should be a bar from employment in the particular job in question.

- It is not clear how aggressive the EEOC will be in enforcing its more forcefully-stated position that an employer cannot automatically follow a state law that expressly bars the employment of certain convicts in specific jobs. It is likely that in many cases there will be no conflict between the state law and the EEOC’s position under Title VII. For example, a youth serving organization, applying the individual assessment discussed earlier in this article, likely will be able to bar the employment of Megan’s Law offenders, as required by New Jersey law.²⁴

However, in situations where the individual assessment would not justify refusing to use the services of a convict but state law bars the employment, the nonprofit should consider consulting with a competent employment lawyer and reaching out to the state agency administering the law or licensing requirements barring employment. Ideally, the State of New Jersey should establish a commission to review the laws that contain employment bars and create a substantial public record that clearly and unequivocally validates that (1) New Jersey’s conviction bars are clearly justifiable in accordance with the federal Uniform Guidelines on Employee Selection Procedures²⁵ (see Section V.B.4-5 of the *Guidance Memo*) and (2) there are no alternative, less discriminatory employment practices that would permit the convict’s employment (see Section V.C of the *Guidance Memo*). Because the level of validation the EEOC requires likely would be too expensive

²³ [Guidance Memo](#), Section VII (footnote omitted).

²⁴ According to Bloomberg BNA, at the American Bar Association’s Section of Labor and Employment Law’s annual conference in New Orleans in 2013, James A. Paretti, Jr., who at the time was senior counsel to EEOC Commissioner Victoria Lipnic, stated that “[a]n individualized assessment is not required in every case so, for example, a day care center provider can screen out applicants with past convictions for child molestation without the extra step.” Kevin P. McGowan, [Gray Areas Remain on Background Checks Under EEOC Guidance, Speakers at ABA Say](#), 219 DAILY LABOR REPORT C-2 (Nov. 12, 2013).

²⁵ The *Uniform Guidelines on Employee Selection Procedures* are set forth in 29 C.F.R. Part 1607, at <https://www.gpo.gov/fdsys/pkg/CFR-2017-title29-vol4/xml/CFR-2017-title29-vol4-part1607.xml>. An explanatory set of FAQs is available at www.eeoc.gov/policy/docs/ganda_clarify_procedures.html.

for a small nonprofit employer to achieve and the State is in a far better position to undertake the validation effort, employers might want to encourage the state agencies that regulate them to encourage the creation of a commission.

The *Guidance Memo* notes that employers will not violate Title VII if they bar from employment convicts whose employment is prohibited by **federal law**.²⁶

More recently, the EEOC has increased its focus on the disparate impact that **credit histories** might have on minorities. The EEOC insists that the use of background checks, including credit checks, be job related and consistent with business necessity.²⁷

²⁶ [Guidance Memo](#), Section VI.

²⁷ See EEOC Informal Discussion Letter, [Title VII: Employer Use of Credit Checks](#) (Mar. 9, 2010); EEOC Press Release, [EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp.](#) (Dec. 21, 2010).

In 2014, the federal Sixth Circuit Court of Appeals upheld a lower court's ruling that the EEOC failed to prove that Kaplan Higher Education Corporation's use of credit reports in its hiring process had an unlawful disparate impact on black applicants, in violation of Title VII. *EEOC v. Kaplan Higher Education Corp.*, 748 F.3d 749 (6th Cir. 2014), at www.ca6.uscourts.gov/opinions.pdf/14a0071p-06.pdf. *Accord EEOC v. Freeman*, 961 F. Supp. 2d 783, 785 (D. Md. 2013), *aff'd*, 778 F.3d 463 (4th Cir. 2015) (also noting, "For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who otherwise appear to be untrustworthy and unreliable. However, under Title VII . . . , a specific hiring policy may constitute an unlawful employment practice if it has a disparate impact on the basis of race, color, religion, sex or national origin and the employer fails to demonstrate that the challenged practice is job-related for the position in question and consistent with business necessity."), at www.gpo.gov/fdsys/pkg/USCOURTS-mdd-8_09-cv-02573/pdf/USCOURTS-mdd-8_09-cv-02573-5.pdf (district court opinion) and www.ca4.uscourts.gov/Opinions/Published/132365.P.pdf (appellate court opinion).

Interestingly, in the first paragraph of the *Kaplan* decision, the Sixth Circuit noted:

In this case the EEOC sued [Kaplan] for using the same type of background check that the EEOC itself uses. The EEOC's personnel handbook recites that "[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations." Because of that concern, the EEOC runs credit checks on applicants for 84 of the agency's 97 positions. [Kaplan has] the same concern; and thus Kaplan runs credit checks on applicants for positions that provide access to students' financial-loan information, among other positions. For that practice, the EEOC sued Kaplan.

To Whom Do New Jersey's Criminal History Background Check Inquiry Restrictions Apply and, If They Apply to Our Nonprofit, What Are the Restrictions?

The Opportunity to Compete Act (TOTCA)²⁸ restricts the manner in which New Jersey **employers**²⁹ with 15 or more employees can conduct criminal history background

Kaplan, 748 F.3d at 750. See also Rod Fliegel and Alex Frondorf, "[Do As I Say, Not As I Do:](#)" *EEOC Required to Provide Discovery of Its Employment Practices*, LITTLER ASAP (Apr. 30, 2012).

The use of credit histories is discussed further in **Appendix A** to this article.

²⁸ The text of TOTCA, N.J.S.A. 34:6B-11 et seq., is available at www.njleg.state.nj.us/2014/Bills/PL14/32_.pdf and www.nj.gov/corrections/pdf/OTS/FRARA/OtherResources/Opportunity%20to%20Compete%20Law.PDF. To see if there have been any subsequent amendments to TOTCA, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>. TOTCA went into effect in 2015.

The December 7, 2015 regulations of the New Jersey Department of Labor and Workforce Development (NJDLWD) under TOTCA, which are codified at N.J.A.C. N.J.A.C. 12:68-1.1 et seq., and its preamble to those regulations are available at https://nj.gov/labor/forms_pdfs/legal/2015/opportunity_to_compete.pdf.

²⁹ The term "**employer**" is defined as a "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 [New Jersey], including the State [of New Jersey], any county or municipality, or any instrumentality thereof." The term includes "job placement and referral agencies and other employment agencies." N.J.S.A. 34:6B-13.

According to the NJDLWD:

1. If an employer has 15 or more employees, TOTCA applies even if the employer has fewer than 15 employees in New Jersey.
2. "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." This is the same method for counting employees as is utilized in the New Jersey Division on Civil Rights' regulations under the New Jersey Family Leave Act, N.J.A.C. 13:14-1.2, which are available at www.nj.gov/oag/dcr/downloads/FamilyLeaveAct-Regulations.pdf.

N.J.A.C. 12:68-1.2 and N.J.A.C. 12:68 Preamble, Response to Comments 17 and 18.

The NJDLWD also has provided guidance for employers who utilize workers from or in association with a "temporary help service firm" (which is a business that employs individuals for the purpose of assigning those individuals to assist the business' customers

checks on applicants for employment during the “initial employment application process.” A number of states and local jurisdictions have adopted similar—often more stringent—laws, which are commonly referred to as “ban the box” laws.³⁰

in the handling of the customers' temporary, excess, or special workloads), an “employee leasing company” (also known as a “professional employer organization”), or an employment agency:

[In the case of] a *temporary help service arrangement*, ..., the client company is not considered an "employer" [under TOTCA] and, therefore, the client company is not restricted under [TOTCA] ... from inquiring about the criminal record of [a worker] 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 [TOTCA]. 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 [TOTCA] ... 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 [TOTCA], but under [the New Jersey law governing employment agencies], 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 [TOTCA's] express inclusion of such agencies within its definition of the term "employer," the employment agency is restricted as an employer under [TOTCA] ... 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 [TOTCA] ... from inquiring about that applicant's criminal record until after the completion of its "initial employment application process."

N.J.A.C. 12:68 Preamble, Response to Comment 13 (paragraph breaks and italics added and bolding removed).

³⁰ “Ban the box” is a term used by advocates for the formerly incarcerated to refer to the removal from employment applications of boxes and corresponding questions that compelled applicants to disclose their criminal histories. The National Employment Law Project’s website includes summaries of the various ban-the-box laws in the United States. See [Ensuring People with Convictions Have a Fair Chance to Work](#).

Four key terms used in TOTCA are:

- “**Employment**” is defined as “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.”³¹

TOTCA applies only when the physical location of the prospective employment is in whole or in substantial part within New Jersey.³² The regulations of the New Jersey Department of Labor and Workforce Development (NJDLWD) under TOTCA state that “the physical location of the prospective employment shall be in substantial part within [New Jersey] 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.”³³

- “**Employee**” is defined as “a person who is hired for a wage, salary, fee, or payment to perform work for an employer.”³⁴ “Employee” also includes an **intern** or **apprentice**, regardless of whether the intern or apprentice is paid.³⁵ However, “employee” does not include a “person employed in the domestic service of any family or person at the person’s home,” an independent contractor, or a director or trustee.³⁶ Thus, **the restrictions set forth in TOTCA do not apply to**

³¹ N.J.S.A. 34:6B-13.

³² N.J.S.A. 34:6B-13.

³³ N.J.A.C. 12:68-1.2.

³⁴ N.J.S.A. 34:6B-13.

³⁵ N.J.S.A. 34:6B-13; N.J.A.C. 12:68-1.2. The NJDLWD's regulations:

1. State that an “employee” includes “interns and apprentices, *whether paid or unpaid.*”
2. Define an “**apprentice**” as “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.”
3. Define an “**intern**” as “an individual, as a student or recent graduate, working as a trainee to gain practical experience in an occupation.”

N.J.A.C. 12:68-1.2 (emphasis added).

³⁶ N.J.S.A. 34:6B-13.

nonemployees such as trustees, unpaid volunteers,³⁷ and independent contractors.

- **“Applicant for employment”** (“applicant”) is defined as:
1. “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
 2. “any person who requests to be considered for employment by an employer ... or who requests information from an employer related to seeking employment.”³⁸

According to the NJDLWD, it will use the traditional “ABC” test for determining whether a worker is an “independent contractor” or “employee.” N.J.A.C. 12:68 Preamble, Response to Comment 8. As the New Jersey Supreme Court has observed:

The “ABC” test presumes an individual is an employee unless the employer can make certain showings regarding the individual employed, including:

- (A) Such individual has been and will continue to be free from control or direction over the performance of such service, both under [the individual’s] contract of service and in fact; and
- (B) Such service is either outside the usual course of the business for which such service is performed, or that such service is performed outside of all the places of business of the enterprise for which such service is performed; and
- (C) Such individual is customarily engaged in an independently established trade, occupation, profession or business.

[N.J.S.A. 43:21–19(i)(6).]

“[T]he failure to satisfy any one of the three criteria results in an ‘employment’ classification.”

Hargrove v. Sleepy’s, LLC, 220 N.J. 289, 305 (2015), at <http://njlaw.rutgers.edu/collections/courts/supreme/a-70-12.opn.html> or <http://law.justia.com/cases/new-jersey/supreme-court/2015/a-70-12.html>.

³⁷ If an individual is receiving course credits from an educational institution for the individual’s work as a volunteer for a nonprofit, then, for purposes of TOTCA, the individual is an intern, not a volunteer.

³⁸ N.J.S.A. 34:6B-13.

Note that an “applicant” includes a current employee of the employer.³⁹ Thus, TOTCA applies when an employer is considering an existing employee for a job opening or when an existing employee applies for a position that an employer has posted internally or externally.⁴⁰

- **“Initial employment application process”** is defined as “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**,⁴¹ whether in person or by any other means[,] of an

³⁹ N.J.S.A. 34:6B-13.

⁴⁰ If an employer already has properly-obtained criminal history information in a current employee’s personnel file, then, both during and after the initial employment application process, the employer can rely on that information when considering the employee for another position. See N.J.A.C. 12:68 Preamble, Response to Comment 23. However, unless one of the exceptions to TOTCA’s prohibitions (discussed later in this section) applies, the employer should not discuss that criminal history information with the internal candidate until after the initial employment application process has concluded.

The foregoing approach is equally applicable to a situation involving a former employee who has reapplied for employment and the employer already has properly-obtained criminal history information in the employee’s archived personnel file.

⁴¹ According to the NJDLWD:

1. An “**interview**” is “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.”
2. An “**interview**” does “not mean the exchange of e-mails or the completion of a written or electronic questionnaire.”
3. If an applicant will go through more than one interview (whether on the same day or on a subsequent day), the initial employment application process ends after the first interview.
4. TOTCA does not require “an employer to engage in a deliberative process and conclude that [an interviewed] applicant meets the employer’s minimum qualifications for the position sought” before conducting a criminal history background check on the applicant.

N.J.A.C. 12:68-1.2 (emphasis added) and N.J.A.C. 12:68 Preamble, Response to Comments 5 and 21.

applicant for employment.”⁴²

Subject to limited exceptions (discussed below), an employer may not:

1. Require an applicant to complete during the initial employment application process an **employment application** (“application”)⁴³ that makes any inquiries regarding the applicant’s **criminal record**.⁴⁴
2. Make any oral or written inquiry during the initial employment application process to anyone, including an applicant, regarding the applicant’s criminal record.⁴⁵ Thus, during the initial employment application process, an employer cannot ask applicants to disclose whether they have a criminal history and cannot order a

⁴² N.J.S.A. 34:6B-13 (emphasis and footnote added).

⁴³ “**Employment application**” is defined as “a form, questionnaire[,] or similar document or collection of documents that an applicant for employment is required by an employer to complete.” N.J.S.A. 34:6B-13. It includes online applications.

⁴⁴ “**Criminal record**” is defined as “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.” N.J.S.A. 34:6B-13. A plea of “nolo contendere” means a plea entered by a defendant without expressly admitting guilt.

TOTCA’s criminal-record inquiry ban includes expunged criminal records.

According to the NJDLWD, “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 [TOTCA].” N.J.A.C. 12:68 Preamble, Response to Comment 2. Neither TOTCA nor the NJDLWD regulations define what a “criminal justice agency” is. It is arguable that the New Jersey Motor Vehicle Commission is such an agency to the extent it collects information regarding drivers’ DWI/DUI and motor vehicle violations. As such, it would be prudent for employers to not request information regarding an applicant’s DWI/DUI and motor vehicle violations until after completing the initial employment application process.

⁴⁵ According to the NJDLWD, internet and other public records searches concerning an applicant’s criminal record are prohibited during the initial employment application process. N.J.A.C. 12:68 Preamble, Response to Comments 3 and 4.

criminal record report pertaining to the applicants from or through a third party.⁴⁶ However, if applicants voluntarily disclose during the initial employment application process any information regarding their criminal record, then an employer may make inquiries to anyone, including the applicants, regarding their criminal record during that process.

3. Knowingly or purposefully publish, or cause to be published, an **advertisement**⁴⁷ that solicits applicants where the advertisement explicitly provides that the employer will not consider applicants who have been arrested or convicted of one or more crimes or offenses.⁴⁸

⁴⁶ See N.J.A.C. 12:68 Preamble, Response to Comment 19 (TOTCA “prohibits an employer from making **any** oral or written inquiry[, including to or through a third party background check vendor,] during the initial employment application process regarding an applicant’s criminal record.”).

⁴⁷ “**Advertisement**” is defined as “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.” N.J.S.A. 34:6B-13.

⁴⁸ According to an earlier 2011 law that bars “employed only” ads, employers are permitted to publish advertisements that set forth any other qualifications for employment, as permitted by law, such as (1) the holding of a current and valid professional or occupational license, certificate, permit, registration, or other credential, or (2) a minimum level of education, training, or field, occupational, or professional experience. N.J.S.A. 34:8B-1, which is at www.njleg.state.nj.us/2010/Bills/PL11/40_.PDF. The 2011 law also provides that New Jersey employers (and their agents) are barred from publishing, in print or on the internet, advertisements for job vacancies that state the employers (1) will not consider any applicants who are currently unemployed or (2) will consider only applicants who are currently employed. To see if there have been any subsequent amendments to the 2011 law, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>.

It is unclear whether TOTCA prohibits an employer from including on an application form an explicit statement that the employer will not consider any applicant who has been arrested or convicted of one or more crimes or offenses. If an advertisement includes an employment application or a hyperlink to an application, then such a statement on the application arguably would be prohibited by the advertisement restriction discussed above. While it is arguable that such a statement could be on the application physically handed to an applicant who has come forward in response to a job advertisement, it would be prudent for an employer not to include such a statement on the application, at least during the initial employment application process.

In any event, the EEOC or the New Jersey Division on Civil Rights (NJDCR) might find that such a statement is impermissible under Title VII or the New Jersey Law Against Discrimination (NJLAD), respectively, in view of an employer’s obligation to conduct an individualized assessment before disqualifying an applicant for employment because of a criminal conviction. In addition, given that the NJDCR has taken the position that inquiries

The foregoing three prohibitions do not apply to a position:

1. where a criminal history record background check is required by law, rule, or regulation;
2. where an arrest or conviction by an applicant for one or more crimes or offenses would or might preclude the person from holding such employment as required by any law, rule, or regulation;⁴⁹
3. where a law, rule, or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees;⁵⁰ or

regarding arrests that have not resulted in convictions are impermissible under the NJLAD, employers should not include on an application form an explicit statement that the employer will not consider any applicant who has been arrested unless otherwise required by applicable laws, rules, or regulations. See discussion above about the EEOC and the NJDCR.

⁴⁹ Thus, during and after the initial employment application process, youth serving nonprofits are permitted to inquire into whether applicants are Megan's Law sex offenders. See discussion above regarding Megan's Law.

⁵⁰ According to the NJDLWD, "[i]n order to assert [this] exemption . . . 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 . . . if it employs an individual with a criminal record to perform any or all of the job functions associated with that job vacancy." N.J.A.C. 12:68 Preamble, Response to Comment 24.

See also Township Pharmacy v. Division of Medicare Assistance and Health Services, 432 N.J. Super 273, 274–76, 287 (App. Div. 2013) (upholding denial of a pharmacy's application to participate in New Jersey's Medicaid program as a pharmaceutical service provider because the pharmacy "failed to perform [the] basic due diligence"—such as conducting criminal background checks—needed to determine and disclose on the application whether any of its directors, employees, members, officers, owners, partners, or shareholders had "[e]ver been indicted, arrested, charged, convicted of, or pled guilty or no contest to any federal or State crime or offense in [New Jersey] or any other jurisdiction, even if this resulted in pre-trial intervention;" also holding that the "applicant's omission . . . caused by inadvertence and without the intent to deceive, mislead, or conceal" is no defense where the applicant had an independent duty to undertake a criminal background check), at <http://caselaw.findlaw.com/nj-superior-court-appellate-division/1642213.html>, <http://law.justia.com/cases/new-jersey/appellate-division-published/2013/a3849-10.html>, or <http://njlaw.rutgers.edu/collections/courts/appellate/a3849-10.opn.html>.

4. in law enforcement, corrections, the judiciary, homeland security, or emergency management.⁵¹

According to the NJDLWD, when one of the exceptions to TOTCA's prohibitions 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."⁵² The employer can inquire about the applicant's entire criminal record, not just those specific crimes or offenses that might be disqualifiers under the applicable law, rule, or regulation.⁵³

Although these exceptions to TOTCA's prohibitions would permit an employer to conduct a criminal history background check prior to the completion of the initial employment application process, the employer still might consider holding off on conducting the check until the process is completed so that all applicants are treated uniformly.

In addition, the first two prohibitions set forth above—relating to employment applications and inquiries—do not apply to a position designated by an 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.

Nothing in TOTCA or the NJDLWD's regulations prohibit:

1. An employer from stating in an advertisement, on an application, or in response to an inquiry from an applicant that the employer requires (or might require) applicants to submit to a background check as a condition of employment.⁵⁴

⁵¹ The NJDLWD's regulations limit positions in law enforcement, corrections, the judiciary, homeland security, and/or emergency management to the public sector (*i.e.*, individuals employed by the government). N.J.A.C. 12:68-1.2.

Given that the NJDCR has taken the position that inquiries regarding arrests that have not resulted in convictions are impermissible under the NJLAD, employers should not make such inquires on applications or during job interviews unless otherwise required by applicable laws, rules, or regulations. See discussion above about the NJDCR.

⁵² N.J.A.C. 12:68 Preamble, Response to Comment 12.

⁵³ See N.J.A.C. 12:68 Preamble, Comment 12 and response thereto.

⁵⁴ See N.J.A.C. 12:68 Preamble, Response to Comment 20 ("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 [TOTCA,] and would, therefore, not be prohibited").

2. A multistate employer “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 in substantial part in New Jersey is instructed not to answer this question.”⁵⁵

After the initial employment application process is completed, an employer may:

1. require an applicant to complete an employment application that make inquiries regarding the applicant’s criminal record; and
2. make oral or written inquiries to anyone, including to an applicant, regarding the applicant’s criminal record.⁵⁶

As long as an employer complies with the requirements of TOTCA, it still can refuse to hire applicants based on their criminal records, unless the criminal records or relevant portions thereof have been expunged or erased through executive pardon, provided that such refusal is consistent with other applicable laws, rules, and regulations.⁵⁷

In contrast to the laws in some other jurisdictions, TOTCA does not set forth any restrictions on how an employer should evaluate or use an applicant’s criminal history.⁵⁸ For an overview of what an employer should do with adverse information obtained through a criminal history background check, see the discussion earlier in this article.

Employers who violate TOTCA are subject to a civil penalty in an amount not to exceed \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation.⁵⁹ Such penalties are payable to the NJDLWD. TOTCA does not permit applicants to sue employers for violations of TOTCA.

⁵⁵ N.J.A.C. 12:68-1.3(h).

⁵⁶ Given that the NJDCR has taken the position that inquiries regarding arrests that have not resulted in convictions are impermissible under the NJLAD, employers should not make such inquires on applications or during job interviews unless otherwise required by applicable laws, rules, or regulations. See discussion above about the NJDCR.

⁵⁷ Given that the NJDCR has taken the position that employers cannot consider arrests that have not resulted in convictions in making employment decisions, employers should not consider such arrests unless otherwise required by applicable laws, rules, or regulations. See discussion above about the NJDCR.

⁵⁸ Earlier versions of the proposed TOTCA legislation contain detailed, restrictive rules on how an employer could use an applicant’s criminal history.

⁵⁹ The NJDLWD’s regulations expressly state that:

TOTCA preempts any county or municipal ordinance relating to criminal histories in the employment context, except for ordinances adopted to regulate employment by a municipality.

To Whom Do the City of Newark’s Criminal History Background Check Restrictions Apply?

Prior to March 1, 2015, nonprofit employers that operated in the City of Newark and conducted criminal history inquiries with respect to prospective and/or current workers needed to comply with a Newark ordinance that placed significant restrictions on conducting such inquiries.⁶⁰ Newark’s ordinance also covered criminal history background checks relating to housing and licensing.

As a result of the enactment of TOTCA, effective March 1, 2015, Newark’s ban-the-box ordinance was superseded with respect to employment-related background checks, except for workers employed by Newark itself. Thereafter, on April 15, 2015, Newark repealed its original ban-the-box ordinance and replaced it with a new ordinance limited to criminal history background checks relating just to housing and licensing.⁶¹

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.

N.J.A.C. 12:68-1.5(c).

⁶⁰ The ordinance went into effect on November 18, 2012. The ordinance was never codified in the Newark Municipal Code. The 2012 ordinance was referred to as File No. 12-1630.

⁶¹ The 2015 ordinance is referred to as File No. 14-0921.

When Should We Conduct Background Checks?

Generally, it is best not to do the formal background check until after a conditional job offer has been made or the final candidates have been identified after initial rounds of interviews have been conducted. As explained in the preceding section of this article, pursuant to TOTCA, during the initial employment application process, an employer cannot ask applicants to disclose whether they have a criminal history and cannot order a criminal record report pertaining to the applicants from or through a third party.

Reports prepared by outside vendors might include information that might inappropriately taint the hiring process. For example, the report might include information about arrests that did not result in convictions. As explained above, employers in New Jersey cannot consider arrest records. Similarly, the report might report a previous name used by the applicant, which might reveal a change in marital status or a gender affirmation, information that normally is irrelevant to the decision to hire a worker.⁶²

The EEOC *Guidance Memo* has added support for this approach: “Some states require employers to wait until late in the selection process to ask about convictions. The policy rationale is that an employer is more likely to objectively assess the relevance of an applicant’s conviction if it becomes known when the employer is already knowledgeable about the applicant’s qualifications and experience. As a best practice, and consistent with applicable [federal] laws, the [EEOC] recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”⁶³

Can We Go Ahead and Let Someone Start Working While We Wait for the Outcome of a Background Check?

Well yes, but you should not! On occasion, background checks take longer than planned. However, that is not an excuse to let a worker start working. The whole point of conducting a background check is to assure the organization that significant risks have been ruled out or—or at least weighed—before letting someone start working. Letting a person start working prior to completing the background check process

⁶² For additional suggestions regarding background checks, see CHRISTINE MICHELLE DUFFY, [GENDER IDENTITY AND SEXUAL ORIENTATION DISCRIMINATION IN THE WORKPLACE: A PRACTICAL GUIDE](#), Chapter 30 (The Hiring Process and Employment Forms) (Bloomberg BNA 2014), which is available in numerous law libraries (see www.worldcat.org/title/gender-identity-and-sexual-orientation-discrimination-in-the-workplace-a-practical-guide/oclc/883749063&referer=brief_results).

⁶³ [Guidance Memo](#), Section V.B.3 (footnotes omitted).

undermines not only the risk management goals of the background check process but also the credibility of an employer's argument to the EEOC or the NJDCR that the background check is required by "business necessity."

If a nonprofit allows a worker to start working without completing its background check process and another person is injured, if it turns out that had the process been completed the organization would never have retained the worker, then the nonprofit might be liable to the injured person under a theory of liability called *negligent hiring*.⁶⁴

Moreover, if the worker quits another job on the basis of the nonprofit saying the worker can start work and then the organization decides to terminate the worker because of the content of a late-received criminal history report, the nonprofit might be liable for damages under a theory of liability called *promissory estoppel*.

If a Former Employer Is Willing to Discuss a Worker's Background, What Questions Can We Ask?

All the questions asked should be directed at obtaining information relevant to the worker's ability to perform the position that is being filled. A nonprofit should not ask questions that it would not be allowed to ask the worker directly, such as, "Does the worker have any mental or physical disabilities?"

For some sample questions, read The Bridgespan Group's articles [The Reference Check: More than a Formality](#) and [Hiring a Bridger: Referencing Guide](#).

Is It Okay to Use a Worker Referred to Us Through a Court-Ordered Community Service Program?

There is no simple answer to this question. At a minimum, the nonprofit should follow its usual background check process. If the worker would be disqualified under that process, then most likely the fact that the worker is participating in a court-approved program should not change the outcome.

To learn more about court-ordered community service programs, and the pros and cons of using workers from such programs, read Blue Avocado's article [Court-Ordered Community Service: Volunteers or Prison Labor?](#)

⁶⁴ Depending upon the circumstances, a nonprofit might avoid civil liability if the New Jersey Charitable Immunity Act applies.

If Another Organization Is Conducting a Background Check on One of Our Former Workers, Must We Respond?

With limited exceptions, the law does not require a former employer to respond to another employer's request for information about a worker. Some employers will not respond to such requests. Others, upon receiving written permission from the former worker, will disclose only dates of employment, last position held, and possibly final hourly rate of pay or annual salary—the so-called *name, rank, and serial number* response.

Employers should have a process in place for responding to reference checks. At a minimum, the process should include:

- Designating specific managers (e.g., the Human Resources Manager and the Executive Director) to be the only persons authorized to respond to reference checks.
- Requiring that all requests for reference checks be in writing, including a written authorization signed by the former worker that grants permission to the employer to release the employment history information. A nonprofit should neither accept telephonic requests nor disclose information that is outside the scope of the written authorization.
- Ensuring that the information disclosed in response to a reference check is accurate. If the nonprofit is negligent in what it discloses—or purposely lies—to the inquiring employer, the nonprofit might be liable to the inquiring employer or the former worker under theories of liability such as *negligent misrepresentation*, *retaliation*, or *tortious interference with prospective business relationship*.

In certain situations, employers must respond to requests for information from a subsequent employer. For example, New Jersey's Health Care Professional Responsibility and Reporting Enhancement Act⁶⁵ (which is also known as the "Cullen

⁶⁵ The text of the Health Care Professional Responsibility and Reporting Enhancement Act, as enacted in 2005, is available at www.njleg.state.nj.us/2004/Bills/PL05/83_.PDF. The current version of the Cullen Act, as codified and amended in the New Jersey Statutes Annotated, should be reviewed before taking actions based on the Cullen Act. See the New Jersey Division of Consumer Affairs' (NJDCA) web page *Health Care Professional Responsibility and Reporting Enhancement Act*, at www.njconsumeraffairs.gov/Pages/hcreporting.aspx, which includes a link to a more current version of the Cullen Act as posted by the Division. To see if there have been any subsequent amendments to the Cullen Act, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>.

Act⁶⁶) requires, among other things, that:

1. Health care professionals⁶⁷ and health care entities⁶⁸ notify the New Jersey Division of Consumer Affairs (NJDCA) when they have information regarding,

The NJDCA's regulations under the Cullen Act are at N.J.A.C. 13:45E-1.1 et seq. The New Jersey Department of Health's regulations under the Cullen Act are at N.J.A.C. 8:30-1.1 et seq.

⁶⁶ As the Home Care Council of New Jersey explains, the Cullen Act “was enacted in July of 2005 in response to the news accounts of Charles Cullen, a nurse who confessed to killing at least 29, and as many as 40, patients under his care while working at several hospitals in New Jersey and Pennsylvania. Cullen was able to move from hospital to hospital for 16 years in spite of a questionable employment record.” Home Care Council of New Jersey, *Cullen Act: Requirements and Protections* (July 2005), at www.homecarecouncilnj.org/CullenAct.pdf.

⁶⁷ A “health care professionals” is defined as a person who is:

licensed or otherwise authorized pursuant to Title 45 or Title 52 of the Revised Statutes to practice a health care profession that is regulated by the Director of the Division of Consumer Affairs or by one of the following boards: the State Board of Medical Examiners, the New Jersey Board of Nursing, the New Jersey State Board of Dentistry, the New Jersey State Board of Optometrists, the New Jersey State Board of Pharmacy, the State Board of Chiropractic Examiners, the Acupuncture Examining Board, the State Board of Physical Therapy, the State Board of Respiratory Care, the Orthotics and Prosthetics Board of Examiners, the State Board of Psychological Examiners, the State Board of Social Work Examiners, the State Board of Veterinary Medical Examiners, the State Board of Examiners of Ophthalmic Dispensers and Ophthalmic Technicians, the Audiology and Speech-Language Pathology Advisory Committee, the State Board of Marriage and Family Therapy Examiners, the Occupational Therapy Advisory Council, and the Certified Psychoanalysts Advisory Committee.

N.J.A.C. 13:45E-2.1. *Accord* N.J.S.A. 26:2H-12.2b(i); N.J.S.A. 45:1-34. A “health care professional” also includes a nurse aide and a personal care assistant certified by the Department of Health and Senior Services and a homemaker home-health aide certified by the Board of Nursing. N.J.A.C. 13:45E-2.1. *See also* N.J.S.A. 26:2H-12.2b(i).

⁶⁸ A “health care entity” is defined as:

a health care facility licensed pursuant to P.L. 1971, c. 136, N.J.S.A. 26:2H-1 et seq. (including, but not limited to, hospitals, ambulatory care facilities and long term care facilities); a health maintenance organization authorized to operate pursuant to P.L. 1973, c. 337, N.J.S.A. 26:2J-1 et seq.; a carrier which offers a managed care plan regulated pursuant to P.L. 1997, c. 192, N.J.S.A. 26:2S-1 et seq.; a State or county psychiatric hospital; a State developmental center; a staffing registry; and a home care services agency as defined in section 1 of P.L. 1947, c. 262, N.J.S.A. 45:11-23.

among other things, an impairment, incompetence, or unprofessional conduct of a health care professional that presents a danger to patient care or safety.⁶⁹

2. Health care entity, upon inquiry from another health care entity concerning a health care professional, truthfully disclose whether, within the seven years preceding the inquiry, it provided any notice about the individual to either the NJDCA or the Medical Practitioner Review Panel.⁷⁰ In addition, the health care entity must provide to the inquiring entity (1) a copy of the notification and any supporting documentation it provided to the NJDCA, a professional or occupational licensing board in the NJDCA, or the panel, and (2) information about a current or former employee's job performance as it relates to patient care and, in the case of a former employee, the reason for the employee's separation.⁷¹

Health care entities and their employees who in good faith and without malice provide information in compliance with the Cullen Act are immune from civil damages in any cause of action arising out of the provision or reporting of the information.⁷²

In 2018, a law similar to the Cullen Act was enacted with respect to the hiring of new employees by school districts, charter schools, nonpublic schools, and contracted service providers holding a contract with a school district, charter school, or nonpublic school (collectively referred to as a "hiring entity") who will hold positions involving

N.J.A.C. 13:45E-2.1. *Accord* N.J.S.A. 26:2H-12.2b(i); N.J.S.A. 45:1-34.

⁶⁹ N.J.S.A. 26:2H-12.2b(a); N.J.S.A. 45:1-37.

⁷⁰ N.J.S.A. 26:2H-12.2c(a). The form (CN-9) and related instructions with respect to a Health Care Facility Inquiry Regarding Health Care Professional are at <http://healthapps.state.nj.us/forms> and www.njconsumeraffairs.gov/Pages/hcreporting.aspx. The first link is more likely to have the most current version of the form and instructions.

⁷¹ N.J.S.A. 26:2H-12.2c(a).

⁷² N.J.S.A. 26:2H-12.2b(g); N.J.S.A. 26:2H-12.2c(c); N.J.S.A. 26:2H-12.2d(b); N.J.S.A. 45:1-35; N.J.S.A. 45:1-37(d). *See Gasperetti v. Deborah Heart and Lung Center*, 2017 WL 5619212, at *10 (N.J. App. Div. Nov. 22, 2017) ("in light of our determination regarding the applicability of the statutory immunity of the Cullen Act, we are satisfied that the policy behind the enactment of the Cullen Act also protects defendants from recovery for a malicious prosecution claim. The fact that defendants had a legal duty to report the information compels that conclusion. Because all the counts allege related torts and are predicated upon the same conduct, defendants are shielded from all civil liability arising out of the provision or reporting of the information, and plaintiff is not entitled to injunctive relief. Therefore, plaintiff's entire complaint was properly dismissed.")

regular contact with students.⁷³ The new law, sometimes referred to as the “Don’t Pass the Trash Act,” requires a hiring entity to conduct a preemployment review of a job applicant’s employment history by (1) contacting the current employer and certain former employers and (2) requesting information regarding child abuse and sexual misconduct.⁷⁴ The current and former employers are obligated to respond.

The New Jersey Department of Education has web pages dedicated to the new law, which includes forms for the applicant and former and current employers to complete and a set of FAQs.⁷⁵

Employers that operate vehicles requiring a commercial driver’s license are required, pursuant to Federal Motor Carrier Safety Administration regulations, to respond to a driver’s prospective employer’s inquiries regarding whether the driver, during the past

⁷³ The text of the law, as enacted in 2018, is available at www.njleg.state.nj.us/2018/Bills/AL18/5_PDF and <https://www.state.nj.us/education/educators/crimhist/preemployment>. The current version of the law, as codified and amended in the New Jersey Statutes Annotated, should be reviewed before taking actions based on the law. To see if there have been any subsequent amendments to the law, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu>.

⁷⁴ The employers that need to be contacted are:

1. the current employer;
2. all former employers within the past 20 years that were schools; and
3. all former employers within the past 20 years where the applicant was employed in a position that involved direct contact with children.

⁷⁵ See NJ. Dept. of Education, *Criminal History Review: Pre-Employment Resources P.L. 2018, c. 5*, at <https://www.state.nj.us/education/educators/crimhist/preemployment>.

Note that the FAQs provide:

Per [the new law], the review must be conducted for applicants who will be employed in positions having regular contact with students. Current employees are not required to undergo this review so long as they remain employed by the same hiring entity. However, current employees of contract service providers must participate in this review prior to the start of employment with a new school entity even if they remain employed by the same independent contractor.

NJ. Dept. of Education, *P.L. 2018, c. 5 Frequently Asked Questions*, FAQ No.2, at <https://www.state.nj.us/education/educators/crimhist/preemployment/faq.pdf>.

two years, refused a drug test or tested positive for either alcohol above a certain limit or illegal drugs.⁷⁶

Youth serving organizations that are in possession of substantiated information that clearly indicates that a former worker presents a serious risk of harm to youth should seriously consider disclosing that information to a youth serving organization that has submitted a reference check request with respect to the former worker.⁷⁷

⁷⁶ 49 C.F.R. §§40.25 and 382.413. The Federal Motor Carrier Safety Administration has published a template *Release of Information Form*, at <https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC%20Release%20of%20Information%20Form.pdf>, for the worker to sign and the prospective new employer to provide to the current or former employer.

⁷⁷ New Jersey's public policy regarding protecting children from abuse is very strong. For example, New Jersey law requires "[a]ny person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse shall report the same immediately to the Division of Child Protection and Permanency by telephone or otherwise." N.J.S.A. 9:6-8.10. See the New Jersey Department of Children and Families' [Reporting Child Abuse and Neglect](#) web pages for additional details, including the phone number of the New Jersey's child abuse hotline ((877) NJ ABUSE or (877) 652-2873).

As the New Jersey Supreme Court has observed: "The duty to report is not limited to professionals, such as doctors, psychologists, and teachers, but is required of every citizen." *J.S. v. R.T.H.*, 155 N.J. 330, 343, 352 (1998) (holding "that when a spouse has actual knowledge or special reason to know of the likelihood of [the other] spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm" and "that a breach of such a duty constitutes a proximate cause of the resultant injury, the sexual abuse of the victim"), at <http://law.justia.com/cases/new-jersey/supreme-court/1998/a-98-97-opn.html>.

In *G.A.-H. v. K.G.G.*, --- N.J. Super. ---, 2018 WL 3075824, at *2 (App. Div. June 22, 2018), at <https://www.judiciary.state.nj.us/attorneys/assets/opinions/appellate/published/a2126-16.pdf>, the New Jersey Appellate Division held that the obligation to report under N.J.S.A. 9:6-8.10 is limited to "abuse arising from the acts or omissions of only a child's 'parent, guardian, or other person having [the child's] custody and control.'" However, the court held that an employee potentially could be held liable for damages if the employee "remains silent and fails to warn a victim or alert authorities [of] knowledge or a reason to suspect that a co-worker has engaged in the sexual abuse of a minor. In our view, the common law does not necessarily preclude the imposition of such a duty." --- N.J. Super. ---, ---, 2018 WL 3075824, at *1.

Similarly, "an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, *** whether by termination or some less drastic remedy," and "to report [the] [e]mployee's activities [with respect to child pornography] to the proper authorities." *Doe v. XYZ Corp.*, 382 N.J. Super. 122, 126, 141 (App. Div. 2005), at <http://law.justia.com/cases/new-jersey/appellate-division-published/2005/a2909-04-opn.html>.

Is It True That a Nonprofit Can Receive Free Federal Insurance to Protect Against Dishonesty By New Hires?

Yes. The U.S. Department of Labor (DOL) provides fidelity bonds to employers who hire at-risk, hard-to-place job seekers, including youth, persons with poor credit, individuals with a criminal record, recovering substance abusers, welfare recipients, individuals dishonorably discharged from the military, and individuals who lack a work history. Bonds can be issued to cover not only new hires but also current employees who need bonding in order to (1) prevent being laid off or (2) secure a transfer or promotion to a new position.

The bonds protect employers against employee dishonesty, such as embezzlement, forgery, larceny, and theft. The bonds, which are available at no cost to employers or employees, are issued in \$5,000 increments, up to a maximum of \$25,000 coverage, and are valid for a six-month period. If no claim for employee dishonesty is submitted during the initial six months of coverage, six months of additional coverage can be purchased by the employer at a reduced cost, though in some cases there might be no cost. There are no deductibles—the employer receives 100% insurance coverage in the event of a valid claim.

To learn more about the Federal Bond Program, see:

- [The Federal Bonding Program](#), administered for the DOL by Union Insurance Group, an insurance brokerage firm, as agent for Travelers Casualty and Surety Company of America.
- The New Jersey Department of Labor and Workforce Development's [Federal Bonding Information for Businesses](#) web pages.
- [Pathways for Youth Employment: Federal Resources for Employers](#) (The White House 2015).

And, as the Supreme Court observed in *In State v. S.B.*, 230 N.J. 62 (2017), at www.judiciary.state.nj.us/attorneys/assets/opinions/supreme/a_95_15.pdf, “the Legislature’s primary objective in enacting Megan’s Law was to create a registration system that provided law enforcement officials ‘with additional information critical to preventing and promptly resolving’ incidents of child sexual abuse. With the 2009 enactment of the youth-serving-organization prohibition [amendment to Megan’s Law], the sponsor’s statement made it clear that the purpose of the amendment was to cast a wide net in order to ‘protect the children and youth of this State by prohibiting sex-offenders from holding positions in youth serving organizations.’ Any ambiguity would have been interpreted in a manner favoring the protection of children to effectuate the statute’s legislative intent.” 230 N.J. at 69-70 (citations omitted).

Are There Any Other Resources We Should Review?

The internet is replete with resources on how to hire employees and conduct background checks. Not all of these resources are very good. Two good resources are:

- *Best Practice Standards: The Proper Use of Criminal Records in Hiring* (2013), published by National H.I.R.E. Network, Lawyers' Committee for Civil Rights Under Law, and National Workrights Institute), at <https://lawyerscommittee.org/publication/best-practice-standards-the-proper-use-of-criminal-records-in-hiring> or <https://lawyerscommittee.org/wp-content/uploads/2015/07/Best-Practices-Standards-The-Proper-Use-of-Criminal-Records-in-Hiring.pdf>.
- [*Nonprofit Hiring Toolkit*](#), The Bridgespan Group's multistep guide to the hiring process.

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Appendix A

The Fair Credit Reporting Act and Background Checks⁷⁸

The Fair Credit Reporting Act (FCRA),⁷⁹ as amended by, among other laws, the Fair and Accurate Credit Transactions Act of 2003 (FACTA), is enforced by the Federal Trade Commission (FTC) and establishes requirements and procedures for the collection, use, and protection of information used to assess consumer credit, employment, and insurance eligibility. The FCRA provides protections for “consumers” and regulates the uses and contents of “consumer reports,” but generally applies only to entities that are a “consumer reporting agency” (CRA) or that use (such as some employers) or resell consumer reports.

⁷⁸ [Appendix A is reprinted from Pro Bono Partnership’s publication [*Primer on Selected Federal, Connecticut, New Jersey and New York Privacy, Identity Theft and Information Security Laws Relevant to Charitable and Other Nonprofit Organizations*](#), which was written by Christopher D. Carlson, Esq., Owen Foster, Esq., Sonia Kothari, Esq., Blair McKechnie, Esq., and Evan S. Posner, Esq., from the Dechert LLP law firm. Some formatting, text, and citations have been changed to correspond to the style used in this article and to allow the addition of a new footnote. One paragraph from the original text has been omitted in Appendix A because it is not relevant to background checks. **Additional commentary added by Christine Michelle Duffy is noted with brackets.**]

⁷⁹ The FCRA is codified at 15 U.S.C. §1681 *et seq.* Information about the FCRA is available at www.ftc.gov/tips-advice/business-center/privacy-and-security/credit-reporting, www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know, and www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-credit-reporting-act.

[In 2014, the Federal Trade Commission (FTC) and the EEOC issued the following two joint publications: *Background Checks: What Employers Need to Know* (Mar. 2014), at www.eeoc.gov/eeoc/publications/background_checks_employers.cfm, www.eeoc.gov/eeoc/publications/upload/eeoc_ftc_background_checks_employers.pdf, www.ftc.gov/tips-advice/business-center/guidance/background-checks-what-employers-need-know, and www.ftc.gov/system/files/documents/plain-language/pdf-0142-background-checks-what-employers-need-know.pdf; and *Background Checks: What Job Applicants and Employees Should Know* (Mar. 2014), at http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm, https://www.eeoc.gov/eeoc/publications/upload/eeoc_ftc_background_checks_employees.pdf, <https://www.consumer.ftc.gov/articles/0157-background-checks>, and www.consumer.ftc.gov/articles/pdf-0143-background-checks-what-job-applicants-employees-need-know.pdf.]

A CRA⁸⁰ generally may disclose consumer reports only to third party businesses for consumer purposes (including background checks by employers) or to government officials acting in their official capacities. CRAs must make reasonable efforts to verify the identity of prospective users of their consumer reports and provide notices to both persons who regularly furnish the CRAs with consumer information and persons who receive the CRAs' consumer reports. In addition, CRAs must maintain reasonable procedures to ensure that information in their consumer reports (1) will be used and reported only for permissible purposes; (2) is accurate; and (3) is not more than seven or ten years old for certain categories of information (such as civil judgments or bankruptcies). CRAs must also dispose of consumer information in a safe manner (*i.e.*, in a way that is not accessible or legible to unauthorized persons, such as by shredding paper copies).

The FCRA also imposes obligations on employers who obtain consumer reports from CRAs to evaluate prospective and current employees.⁸¹ The employer must:

- provide prior written notice to and obtain written consent from the prospective or current employee regarding the consumer report;⁸²

⁸⁰ A “consumer reporting agency” is any person (including a corporation or association) that regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing “consumer reports” to third parties. A “consumer report” includes any information collected by a consumer reporting agency with regard to a consumer’s creditworthiness or eligibility for extensions of personal credit, insurance or employment purposes. Information about an individual collected for a consumer purpose (such as extensions of credit or insurance) might also constitute a consumer report.

[An “investigative consumer report” is a report based on personal interviews concerning a person’s character, general reputation, personal characteristics, and/or mode of living (*i.e.*, lifestyle). Additional requirements, which are not discussed in this article, apply to such reports.]

⁸¹ [Note that the mandatory compliance requirements of the FCRA do not apply to background checks conducted for nonprofits by the State Police and/or the Federal Bureau of Investigations. See Federal Trade Commission, [Advisory Opinion to Pickett](#) (July 10, 1998); Federal Trade Commission, [Advisory Opinion to Copple](#) (June 10, 1998).]

⁸² The prior written notice and the written consent may be in the same document, but the document cannot contain anything else.

[Note that while both the written request for consent and the employee’s written consent can be set forth in one form, that form must not be part of any other document. In other words, the written request and the written consent cannot be part of an employment application or other form.

In April 2017, the FTC advised that the notice and consent form should **not** include:

- provide the prospective or current employee with a copy of the consumer report and a description of the employee’s rights under the FCRA if contemplating certain “adverse actions” (e.g., denying or terminating employment) based on the information contained in the consumer report (a “pre-adverse action notice”); and
- notify the prospective or current employee orally or in writing if, based in whole or in part on the information obtained from the CRA, any adverse action has been taken (an “adverse action notice”),⁸³ which must include:

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- language that claims to release the employer from liability for conducting, obtaining, or using the background screening report;
 - a certification by a job applicant that all information in the employment application is accurate;
 - wording that purports to require an applicant to acknowledge that hiring decisions are based on legitimate non-discriminatory reasons; or
 - an authorization that permit the release of information that the FCRA doesn’t allow to be included in a background screening report – e.g., bankruptcies that are more than 10 years old.

See FTC, [Background Checks on Prospective Employees: Keep Required Disclosures Simple](#) (Apr. 28, 2017). Also, if an organization orders a consumer report for one purpose, it cannot use the report for an entirely different purpose at that time or in the future. See FTC, [Background Checks? Don’t Double-Dip](#) (Feb. 16, 2017).]

⁸³ The FCRA adverse action notification provisions have been interpreted to require that a period of time elapse between the pre-adverse action and adverse action notices. The FTC has indicated in informal guidance that five business days might be appropriate, depending on the nature of the employer’s business. [See FTC, [Advisory Opinion to Weisberg](#) (June 27, 1997) (“Although the facts of any particular employment situation may require a different time, the five day period that you proposed appears reasonable”); FTC, [Advisory Opinion to Lewis](#) (June 11, 1998) (“The amount of time that an employer should wait before taking adverse action will vary depending upon the circumstances, such as the nature of the job involved and the way that the employer does business. Employers may wish to consult with their counsel in order to develop procedures that are appropriate, keeping in mind the purpose of the provisions to allow consumers to discuss the report with employers before adverse action is taken.”).]

[According to the regulations of the New Jersey Division of State Police:

If criminal history record information [provided by the State Police] may be used to disqualify a person from obtaining or holding any position, employment or license or performing any services, whether compensated or uncompensated, the . . . person making such determination shall provide the subject of the request with adequate notice and opportunity to confirm or deny the accuracy of

- the name, address, and phone number of the CRA that supplied the report;
- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- a notice of the individual's right to (1) dispute the accuracy or completeness of any information the agency furnished and (2) an additional free consumer report from the CRA upon request within 60 days.⁸⁴

If a business retains an outside party, such as a lawyer or a human resources consultant, to conduct an internal investigation into workplace misconduct, the FCRA might apply to the report generated by the investigator. Before having a third party conduct such an investigation, confer with legal counsel for guidance.

any information contained in the criminal history record. The subject of the request shall be afforded a reasonable period of time to correct or complete the record prior to a final determination or decision concerning the subject's eligibility for the position, employment or license. A person is presumed innocent of any pending charges or arrests for which there are no final dispositions indicated on the record.

N.J.A.C. 13:59-1.6(a). *Accord* N.J.A.C. 13:59-1.2(c); N.J.A.C. 13:59-1.6(b).]

⁸⁴ [Section 1100F of the [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) of 2010 amended the FCRA to provide that if an employer takes an adverse action against an applicant or employee based in whole or in part on the individual's **numerical credit score**, then, in addition to the disclosures required above, the employer must provide the individual with additional written notice of:

- the numerical credit score the employer used when taking the adverse action;
- the range of possible credit scores under the credit-scoring model used;
- the key factors (up to four), listed in order of importance, which adversely affected the individual's credit score in the credit-score model used, plus disclosure of the number of inquiries into the credit file of the individual if that was also a key factor;
- the date on which the credit score was created; and
- the name of the entity that provided the credit score or the credit file used to create the credit score, so that the individual can contact the entity to correct any error.]

[Section 611 of the [Fair and Accurate Credit Transactions Act of 2003](#) (FACTA) amended the FCRA to limit the applicability of the FCRA to internal investigation into workplace misconduct. In particular, the advance notice, advance consent, and the pre-adverse action notice requirements of the FCRA do not apply to an investigative report (or related communication) that is:

1. made to an employer in connection with an investigation of:
 - (a) suspected misconduct relating to employment, or
 - (b) compliance with federal, state, or local laws and regulations, the rules of certain self-regulatory organizations (SROs) that have regulatory authority over the activities of the employer or the employee who is the subject of the investigation,⁸⁵ or any preexisting written policies of the employer;
2. not made for the purpose of investigating creditworthiness; and
3. not provided to any person other than (a) the employer or its agent, (b) the government, (c) the SRO, or (d) as required by law.

If as a result of the investigation the employer takes adverse action against an employee based in whole or in part on such the investigative report (or related communication), the employer must thereafter give the employee a summary of the nature and substance of the report (or related communication). However, the sources of information acquired solely for purposes of preparing the investigative report need not be disclosed in the summary.]

Under the FTC's "Disposal Rule," any person subject to the FTC's jurisdiction that maintains or otherwise possesses "consumer information" (which includes any consumer report and information derived from it) for a business purpose must properly dispose of such information by taking "reasonable measures" to protect against unauthorized access to or use of the information. This would include an employer's possession of a consumer report obtained for employment purposes. Reasonable measures would include implementing and monitoring compliance with policies and procedures that require shredding paper copies and erasing electronic media containing the consumer information so that such information "cannot practicably be read or reconstructed."

In addition, users of consumer reports are required, upon receiving notice from the CRA that a substantial discrepancy exists between the address the user (*i.e.*, the employer)

⁸⁵ For purposes of the FCRA, a SRO includes a SRO as defined in §3(a)(26) of the Securities Exchange Act of 1934, any entity established under Title I of the Sarbanes-Oxley Act of 2002, any board of trade designated by the Commodity Futures Trading Commission, and any futures association registered with the Commission.

provided and the address listed in the consumer report, to attempt to verify the address based on information in the user records or with the consumer about whom the report relates and to notify the CRA of the verified address.

Illustration. ABC Nonprofit receives multiple applications for an open position. ABC provides written notice to, and obtains written consents to receive credit reports from, all applicants. ABC rejects some applicants due to their negative credit histories, although the lack of relevant experience carries more weight in ABC's decisions not to hire.⁸⁶

ABC was required to provide pre-adverse action disclosures before rejecting the applicants and notices of adverse action once the decisions not to hire the applicants were finalized, even though the information in the credit reports was not the only factor in the decisions not to hire.

Upon a consumer's request, a CRA must disclose all information in that consumer's "file,"⁸⁷ along with a summary of consumer rights under the FCRA that the Consumer Financial Protection Bureau (CFPB) has published.⁸⁸ If a consumer disputes the completeness or accuracy of information in such a consumer report, then upon notice from the consumer the CRA must reasonably investigate the charge – unless the consumer fails to provide sufficient information upon which to verify the disputed information. If a consumer contacts a CRA and identifies as a victim of fraud or identity theft, then the CRA is required to provide the consumer with a special notice and summary of rights that the CFPB has published.⁸⁹

⁸⁶ Please note that the use of credit histories in employment decisions might give rise to claims of employment discrimination. See, e.g., EEOC Informal Discussion Letter, [Title VII: Credit Reports](#) (Feb. 14, 2005). [Note: The use of credit histories is discussed further in the main article above, in connection with litigation involving the EEOC and Kaplan Higher Education Corporation.]

⁸⁷ A consumer's "file" is all of the information pertaining to the consumer that is recorded and retained by a CRA.

⁸⁸ [The CFPB's *A Summary of Your Rights Under the Fair Credit Reporting Act* is set forth in 12 C.F.R. Part 1022 Appendix K and is available at http://files.consumerfinance.gov/f/201504_cfpb_summary_your-rights-under-fcra.pdf. The FTC has a similar summary in 16 C.F.R. Part 698 Appendix F and at <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>.

The CFPB's website relating to credit reports is at www.consumerfinance.gov/consumer-tools/credit-reports-and-scores. The [Dodd-Frank Wall Street Reform and Consumer Protection Act](#) of 2010 created CFPB. The CFPB and the FTC share consumer protection enforcement authority, including with respect to the FCRA.]

⁸⁹ [The CFPB's *Remedying the Effects of Identity Theft* is set forth in 12 C.F.R. Part 1022 Appendix I. The FTC has a similar summary in 16 C.F.R. Part 698 Appendix E.]

Appendix B

Nonprofit Youth Serving Organizations' Requests for Criminal History Background Checks on Prospective and Current Employees and Volunteers from the New Jersey State Police

Chapter 3A of the New Jersey Nonprofit Corporation Act⁹⁰ permits, ***nonprofit youth serving organizations*** that (1) are exempt from federal income taxes, (2) in good-standing with their annual report filings in New Jersey, and (3) provide recreational, cultural, charitable, social, or other activities or services for persons younger than 18 years of age to request criminal history background checks on prospective and current employees and volunteers from the New Jersey State Police.⁹¹

Generally, the procedure is as follows:

1. *The Nonprofit Requests or Downloads a Registration Packet from the State Police*

The Registration Packet is available from the New Jersey State Police, Identification & Information Technology Section, State Bureau of Investigation (SBI), Volunteer Review Operation (VRO), at (609) 882-2000 x 2762. The Registration Packet is also available online, at www.njsp.org/info/pdf/vro_nonprofit_app.pdf.

Note: There are two versions of the Registration Packet – one for use by churches and governmental organizations and one for all other nonprofit organizations. Be sure to complete the appropriate Registration Packet.

The **State Police's website for information on criminal history records checks** is at www.njsp.org/criminal-history-records/index.shtml#vro.

⁹⁰ To read the sections of Chapter 3A, go to <http://lis.njleg.state.nj.us/nxt/gateway.dll?f=templates&fn=default.htm&vid=Publish:10.1048/Enu> and click on two consecutive right-facing triangles that will appear in the navigation pane on the left side of the screen. Then scroll down to Title 15A and click on the right-facing triangle. Then scroll down to 15A:3A-1 to -5. Chapter 3A is discussed further in the main article above.

⁹¹ The State Police will conduct criminal history background checks on prospective and current employees and volunteers of non-YSOs as well, though the process is different. See N.J. State Police, *NJ Criminal History Records Information*, at www.njsp.org/criminal-history-records/index.shtml#ncer.

2. *The Nonprofit Registers with the State Police*

The *Registration Packet* contains (a) a copy of Chapter 3A,⁹² (b) instructions for registration, and (c) a “Memorandum of Understanding” that the nonprofit must complete and sign.

As part of the registration process, the nonprofit must provide the State Police with all three of the following documents:

- A copy of the nonprofit’s **Short Form of Certificate of Good Standing**. The nonprofit can obtain a current copy of this form from the New Jersey Division of Revenue by submitting a written request for the certificate, along with a check for \$25 payable to “Treasurer, State of New Jersey,” to:

New Jersey Division of Revenue
Certificate and Status Unit
P.O. Box 450
Trenton, NJ 08646

The Short Form Certificate of Good Standing can also be ordered online at www.state.nj.us/treasury/revenue/standcert.shtml.

- A copy of the nonprofit’s **IRS Tax-Exempt Determination Letter**. The nonprofit must submit a copy of the letter provided by the IRS that states that the nonprofit is a tax-exempt organization under the Internal Revenue Code.
- The signed **Memorandum of Understanding**. By signing the Memorandum, the nonprofit certifies that it will maintain both its good-standing status as a registered nonprofit with the Division of Revenue and its tax-exempt status with the IRS. An authorized officer in the nonprofit must sign this document.

The required paperwork must be mailed to:

New Jersey Division of State Police
P.O. Box 7068
West Trenton, NJ 08628-0068
Attn: Criminal Information Unit/VRO

⁹² **Note:** The version of Chapter 3A that is included in the *Registration Packet* does not reflect amendments to Chapter 3A that were made in 2009 relating to Megan’s Law.

3. The State Police Assigns a Registration Identification Number

The State Police will assign the nonprofit a specific 6-digit registration identification number – the “VRN#”.

The State Police will send the nonprofit detailed instructions for requesting criminal history record background checks.

4. The Nonprofit Sends Its Employees and Volunteers To Get Fingerprinted By the State Police’s Outside Vendor

The nonprofit must give the employee or volunteer a *New Jersey Universal Fingerprint Form* to file out in order to get fingerprinted.⁹³ There are two versions of the forms:

- For employees: www.njsp.org/criminal-history-records/pdf/2018_universform_ysp_employee.pdf
- For volunteers: www.njsp.org/criminal-history-records/pdf/2018_universform_ysp_volunteer.pdf

Note: The immediately preceding links are to the January 2018 version of the forms. Check www.njsp.org/criminal-history-records/index.shtml#vro to see if a later version of the forms has been issued.

This form must be used. The nonprofit needs to insert its VRN# (see above) in Block No. 7 on the form.

The person being fingerprinted needs to carefully review the instructions on the form and complete the form. Then the individual needs to schedule an appointment to be fingerprinted by the State Police’s outside vendor, MorphoTrust. An appointment **MUST** be scheduled in advance of showing up to be fingerprinted. For details, go to <https://nj.ibtfingerprint.com>. As of July 2018, MorphoTrust has 18 locations in New Jersey at which electronic fingerprinting can be done.

Once fingerprinted, MorphoTrust will give the employee or volunteer a Process Control Number (PCN). The PCN will be needed in order to make inquiries to the State Police regarding the background check. The nonprofit should request the PCN from the employee or applicant.

⁹³ The form is partially gender-friendly in that employees and volunteers can list their gender as female, male, or both.

The person being fingerprinted must pay the mandated fee for fingerprinting, which as of July 2018 is:

- \$52.66 per employee
- \$21.41 per volunteer

Although not required to by law, the nonprofit is free to reimburse the employee or volunteer for the fee paid.

5. The State Police Conducts a Criminal History Record Check of Both New Jersey (State) Records and FBI (National) Records

The State Police will review the identity and criminal history of the individual to see if the individual has been convicted of one of the crimes or disorderly persons offenses that are identified in New Jersey law as potentially disqualifying crimes or offenses for volunteer service or employment with youth serving organizations.

Note: The record check is accurate only as of the day the check is conducted by the State Police. The individual might be convicted of a potentially disqualifying crime or offense in the future, and the State Police will not inform the nonprofit of this occurrence unless a subsequent records check is requested.

6. The State Police Notifies the Nonprofit of the Results and Sends the Nonprofit a "SBI" Card for Each Individual Reviewed

If no conviction of a potentially disqualifying crime or offense is discovered, the State Police will send the nonprofit a notice advising that no potentially-disqualifying convictions were found.

If a conviction of any potentially disqualifying crimes or offenses is discovered, the State Police will send the nonprofit a notice advising that a potentially-disqualifying conviction was found and that the nonprofit may choose not to utilize the services of the individual.

The ultimate decision to utilize the services of the employee or volunteer is made by the nonprofit. (See further discussion below.)

The State Police will also send the nonprofit a "SBI" card for the employee or volunteer it reviewed. The card will include an assigned SBI Number.⁹⁴ The card should be given

⁹⁴ According to the regulations of the New Jersey Division of State Police:

to the individual because it shows that the State Police has reviewed the individual's criminal history. The individual can take this card to another nonprofit to prove that a criminal history review had been previously conducted on that individual by the State Police.

The card does not reveal the result of the criminal history check. The card merely demonstrates that the State Police had previously conducted such a check.

Remember, the record check is accurate only as of the day the check was conducted by the State Police.

7. The Nonprofit Determines Whether To Utilize the Services of the Employee or Volunteer

Deciding whether to utilize the services of an employee or volunteer who has a potentially disqualifying conviction should be done with care. A decision should be made only after there has been an evaluation of whether the prior conviction is relevant to the position/job duties of the individual. See the discussion earlier in the main article above.

The individual may request a copy of the individual's criminal history record directly from the State Police in order to show the nonprofit what the conviction was for or, if the individual believes that the record-check result is incorrect, to try to get the State Police or FBI to correct its records.

The nonprofit must discuss the State Police's notification directly with the employee or volunteer, and should ask the individual what the conviction was for.⁹⁵ The nonprofit

"SBI Number" means the identification number assigned to the criminal history record file of the State Bureau of Identification for a particular individual as identified by fingerprints.

N.J.A.C. 13:59-1.1.

⁹⁵ According to the regulations of the New Jersey Division of State Police:

If criminal history record information [provided by the State Police] may be used to disqualify a person from obtaining or holding any position, employment or license or performing any services, whether compensated or uncompensated, the . . . person making such determination shall provide the subject of the request with adequate notice and opportunity to confirm or deny the accuracy of any information contained in the criminal history record. The subject of the request shall be afforded a reasonable period of time to correct or complete the record prior to a final determination or decision concerning the subject's eligibility for the position, employment or license. A person is presumed innocent of any

should verify the individual's explanation prior to making a final decision. This can be facilitated by the individual requesting a copy of the individual's own criminal history record directly from the State Police and voluntarily sharing that copy with the nonprofit.

In some cases, the conviction might have occurred so long ago, or been so minor, that the nonprofit might determine that the conviction is not relevant to the services that the employee or volunteer will perform for the nonprofit. In such a case, the nonprofit should carefully document that it conducted an investigation, including speaking with the individual about the past conviction and confirming the individual's explanation. The documentation should include a narration of the basis for the nonprofit's determination to utilize or continue to utilize the services of the individual.

IMPORTANT:

- The nonprofit may not share the results of the criminal history records check with anyone other than employees at the nonprofit with a "need to know." This would include only those people making the determination whether or not to let the individual work, or retain the individual if already working.
- The results of criminal background checks, including any communications from the State Police about an individual, are considered confidential information. Once received, the information on the individual should be maintained in a confidential file, with limited access. Once there is no longer a need to retain the information, the employer needs to shred all documents containing the criminal history information.

pending charges or arrests for which there are no final dispositions indicated on the record.

N.J.A.C. 13:59-1.6(a). *Accord* N.J.A.C. 13:59-1.2(c); N.J.A.C. 13:59-1.6(b).

The Fair Credit Reporting Act (FCRA) has a similar provision that provides a job applicant a short period of time to dispute the accuracy of a criminal history report obtained by an employer from a third-party vendor. See **Appendix A** to this article for more information about the FCRA.