

Legal Remedies and Limitations on the Employment of Ex-Offenders in Pennsylvania

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The list of employment restrictions contained in this paper is the result of CLS's review of Pennsylvania and U.S. statutes and regulations as of April, 2009. However, it is possible that other restrictions exist that have not come to our attention or that have passed since this report was written. We invite readers of this report to contact Community Legal Services if they discover any other employment restrictions not reported here.

Legal Remedies and Limitations on the Employment of Ex-Offenders in Pennsylvania

Introduction

Like most Americans, ex-offenders need to be employed to support themselves and their families. Moreover, participation in the labor economy is central to most of our identities; our jobs play a major role in defining who we are. In short, employment is a linchpin to the successful rehabilitation of ex-offenders and their full and productive participation in society.

Unfortunately, the very existence of any kind of a criminal record is frequently a significant barrier to being hired for a job, or once hired, keeping the job¹. Increasing numbers of Americans indisputably are passing through the criminal justice system and thus experiencing this employment barrier. In 2007, more than 7.3 million people, or 3.1% of the country's adult population, were incarcerated, on probation or on parole in the United States, constituting one of 31 of U.S. adults. Rising unemployment rates make finding employment even more difficult for persons with criminal records, often limiting them to low-wage jobs that offer no future.

The options for ex-offenders who are looking for work are limited. They can try to clean up their criminal records through expungements or pardons, although these procedures are severely limited in Pennsylvania. They can attempt to enforce under-utilized legal remedies that limit the extent to which criminal records can be considered when employment decisions are made.² They can try to convince an employer to seek a bond against the risk of theft that the

¹ Some employment or licensing restrictions may also apply to individuals who have “founded” or “indicated” reports of child abuse. Although they are civil in nature, “indicated” reports of child abuse often carry some of the same employment consequences as criminal convictions, without the procedural safeguards afforded to persons charged with crimes. Because child abuse reports can affect employment opportunities, a brief discussion of these reports is warranted; please see Appendix A.

² See Part III of this paper.

employer fears from employing an ex-offender. Most likely, they do not know of or cannot utilize any of these options, and their only alternatives are a long, dogged and often repetitive job search, work in the underground economy, or a return to a life of crime.

This report outlines the impact of criminal records on employment opportunities in Pennsylvania. In Part I, we discuss the overall legal framework applicable to the employment of people with criminal records. In Part II, we list occupations in which criminal records must be considered and which legally prohibit employment of some ex-offenders. In Part III, we discuss legal rights and remedies for ex-offenders in the employment context.

I. Employer Consideration of Criminal Records - Generally

In many occupations, federal or state statutes require a criminal background check on new employment applicants. These laws usually mandate that the report be ordered from the Pennsylvania State Police (the PSP), the Federal Bureau of Investigation (the FBI), or both. These laws typically also list offenses or classes of offenses (such as felonies) that prohibit employment of the person with the criminal record in that field. In other occupations, a similar statutory mandated screening is done in the licensing process, usually by a State licensing board. These statutes tend to exist in care-giving and security professions. These laws are discussed in the next section.

For the vast majority of jobs, however, no such laws exist to control an employer's decision about an applicant with a criminal record. In those "unregulated" jobs, employers have a great deal of discretion whether or not to conduct a background check and hire an ex-offender. However, there are limits to this discretion, created by federal discrimination law and by state law that require employers to assess the suitability of the person despite the criminal record. These statutes are discussed in Part III.

II. Occupations Where Certain Ex-Offenders Are Prohibited By Law from Employment

While all employers *may* use job-related criminal records in their hiring decisions, some employers *must* obtain criminal records and reject candidates with certain convictions. Both state and federal laws proscribe or restrict the hiring or licensing of individuals with particular types of convictions in the following professions. Note that these laws only govern convictions, not arrests that do not lead to convictions. Moreover, juvenile adjudications do not constitute disqualifying offenses.³

The following are summaries of criminal background restrictions on Pennsylvania workers in employment or licensing that are created by federal and state law. Ex-offenders whose employment could be impacted should check into the precise list of crimes prohibited by statute and regulation and compare it to their criminal history records as reported by the PSP.⁴ Employers are encouraged to learn the exact provisions of the laws applicable to their jobs, so that they do not over-exclude persons whose offenses on their criminal records are not enumerated among the prohibitions.

Broad Restriction: “Working with Children”

Recently-enacted restrictions on working with children do not fit neatly into any particular category listed below, and therefore merit a separate explanation. In late 2006, the Pennsylvania legislature amended the Child Protective Services Law (CPSL) to expand the prohibitions on employment of individuals working with children. While previously the CPSL had required background checks and prohibited certain employment of job applicants for schools and child care, it now applies as well to anyone with a “significant likelihood of regular contact

³ A juvenile adjudication is not a criminal conviction, and it does not impose any civil disability ordinarily resulting from a conviction. 42 Pa. C.S.A. § 6354(a).

⁴ A PSP record can be order on-line: <https://epatch.state.pa.us/Home.jsp> .

with children” under his or her “care, supervision, control or training.” While the exact contours of the coverage of this law are still being determined, examples given by the statute are social workers, clergy, hospital personnel, mental health professionals, counselors, librarians and doctors. The definition is arguably overbroad and vague and may be read to apply to an extremely broad range of professions.⁵ Persons determined to be covered by this law are required to obtain both FBI and PSP records, as well as child abuse records.⁶

The offenses which prohibit employment under the CPSL are as follows:

May not hire individuals with **founded** child abuse reports **within last five years** or with convictions for homicide, aggravated assault, kidnapping, rape, various sex crimes, prostitution felonies, concealing death of child, endangering welfare of child, or pornography **ever**, or for drug felonies **within the last five years**

In 2004, the CPSL’s lifetime prohibition on the employment of people with aggravated assault convictions was determined to violate the Pennsylvania Constitution. Warren County Human Services v. State Civil Service Commission, 844 A.2d 70 (Pa. Commw.), *appeal denied*, 863 A.2d 1152 (Pa. 2004). The legislature has not yet modified the statute to make it constitutional by putting time limits on the lifetime disqualifications. Consequently, the Pennsylvania Department of Public Welfare has an interim policy permitting employers required to comply with the CPSL to hire persons with convictions of the enumerated crimes if the following requirements are met.

- The individual has a minimum five year aggregate work history in care dependent services since conviction of the crime or release from prison, whichever is later. Care dependent services include healthcare, elder care, child care, mental health services, mental retardation services, or care of the disabled.

⁵ 23 Pa. C. S. § 6344.2.

⁶ 23 Pa. C.S. § 6344(b).

- The individual's work history in care dependent services may not include any incidents of misconduct⁷

Employment Prohibitions

The following are professions in which employers are legally prohibited by law from hiring persons with certain offenses.

Aircraft/Airport Employees (applies to those with direct access to airplanes or secure airport areas and to security screeners)

May not hire individuals convicted of federal hijacking or other air crimes, murder, assault with intent to murder, espionage, treason, sedition, kidnapping, rape, extortion, armed robbery, weapons convictions, distribution (or intent to distribute) a controlled substance, or felonies involving: a threat, willful destruction of property, importation or manufacture of a controlled substance, burglary, theft/fraud, possession or distribution of stolen property, aggravated assault, bribery, or illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than **one year within last 10 years**. 49 U.S.C. § 44936; 14 C.F.R. §§ 107.209 and 108.229.

Armored Car Crew Member

May not hire individuals with any conviction that disqualifies them from firearm license or permit. 15 U.S.C. § 5902.

Bank Employee

May not hire individuals convicted of crimes of dishonesty, breach of trust, or money laundering without prior written consent of the Federal Deposit Insurance Corporation. FDIC has indicated that it considers drug offenses to be crimes of dishonesty.

FDIC may not give consent for a **minimum of 10 years** for crimes involving bribery /corruption in banking, embezzlement/theft, fraud or false statement in banking or bankruptcy transactions, obstructing the examination of a financial institution, or racketeering. 12 U.S.C. § 1829.

⁷ This policy is found in DPW Office of Children, Youth and Families Bulletin No. 3490-08-03 (June 27, 2008), at [http://www.pccyfs.org/dpw_ocyfs/Implementation_Act179\(2006\)_Act73\(2007\)_amending_CPSL.pdf](http://www.pccyfs.org/dpw_ocyfs/Implementation_Act179(2006)_Act73(2007)_amending_CPSL.pdf).

Child Care

May not hire individuals with **founded** child abuse reports **within last five years** or with convictions for homicide, aggravated assault, kidnapping, rape, various sex crimes, prostitution felonies, concealing death of child, endangering welfare of child, or pornography **ever**, or for drug felonies **within the last five years**. 23 Pa. C.S. § 6344(c); 55 Pa. Code § 6000.22 (the Child Protective Services Law, or CPSL).

For more on the CPSL, including the unconstitutionality of its lifetime bars on employment and DPW's interim policy permitting persons with enumerated convictions to be employed, *see supra* at pages 6-7.

Child Care Workers in Federal Agencies or Facilities

May refuse employment for a conviction involving a sex crime, offense involving child victim, drug felony, or any other crime that bears on fitness to work with children. 42 U.S.C. § 13041.

Employee Benefits Employee

May not hire any individual (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**. 29 U.S.C. §1111.

Nursing Home/Home Health Care/Other Workers in Long-Term Care Facilities

May not hire individuals convicted of homicide, aggravated assault, kidnapping, rape, robbery, burglary, arson, theft (including two misdemeanors), various sex crimes, concealing death of child, endangering welfare of child, pornography, felony drugs **ever**. 35 P.S. § 10225.503(a) (known as the Older Adults Protective Services Act, or OAPSA).

In Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003), the Pennsylvania Supreme Court held that the lifetime criminal records ban of OAPSA violated the Pennsylvania Constitution as applied to petitioners because it did not provide an opportunity for them to prove their suitability for employment. Efforts are underway to amend OAPSA to reflect this decision. In the meantime, the Pennsylvania Department of Aging has an interim policy permitting people to work if they have an a minimum five year aggregate work history in care dependent services since conviction of the crime or release from prison, whichever is later. http://www.aging.state.pa.us/aging/lib/aging/Nixon_Letter.pdf

Police

May not employ if convicted of felony or serious misdemeanor. 53 P.S. § 2164(7); see also pages 6-7 regarding restrictions on working with children.

Port Workers (must have a transportation security card – also known as TWIC - consistent with the following restrictions)

May not employ if convicted of espionage, sedition, treason or federal terrorism crime (or conspiracy to commit any of the above) **ever**.

May not employ if convicted of a crime involving a “transportation security incident,” improper transportation of a hazardous material, unlawful possession, use, sale or manufacture of an explosive device, murder, making a threat of using an explosive or other lethal device against a government facility or transportation system, violation of RICO or conspiracy or attempt regarding any of the above **ever—but can apply for a waiver from the Transportation Security Administration (TSA)**.

May not employ if convicted of a weapons offense, drug offense, crime of dishonesty (not including welfare fraud or writing bad checks), extortion, bribery, smuggling, immigration violations, arson, kidnapping or hostage taking, rape or aggravated sexual assault, assault with intent to kill, robbery, fraudulent entry into a seaport, RICO or conspiracy or attempt of the above **for seven years before applying for transportation credentials or for five years after release from incarceration, whichever is later—but can apply for a waiver from TSA**. 46 U.S.C. § 70105(c)(1); 49 C.F.R. § 1572.103.

Private Detective (including employees of organizations with private detective licenses)

Must refuse employment for a conviction of any felony or of the following crimes: weapons offenses, possessing burglar’s tools, receipt of stolen property, unlawful entry, aiding escape from prison, pick-pocketing, possessing or distributing narcotics, solicitation of sodomy or other lewdness, reckless endangerment, terroristic threats, simple assault. 22 P.S. § 23(a).

School Employees (public and private schools in Philadelphia)

Must refuse employment for a conviction involving homicide, aggravated assault, harassment/stalking, kidnapping, unlawful restraint, rape, statutory sexual assault, involuntary deviate sexual

intercourse, sexual assault, indecent exposure, incest, concealing death of a child, endangering welfare of children, dealing in infant children, felony prostitution, obscene materials, corruption of minors, sexual abuse of children, or felony drug offense for five years preceding employment application.

Public School Code, 24 P.S. § 1-111(e)(these rules also apply to school bus drivers and student teachers); CPSL, 23 Pa. C.S. § 6344(c). For more on the CPSL, including the unconstitutionality of its lifetime bars on employment and DPW's interim policy permitting persons with enumerated convictions to be employed, *see supra* at pages 6-7.

U.S. Government Employee

May not hire individuals convicted of attempting or advocating the overthrow of the U.S. government for **five years** following conviction. 18 U.S.C. § 2385.

Occupational Licenses

Some occupations and professions require a license and are regulated by licensing boards created under state statute. The licensing boards are generally given a great deal of discretion to determine the fitness of individuals applying for licenses or certificates and are authorized to refuse or revoke licenses where the applicant has been convicted of any felony or a misdemeanor that relates to the relevant trade, occupation or profession. Many licensing boards are *required* to consider convictions when making licensing decisions or are even prohibited from licensing individuals with certain convictions. Ex-offenders considering training for specific professions should contact the appropriate licensing board to determine whether a particular policy or restriction will make a license in that field difficult or impossible to obtain. The following is a list of licensing boards that may or do consider criminal convictions in their licensing decisions.

Accountant

May revoke or suspend license if individual engages in dishonest conduct. 63 P.S. § 9-9.a.

Architect

May refuse or revoke license for conviction of any felony or crime of moral turpitude. 63 P.S. § 34.19. A crime of moral turpitude is a crime of dishonesty and includes offenses such as fraud, tax evasion, perjury and similar offenses.

Auctioneer

May revoke license for conviction for forgery, embezzlement, extortion, fraud, any crime of moral turpitude **within five years prior to issuance of license.** 63 P.S. § 734.20.

Barber

May revoke or suspend license if individual engages in dishonest conduct. 63 P.S. § 559.

Bondsman

May suspend or revoke license if convicted of any criminal offense. 42 Pa. C.S. A. § 4746(b)(3).

Casino employee (gaming employees)

License or permit **will be denied** for felonies and gambling offenses **within 15-years.**

When evaluating an application after 15 years, the Gaming Control Board will consider:

- (1) the nature and duties of the applicant's position;
- (2) the nature and seriousness of the offense;
- (3) the circumstances under which the offense occurred;
- (4) the age of the applicant when the offense was committed;
- (5) whether the offense was an isolated or repeated incident;
- (6) evidence of rehabilitation.

4 Pa. C.S.A. § 1213; 58 Pa. Code § 435a.1(f) and (g).

Casino employee (nongaming employees) (do not handle gaming money – includes bartenders, food service, clerical, parking attendants, and janitorial workers)

Registration **may be denied** for felonies and gambling offenses **within 15-years.**

When evaluating an application for a registration, the Gaming Control Board will consider:

- (1) the nature and duties of the applicant's position;
- (2) the nature and seriousness of the offense;
- (3) the circumstances under which the offense occurred;
- (4) the age of the applicant when the offense was committed;
- (5) whether the offense was an isolated or repeated incident;
- (6) evidence of rehabilitation.

4 Pa. C.S.A. § 1213; 58 Pa. Code § 435a.1(g).

Chiropractor

Applicant for license must submit evidence that he/she has not been convicted of drug felony **in last ten years.** Board **may refuse license** if convicted of any felony, or misdemeanor **in the chiropractic profession.** 63 P.S. §§ 625.501, 625.506.

Dental Hygienist

May refuse or revoke license for any felony or crime of moral turpitude. 63 P.S. § 124.1. *See also* pages 5-7, regarding new restrictions on working with children.

Dentist

Must refuse or revoke license if convicted of any drug felony less than **10 years old.** **May** refuse or revoke license if convicted of any other felony or any crime of moral turpitude. 63 P.S. §§ 123.1, 124.1. *See also* pages 5-7, regarding new restrictions on working with children.

Employment Agent (applies to license holder only)

May refuse license to anyone with conviction for any crime other than traffic violation. 43 P.S. §§ 539(8), 541; 34 Pa. Code § 9.13.

Engineer, Land Surveyor, Geologist

License **must be revoked** (with opportunity to be heard) for any drug felony or crime relating to professional field. 63 P.S. §§ 151(g), 157.1(b).

Funeral Director

May refuse license for any crime of moral turpitude, violation of health law, or relating to profession. 63 P.S. § 479.11.

Horse Racing (applies to anyone employed at horse gambling or race meetings, including vendors and stable workers)

Must refuse license for conviction of race fixing. **May refuse** license for conviction of any crime of moral turpitude, illegal gambling. 58 Pa. Code § 165.35.

Hunting/Trip Permit Salesperson

May deny license for conviction of any crime. 67 Pa. Code § 65.3.

Insurance Adjuster

May revoke license for conviction of any felony. 63 P.S. § 1606.

Medical Technician, Emergency (EMT)

May suspend, revoke or refuse certification for conviction of a felony or crime involving moral turpitude. 35 P.S. § 693(j.1)(1)(xiv). *See also* pages 5-7, regarding new restrictions on working with children.

Midwives

May refuse license for crime of moral turpitude. 63 P.S. § 172. *See also* pages 5-7, regarding new restrictions on working with children.

Mortgage Broker

May deny license for conviction of any felony or misdemeanor. 63 P.S. § 456.06(d).

Motor Vehicle Dealer

May refuse or revoke license for any crime of moral turpitude, dishonesty/theft **committed as a dealer within 5 years of application.** 63 P.S. § 818.19.

Nurse (Registered Nurse and Licensed Practical Nurse)

Must refuse license for any drug felony conviction **in the last ten years**. **May refuse** license for any other felony or crime of moral turpitude. 63 P.S. §§ 216(c), 224(a)(5)(RNs); 63 P.S. §§ 655, 666(a)(5)(LPNs). *See also* pages 5-7, regarding new restrictions on working with children.

Occupational Therapist

Must refuse or may revoke license for any crime found by Board to have a direct bearing on fitness to be an OT. 63 P.S. § 1516. *See also* pages 5-7, regarding new restrictions on working with children.

Optometrist

Must suspend license for a drug felony. **May revoke** license for any felony or crime of moral turpitude. 63 P.S. § 244.7. *See also* pages 5-7, regarding new restrictions on working with children.

Osteopath

May refuse license for any felony, drug felony, crime of moral turpitude or any crime related to the practice of osteopathic medicine. 63 P.S. §§ 271.14, 271.15. *See also* pages 5-7, regarding new restrictions on working with children.

Pawnbroker

Must refuse license for any conviction of engaging in pawnbroking business without license. 63 P.S. § 281-8(a).

Pharmacist

Must refuse license for conviction of any drug felony **in the last 10 years**. **May refuse** license for any felony related to the practice of pharmaceuticals, or any crime of moral turpitude. 63 P.S. §§ 390-3, 390-5.

Physical Therapist/Athletic Trainer

Must refuse license to individuals convicted of any drug felony **in the last ten years**. 63 P.S. § 1306.

Physician

Must refuse license for any drug felony conviction **in the last ten years**. **May refuse** license for any other felony or any misdemeanor **relating to a health profession**. 63 P.S. §§ 422.22, 422.41. *See also* pages 5-7, regarding new restrictions on working with children.

Physician's Assistant

May refuse license for any felony conviction. 63 P.S. § 271.15(b). *See also* pages 5-7, regarding new restrictions on working with children.

Podiatrist

May refuse, suspend or revoke license for conviction in connection with the practice of podiatric medicine or involving moral turpitude. 63 P.S. § 42.16. *See also* pages 5-7, regarding new restrictions on working with children.

Private Detective

May not issue license if convicted of any felony or of the following crimes: weapons offenses, possessing burglar's tools, receipt of stolen property, unlawful entry, aiding escape from prison, pick-pocketing, possessing or distributing narcotics, solicitation of sodomy or lewdness, reckless endangerment, terroristic threats, simple assault. 22 P.S. § 16(b).

Psychologist

Must refuse license for any drug felony conviction **in last ten years**. **May refuse** license for any other felony or misdemeanor **in the practice of psychology**. 63 P.S. §§ 1206, 1208. *See also* pages 5-7, regarding new restrictions on working with children.

Radioactive Waste Disposal (applies to facility operators)

Must deny license for conviction of a first degree misdemeanor or felony **involving an environmental crime within the last 10 years**. **May deny** license if applicant or applicant's partner, officer, associate, or agent has engaged in unlawful conduct. 35 P.S. § 7131.502.

Real Estate Appraiser

May refuse certification for any crime substantially related to qualifications, functions, and duties of persons appraising real estate. 63 P.S. § 457.11.

Real Estate Broker

May refuse license for conviction of any felony or crime of dishonesty. 63 P.S. § 455.604.

Salesperson of Game of Chance

May not issue or renew license for conviction of an felony **in the last five years** or any gambling (“Bingo Law”) offense **in the last ten years**. 10 P.S. § 317.

Speech Pathologist/Teacher of the Impaired

May refuse or revoke license for conviction of any felony or first or second degree misdemeanor **in the last ten years**. 63 P.S. § 1710. *See also* pages 5-7, regarding new restrictions on working with children.

Social Worker

Must refuse license for any drug felony conviction **in the last ten years**. **May refuse** license for any other felony or crime of moral turpitude. 63 P.S. §§ 1909, 1911; 49 Pa. Code § 47.12(2). *See also* pages 5-7, regarding new restrictions on working with children.

Tax Assessor

May refuse certification for any crime substantially related to qualifications, functions, and duties of persons developing real property assessment. 63 P.S. § 458.7.

Taxi Driver

May not issue medallion if applicant or officer/director of corporate applicant has any felony conviction **in last five years**. 66 Pa. C.S. § 2408(c).

Truck Drivers of Hazardous Materials (hazmat endorsements)

May not employ if convicted of espionage, sedition, treason or federal terrorism crime (or conspiracy to commit any of the above) **ever**.

May not employ if convicted of a crime involving a “transportation security incident,” improper transportation of a hazardous material, unlawful possession, use, sale or manufacture of an explosive device, murder, making a threat of using an explosive or other lethal device against a government facility or transportation system, violation of RICO or conspiracy or attempt regarding any of the above **ever—but can apply for a waiver from the Transportation Security Administration (TSA).**

May not employ if **felony** conviction for weapons offense, drug offense, crime of dishonesty (not including welfare fraud or writing bad checks), extortion, bribery, smuggling, immigration violations, arson, kidnapping or hostage taking, rape or aggravated sexual assault, assault with intent to kill, robbery, fraudulent entry into a seaport, RICO or conspiracy or attempt of the above **for seven years before applying for transportation credentials or for five years after release from incarceration, whichever is later—but can apply for a waiver from TSA.** 49 C.F.R. § 1572.103(a) and (b).

Vehicle Damage Appraiser

May deny license for conviction of any felony. 63 P.S. § 856.

Veterinarian

Must refuse license for any drug felony conviction in last ten years. **May** revoke or suspend license for any other felony. 63 P.S. §§ 485.9, 485.21; 49 Pa. Code § 31.11(b).

III. Potential Remedies for Denials of Employment Based on Criminal Records

Job applicants who are rejected from employment solely because of their criminal records have several potential remedies, under state law and federal antidiscrimination laws.

A. Pennsylvania Law Limiting Consideration of Criminal Records

A Pennsylvania statute provides, “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.” 18 Pa. C.S. § 9125(b). There has been almost no guidance under state law on the issue of “suitability” under this law. However,

one of the few cases construing this statute has been determined that it means that employers may *only* consider *felony and misdemeanor convictions*. Cisco v. United Parcel Services, Inc., 476 A.2d 1340 (Pa. Super. 1984). Consequently, under this statute, employers may *not* consider *arrest records, juvenile adjudications and summary offense convictions*.

No administrative agency enforces this law; it must be enforced through filing a lawsuit. To date, there have been very few lawsuits enforcing this statute, possibly because it does not provide for attorneys' fees to a winning plaintiff. However, recent case law in Pennsylvania indicates that the courts may be sympathetic to a claim by an individual who is otherwise qualified for a position.⁸ Moreover, increased attention to and education regarding this statute may make employers more aware of their legal obligations.

B. Race Discrimination Claims Under Title VII

For African-American and Hispanic ex-offenders, an employment rejection for having a criminal record may implicate a race discrimination claim under Title VII of the Civil Rights Act of 1964 ("Title VII").⁹ This claim is based on a "disparate impact" theory that recognizes that even unintentional discrimination violates the law where a facially neutral policy disparately harms minority job seekers and is not required by business necessity. In the criminal record context, the claim is that because African-Americans and Hispanics are arrested and convicted in numbers disproportionate to whites, minority job applicants are disproportionately excluded records.¹⁰

⁸ See, for instance, the Warren County and Nixon decisions, discussed *supra* at 6 & 8.

⁹ 42 U.S.C. §§ 2000e- 2000e-17.

¹⁰ Judge John J. Fullam notably ruled that an employer violated Title VII when it terminated a white woman because of an old criminal conviction. The judge ruled that even though she was not a member of the protected class, she had been adversely impacted by a discriminatory policy and therefore had standing under Title VII. Field v. Orkin, No. 00-5913 (E.D. Pa. filed October 30, 2001).

Legal support for criminal record disparate impact claims dates to the early 1970s, when the courts and the Equal Employment Opportunity Commission (EEOC), which is responsible for enforcement of Title VII, started to find Title VII violations where there was either a blanket exclusion of persons with criminal records or a lack of business necessity for such a policy. In 1970, a federal district court found that a policy which automatically disqualified persons who had arrest records violated Title VII.¹¹ In 1975, a federal appeals court rendered the most important decision on convictions until recently, ruling that an across-the-board disqualification based on convictions was invalid.¹² Several more rulings followed which found a Title VII violation for employer use of criminal records.¹³ These court decisions are synthesized in an EEOC policy statement issued in 1987 on employer use of criminal convictions records.¹⁴

This statement reiterated EEOC's position: that because a policy or practice of excluding persons from employment on the basis of their conviction records has an adverse impact on African-Americans and Hispanics, such a policy violates Title VII unless the employer demonstrates a business necessity for the policy. The policy identified three factors relevant to the business necessity justification:

- (1) The nature and gravity of the offense or offenses;

¹¹ Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972). Gregory is still considered the leading case on an employer's use of arrest records.

¹² Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

¹³ E.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971)(brought under 42 U.S.C. Sect. 1981 and 1983); Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975); Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); EEOC Decision No. 74-89 (Feb. 12, 1974); EEOC Decision No. 71-2682 (June 28, 1971).

¹⁴ "Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)" (Feb. 4, 1987) in II EEOC Compliance Manual § 604.

- (2) The time that has passed since the conviction and/or the completion of the sentence; and
- (3) The nature of the job held or sought.¹⁵

The EEOC's most recent policy guidance on employer use of criminal records was a 1990 statement on arrest records, which reaffirmed its 1987 statements on convictions and concluded that employers will seldom be justified in making employment decisions based on arrests which did not lead to convictions.¹⁶ For evaluating arrests, EEOC added a fourth criteria to the three established for evaluating convictions: the employer must evaluate the likelihood that the applicant engaged in the conduct for which he or she was arrested. Under the detailed analysis set forth by the EEOC in its 1990 Policy Guidance, a blanket exclusion from employment of persons with arrest records will rarely be justified since the criteria requires individual assessment of the applicant's situation.

Claims based on Title VII and criminal history records brought between 1990 and the present have often been rejected, when they have been brought at all.¹⁷ The most recent and most notable decision on this issue since the 1970s involved a lawsuit challenging the criminal records policies of Philadelphia's public transit authority for its paratransit contractors. El v.

¹⁵ A subsequent policy issued by EEOC in 1987 discussed the plaintiff's burden of proving a disparate impact in a criminal conviction charge, indicating that EEOC would apply a presumption of an adverse impact on African-Americans and Hispanics, based on national and regional conviction rates statistics. "Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment" (July 29, 1987) in II EEOC Compliance Manual App. 604-B.

¹⁶ Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)" (Sept. 7, 1990) in EEOC Compliance Manual § 604.

¹⁷ See, e.g., Matthews v. Runyon, 860 F. Supp. 1347 (E.D. Wis. 1994) (summary judgment against plaintiff for failing to establish a prima facie case); Lewis v. Alabama Dept. of Public Safety, 831 F. Supp. 824 (M.D. Ala. 1993) (dismissal on plaintiff's inadequate statistical showing); Williams v. Carson Pirie Scott, No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643 (N.D. Ill. Sept. 9, 1992) (finding that defendant established business necessity to fire employee from "collector" position); Equal Employment Opportunity Commission v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989) (both rejecting plaintiff's prima facie case and finding business necessity); Moses v. Browning-Feris Industries of Kansas City, No. 84-2334-S (D. Kan. Sept. 22, 1986) (finding for defendant after trial on grounds that the policy of rejecting applicants for position of garbage collector who were convicted of crimes involving moral turpitude was justified by business necessity). One notable exception is Field v. Orkin, No. 00-5913 (E.D. Pa., October 30, 2001), discussed *supra* note 10.

Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3d. Cir. 2007). Although the Third Circuit rule against the plaintiff, it did so because of the plaintiff's failure to submit evidence to rebut the defendant's expert on recidivism, not because people with criminal records lack entitlement to legal protections in the employment context. The court did not endorse the EEOC guidance on convictions, concluding that it was not entitled to deference. Id. at 244. However, *it did mandate that criminal records policies "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."* Id. at 245. Describing the application of its test, the court distinguished between applicants who pose "minimal level of risk" and those who do not. Id. at 245 n. 13 & 14. The court indicated that business necessity case law requires "some level of empirical proof that challenged hiring criteria accurately predicted job performance." Id. at 240.

The EI decision, then, presents several lessons. (1) Employers may refuse to hire some persons with criminal records, despite the racially disparate impact. (2) However, to avoid violating Title VII, they must carefully craft their criminal record exclusionary policies, based on empirical evidence as to whether a person with a criminal record presents more than a minimal risk.

Given the solid legal foundation that these actions have in the EEOC guidances and case law, as well as the increased attention that is being paid to the employment barriers faced by ex-offenders, race discrimination claims under Title VII may become a more viable remedy for individuals with criminal records who are being unfairly barred from employment. In order to enforce Title VII rights, claims must be filed with a regional office of the EEOC within 300 days of the date of the violation of rights.

APPENDIX A--CHILD ABUSE REPORTS

Some employment or licensing restrictions may also apply to individuals who have “founded” or “indicated” reports of child abuse or neglect. Although they are civil in nature, “indicated” reports of child abuse often carry some of the same employment consequences as criminal convictions, without the procedural safeguards afforded to persons charged with crimes. Because child abuse reports can affect employment opportunities, a brief discussion of these reports is warranted.

Under the Child Protective Services Law (CPSL), 23 Pa.C.S. §6301 et. seq., local child protective service agencies throughout Pennsylvania are required to investigate reports of suspected child abuse or neglect. These reports of suspected abuse originate from a variety of sources: neighbors, teachers, doctors, hospital social workers, family members, even the children themselves. Investigative social workers are supposed to interview witnesses and review any available medical documentation in making a determination as to whether or not the report is substantiated. If not substantiated, the social workers mark the reports as “unfounded” and the reports are eventually expunged. “Founded” reports are those in which a court has made an adjudication of child abuse. Court adjudications theoretically can be appealed to a higher court. The CPSL prohibits the employment of individuals who have “founded” child abuse reports within the five years preceding applications from jobs in child care and schools.

Reports are “indicated” when the investigating child protective services agency determines that there is “substantial evidence” of abuse or neglect. In our experience, many “indicated” reports of child abuse involve incidents that do not rise to the level of child abuse under the law—such as

purely accidental injuries, fights between siblings, or the lawful infliction of corporal punishment that does not result in severe pain. These reports are not subject to any judicial oversight or due process protection unless appealed in a timely manner. Under Pennsylvania statute, reports made after July 1, 1995, must be appealed within 45 days of notification of the indicated status of the report.¹⁸ **However, because the notice that was sent to individuals placed on the Child Abuse and Neglect Registry was deemed by the Commonwealth Court of Pennsylvania to be defective, individuals can still appeal their indicated reports even beyond the 45-day deadline.** The Department of Public Welfare is in the process of revising this notice, and the 45-day deadline will be in effect again once that process is completed.

Many individuals do not receive the notification, do not understand it, or do not recognize its significance when they do receive it. Expungement requests made after the 45-day deadline are automatically denied, and it is extremely difficult to get the deadline lifted without very good cause for missing the appeal deadline. Failing to receive notification without extenuating circumstances is not generally accepted as good cause. Consequently, a permanent barrier to certain types of employment is thus created.

Even though no statute prohibits the employment of persons with “indicated” reports of child abuse in any field that we are aware of, these reports regularly preclude people’s employment or impede their ability to get a license in many professions, such as those related to children or medical professions. As discussed on page 5 of this report, recent legislation has expanded employment restrictions contained in the CPSL for individuals seeking to work with children. We recommend that individuals ascertain that they are not the subject of any indicated or founded child

¹⁸ Indicated reports made before July 1, 1995, are appealable at any time.

abuse reports before attempting to get a license or enrolling in costly and time-consuming vocational training or education. They can do so by calling or writing the child abuse registry as follows:

Terry Clark, Director
Childline & Abuse Registry
Department of Public Welfare
Office of Children, Youth and Families
P.O. Box 8170
Harrisburg, PA 17105-8170
(717) 783-6211

We further recommend that they contact the relevant licensing boards to find out whether a child abuse report might affect their ability to get a license. In the event that a report exists that may affect employment or licensing, a local legal services organization or a private attorney may be able to assist individuals in getting their records cleared.