

CRIMINAL HISTORY RECORD AND USE OF RELATED RECORDS FOR EMPLOYMENT DECISIONS

Pennsylvania law; Title 18, § 9125 governs how private employers are required to handle applicants with a Criminal History Record and use of related records for employment decisions.

In general, whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with the following:

- Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.
- The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.

Additionally, the Pennsylvania Human Relations Commission ("PHRC") has proposed ["Policy Guidance"](#) stating that it intends to treat an employer's rejection of an African-American or Hispanic applicant because of his or her criminal record as presumptive evidence that the employer is discriminating against the applicant in violation of the Pennsylvania Human Relations Act ("PHRA").

It is the position of the Pennsylvania Human Relations Commission (PHRC or Commission) that employment policies or practices that disqualify individuals from employment on the basis of a prior criminal conviction may violate state and federal civil rights statutes. While such hiring policies are facially neutral they can produce a severe disparate impact on Black and Hispanic populations due to the significantly higher rates of criminal convictions experienced by these populations. Therefore, when investigating complaints of alleged unlawful disparate impact discrimination presented by Black and Hispanic complainants, the PHRC will presume that the complainant has established the disparate impact element of a prima facie case of unlawful discrimination. So, an employer's policy or practice of excluding individuals from employment on the basis of a prior criminal conviction will be presumed by the PHRC to have a disparate impact on Blacks and Hispanics in light of statistics that demonstrate that they are convicted at a rate disproportionately greater than their representation in the population.

To rebut the presumption of disparate impact, respondent employers, upon an appropriate showing of relevance, may utilize conviction data from a more limited geographical boundary than the Commonwealth of Pennsylvania (e.g. the relevant city, census region, or county) or conviction data for the specific crimes being screened by the respondent.

In utilizing more narrowly drawn statistics, the Commission also will consider "applicant pool" data. The Commission notes, however, that there is an inherent likelihood that such "applicant pool" data will exclude otherwise interested applicants who chose not to apply due to the existence of an employer's conviction policy or practice and may thus have little persuasive effect.

A respondent employer, in addition to being able to offer evidence intended to rebut the presumption, also may defend the existence of such a policy or practice by presenting evidence intended to prove that the policy or practice is required as a matter of business necessity. Additionally, if a respondent employer's criminal records conviction policy has a disparate impact, it will not be deemed a violation if the employer can demonstrate that the policy is justified by business necessity.

To demonstrate business necessity, an employer must show with "some level of empirical proof" that the individual excluded from employment has been convicted of a crime, not merely arrested, and poses an "unacceptable level of risk." provided evidence that amounts to "some level of empirical proof" that the disqualified individual poses an "unacceptable level of risk", the Commission will consider the following:

- **The circumstances, number and seriousness of the disqualified individual's prior offense(s).**
- **Whether the disqualified individual's prior conviction substantially relates to his or her suitability for the job.** In determining whether the conviction relates to the job, the Commission will consider: (1) the duties and responsibilities of the job; and (2) the bearing, if any, of the applicant's prior criminal offense(s) on the applicant's suitability to assume these duties and responsibilities.

- **The length of time that has elapsed subsequent to the disqualified individual's conviction, or release from prison.** Modern criminological research shows that the risk of recidivism clearly decreases with time. The Commission, therefore, will consider the length of time that has elapsed subsequent to the individual's conviction or release from prison. A presumption against business necessity will be established if an individual has not re-offended seven or more years prior to his or her disqualification (excluding time spent in jail or prison).
- **Evidence of the disqualified individual's rehabilitation**, including:
 - satisfactory completion of all terms and conditions of parole and/or probation;
 - maintenance of steady employment since the conviction or release from prison;
 - educational attainment or professional training since the conviction;
 - completion of rehabilitative treatment (e.g. alcohol or drug treatment); letters of recommendation from employers, parole, or probation officers who have been in contact with the individual subsequent to his or her conviction or release from prison.
- **The manner in which the employer solicited the disqualified individual's criminal history during the hiring process.** A hiring policy in which the employer considers the above-listed factors and does not inquire into, or consider, an individual's criminal background until later stages of the hiring process (e.g., after the interview or after a conditional offer of employment has been made) will be looked upon favorably by the Commission.

The PHRC recommendation does recognize that various state and federal laws require some employers to obtain criminal records and permit us to reject applicants with certain convictions from employment. They have included an illustrative list of *various states and federal laws which require employers to reject applicants with certain convictions from employment*; (also see attached Legal Limitations) these include but are not limited to:

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| ◦ Aircraft/Airport Employees | ◦ Nursing Home/Home Health Care/Other Workers in Long-Term Care Facilities |
| ◦ Armored Car Crew Member | ◦ Police |
| ◦ Bank Employee | ◦ Private Detective |
| ◦ Child Care | ◦ School Employee |
| ◦ Child Care Workers in Federal Agencies or Facilities | |
| ◦ Employee Benefits Employee | |

The PHRC also recognizes that *Pennsylvania licensing boards legally prohibit the licensing and/or revocation of licenses of individuals with particular types of convictions for licensed Occupations.* PENNSYLVANIA OCCUPATIONAL LICENSES INCLUDE:

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| ◦ Accountant | ◦ Midwives |
| ◦ Architect | ◦ Mortgage Broker |
| ◦ Auctioneer | ◦ Motor Vehicle Dealer |
| ◦ Barber | ◦ Nurse (Registered Nurse and Licensed Practical Nurse) |
| ◦ Bondsman | ◦ Occupational Therapist |
| ◦ Casino employee (gaming employees) | ◦ Optometrist |
| ◦ Chiropractor | ◦ Osteopath |
| ◦ Dental Hygienist | ◦ Pawnbroker |
| ◦ Dentist | ◦ Physical Therapist/Athletic Trainer |
| ◦ Employment Agent | ◦ Physician |
| ◦ Engineer, Land Surveyor, Geologist | ◦ Physician's Assistant |
| ◦ Funeral Director | ◦ Podiatrist |
| ◦ Horse Racing | ◦ Psychologist |
| ◦ Hunting/Trip Permit Salesperson | ◦ Radioactive Waste Disposal (applies to facility operators) |
| ◦ Insurance Adjuster | |
| ◦ Medical Technician, Emergency (EMT) | |

What we as employers may need to review and change as a result of the PHRC policy guidance is the manner in which we solicit the individual's criminal history during the hiring process. Many large companies are already held to standards via their own corporate guidelines in which they can't turn an applicant down because of a criminal record, i.e., if that criminal record has nothing to do with the job function at hand.

Also, once a felony is several years old, most companies are held to a legal standard in which they cannot take that part of a person's background into consideration of employment at all. With this proposed guidance we now know the PHRC will be scrutinizing very closely, whether because of a conviction record a minority applicant was denied employment. So, we now have clear directions from the PHRC that a "protected class" individual who has been convicted of a crime and paid the price to society by serving the imposed sentence should not be denied the opportunity to be gainfully employed in an occupation which they are qualified to perform and their previous conviction doesn't bar entry.

Therefore, unless an employer is hiring to fill a position listed in one of the above categories which permit us to reject applicants with certain convictions from employment, and only if the employer can justify the question on conviction records, we should qualify the question on an application "have you been convicted of a crime or felony in the past 7 to 10 years" (see suggested insert below).

Employers may need to adopt a policy in which the it does not inquire into, or consider, an individual's criminal background until later stages of the hiring process, e.g., after the interview, or after a conditional offer of employment has been made, since the PHRC guidance tells us, "that will be looked upon favorably by the Commission". Although this protection is not extended to unprotected classes, it is probably a good idea to have a consistent process for all applicants.

Obviously this puts more of a burden upon each employer to have good pre-screening processes that clearly define essential functions of the job, ensuring that only those who meet the job's minimum qualifications are considered, and then hiring the best qualified individual to fill the job. If someone is rejected it should not be due to a prior conviction unless having no prior convictions is directly related to the position being filled.

Unfortunately, in today's litigious culture, you cannot afford to hire employees who will put your company at risk. Employers can, and are, being held legally responsible for the wrongful acts of employees, as courts have established that it's an employer's duty to conduct a thorough background screening of all potential employees. So our dilemma is, if you do not check for criminal records, there is almost a guarantee that you will hire an employee with a criminal record and be confronted with the potential of a serious negligent hiring lawsuit, or if you use a criminal record to reject a minority applicant you will face a potential disparate impact lawsuit. Average settlements in negligent hiring lawsuits are now approaching one million dollars, with juries in such cases assuming that if you could have known you were hiring someone dangerous or unfit for a job, you should have known. Showing that you have exercised due diligence in making your hiring decisions will dramatically decrease your chances of being found negligent, but will also put you at risk of a class action suit if you refuse to hire the minority candidate based on a prior criminal record.

It is still OK to include a statement on your application form that says: "any fraudulent material provided by an applicant for employment at ABC Company is grounds for termination." The EEOC supports an employer's decision to refuse to hire an applicant or to discharge an employee on the basis of falsified answers to questions regarding their employment history and conviction records. **Therefore, a clear, strongly-worded application could make it easier to dismiss an applicant for providing false information.**

You also should be alert to how the application form has been completed, e.g., an applicant failing to provide the name of his or her last supervisor; or they may not explain why they left a previous job or they may fail to explain a gap in employment; or they may not sign the application; or the applicant may have made several changes; or scribbles on the application as if they are making it up as they go.

The interview process is also a line of defense in the hiring process. The interview provides an opportunity for the applicant to clarify unexplained gaps in employment. If everything checks out and there are no unexplained gaps, it decreases the likelihood that the applicant has provided misleading or even falsified information.

Also, at some time during the interview the employer should tell the applicant that a background check will take place. An interviewer may do it in the form of a question such as, "Here at ABC Company, we perform background checks on all applicants. Is there anything you might be concerned about?" This allows the applicant to self-disclose. But, if you say you are going to check references, then be certain that you check employment references before you extend an offer. Checking employment references may also uncover resume fraud.

With the employment application, interview, and reference checks completed, you should be able to verify the identity, address, and employment history of your applicant. If you cannot verify this information something is askew.

Currently many employers include the following question on their application form:

- Have you been convicted of a felony in the last seven years (*some go as high as thirteen years*)? If yes, please explain.
- (They also sometimes state: "Conviction of a crime will not automatically disqualify the applicant from employment".)

Employers should consider removing this question from the general application form, and in its place include an employment application insert if hiring for any of the above positions that restrict entry due to a criminal record, i.e., *justification based on business necessity*. The questionnaire insert could then be tailored to the specific position.

For example, you may want to include an insert if you are hiring for an **Employee Benefits position**, which is one of the positions for which entry is restricted if an employee has a conviction record.

The insert(s) may state something similar to this:

Employee Benefits Applicants must complete the following:

Have you been convicted of any of the above listed crimes in the past 13 years?

Yes _____ No _____

Note: We are not permitted to hire any individual as an "Employee Benefits Employee" (or assign fiduciary, trustee or officer) with convictions for robbery, burglary, extortion, embezzlement, fraud, theft, bribery, arson, murder, rape, drugs, kidnapping, perjury, assault with intent to kill, for 13 years after conviction.

Finally, most HR Professionals agree that no single factor in and of itself should be the reason why an individual(s) would be denied to be hired. It should be a professional judgment, and for business related reasons based on many factors related to knowledge, skills, ability, education, experience, cultural fit, etc.

The bottom line conclusion is, to reject someone in a protected class simply because of a conviction record, when that record has no relationship to job requirements will put your company at risk.



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