
I. Is It Illegal for Employers to Discriminate?

While the answer is not as simple as the question, the answer is often “yes.”

Protections for People in Recovery from Alcohol or Drug Dependence

Two **federal laws** address directly the issue of employment discrimination against individuals with past or current alcohol or drug problems. They are the federal **Rehabilitation Act** of 1973¹ and the **Americans with Disabilities Act** of 1990.² These laws encompass all areas of employment discrimination, including the hiring and firing of employees and terms and conditions of employment.

The Rehabilitation Act prohibits discrimination against persons with a past or current **“disability”** (as well as those who are perceived to have a disability) who are otherwise qualified to perform the job they seek or hold. Under this Act (like the Americans with Disabilities Act described below), a “disability” is defined as a physical or mental impairment that substantially limits one or more of an individual’s major life activities, including working, learning, performing manual tasks, and caring for one’s self, among others. Both the federal agencies responsible for implementing and

enforcing the Act, and federal courts in a number of cases, have ruled that individuals in recovery from alcoholism or drug dependence, including those in methadone treatment, are covered by the law’s definition of individuals with a disability and that the Act forbids employers from discriminating against job applicants and employees because of their history of or treatment for alcohol or drug dependence, if those individuals are qualified to perform their jobs. Being “qualified” for employment means being able, with or without a reasonable accommodation, to perform the essential functions of a job.

In 1990, the Act was amended to exclude individuals who **“currently engage in the illegal use of drugs”** from protection. Individuals in recovery, including those in treatment (both drug-free and in methadone treatment) who are no longer illegally using drugs, are protected as long as they satisfy the definition of disability. The Act continues to protect individuals with current as well as past alcohol problems who satisfy the definition of disability and are qualified for the jobs they hold or seek.

¹ 29 U.S.C. §§ 701 et seq.

² 42 U.S.C. §§ 12101 et seq.

The Rehabilitation Act applies to private employers who hold federal government contracts, and to both private and public employers who receive federal grants or aid. The Act also applies to the federal government itself.³

The Americans with Disabilities Act (ADA) extends the Rehabilitation Act’s prohibition against disability-based discrimination to most employers, private and public. The ADA prohibits employers from discriminating against a “qualified individual with a disability” and requires, as does the Rehabilitation Act, that employers make “reasonable accommodations” to the known physical or mental limitations of a qualified individual with a disability. Title I of the ADA covers private employers and state and local government agencies with more than fifteen employees.

Although Title II of the ADA generally applies to public employers (without regard to the number of employees they have), the United States District Court for the Eastern District of Pennsylvania has held that Title II does not apply to employment.⁴ Therefore, in Pennsylvania, employment discrimination claims are covered under Title I of the ADA alone.

The ADA defines a “disability” as a past, current, or perceived “mental or physical impairment” that “substantially limits” one or more of an individual’s major life activities, such as those noted above.

The federal agencies charged with implementing and enforcing the ADA and a number of federal courts have ruled that alcohol and drug dependence are, or in individual cases can constitute, substantially limiting impairments under this definition. The law requires this determination to be made on an individualized, case-by-case basis, examining how the condition affects the particular person’s functioning.

As in the Rehabilitation Act, however, the ADA’s definition of an individual with a “disability” does not include an employee or job applicant who currently engages in illegal drug use.

In sum, individuals in recovery from drug dependence (including those enrolled in rehabilitation programs), and those erroneously perceived to be drug dependent, have been and in many, if not most, cases will be recognized as individuals with a “disability” under the ADA. This is also the case with recovered, current, and perceived alcoholics. If these individuals are “qualified” for the job in question — which, like the Rehabilitation Act, means able to perform the essential duties of that job, with or without reasonable accommodation — the ADA protects them from discrimination.

Pennsylvania has its own fair employment law, the **Pennsylvania Human Relations Act (PHRA)**.⁵ The

³ The law’s nondiscrimination provisions are contained in sections 501 through 504 of the Act, 29 U.S.C. §§ 791-794.

⁴ *Koslow v. Pennsylvania*, No. CIV.A.97-5951, WL 915246, at *1 (E.D. Pa. May 31, 2001).

⁵ 43 PA. CONS. STAT. ANN. §§ 951 *et seq.*

PHRA offers important protections to people with past and perceived (and perhaps current) alcohol problems. Arguably, the state law also protects persons with past or perceived drug problems. The state law reaches more employers, and so protects a broader range of persons than the federal law.

This law applies to all employers with four or more employees, including employment agencies and labor organizations. It prohibits discrimination based on any “non-job related handicap or disability.” The term “non-job related handicap or disability” is treated similarly to the term “disability” under the Rehabilitation Act and the ADA. “Handicap or disability” is defined as “a physical or mental impairment which substantially limits one or more of such person’s major life activities.” For a handicap or disability to be non-job related, it must not interfere with the ability to perform the essential functions of the job. In addition, both having a record of an impairment and being regarded as having an impairment are included in the law’s definition of “disability.”

As is the case in the Rehabilitation Act and the ADA, “current, illegal use of or addiction to a controlled substance” is expressly excluded from the definition of a handicap or disability.⁶

The Pennsylvania Human Relations Commission (PHRC), the administrative

agency responsible for enforcing this law, and Pennsylvania state courts clearly consider alcoholism a “disability” covered by the PHRA, and the PHRC will accept discrimination complaints from individuals with past, perceived, or current alcohol problems. But no case law addresses whether the law protects individuals currently using alcohol or participating in treatment.⁷ However, because a federal district court in Pennsylvania has held the state law should be interpreted in accord with the ADA, current, perceived, and recovered alcoholics may be covered by the PHRA.⁸

The PHRA’s coverage of individuals with past or perceived drug use or addiction is also ambiguous. Like the ADA, only current use and addiction are expressly excluded by the PHRA. The PHRC will accept complaints from individuals with past or perceived drug problems, and individuals in treatment. The PHRC has not, however, rendered any public decisions on whether past or perceived drug use or addiction is a disability. Nor have the Pennsylvania courts addressed whether the PHRA protects individuals with past or perceived drug problems. A federal district court in Pennsylvania has held that individuals with histories of drug use and those currently participating in drug treatment programs are disabled under the Rehabilitation Act. Based upon this case and the PHRA’s conformance with the ADA, the state law may be interpreted to cover individuals with past

⁶ 43 PA. CONS. STAT. ANN. §§ 954 *et seq.*

⁷ *City of Pittsburgh, Dept. of Public Works v. Foster*, 669 A.2d 492, 494 (Pa. Commw. 1995).

⁸ *Clarke v. Whitney*, 907 F.Supp. 893, 895 (E.D. Pa. 1995).

and perceived drug problems, as well as those in treatment for drug dependence.

The state and federal disability discrimination laws may protect a client like John who has a history of drug dependence and treatment. First evaluate whether he is covered by one of these statutes. For example, if John is currently using illegal substances, neither the ADA nor the PHRA would protect him from discrimination based upon his current illegal drug use. But if he had a drug dependence problem that affected his ability to function in the past and is now in recovery, these laws most likely protect him against discrimination on the basis of disability.

The remedies available to persons who believe they have been subjected to discrimination in violation of the federal, state, and local laws just discussed are described in Chapter V of this manual.

Protections for Ex-Offenders

There is no federal statute that specifically protects ex-offenders from employment discrimination. However, a policy of denying people jobs on the basis of arrests not followed by conviction, and policies that bar those with criminal records from employment, have been ruled illegal as applied to racial minorities under **Title VII of the Civil Rights Act of 1964**. Since minorities are arrested and convicted at a greater rate than their percentage of the population, courts have

found that such policies have a racially discriminatory effect absent a business justification. So, in some cases, a refusal to hire on the basis of a criminal record may be illegal race discrimination under federal law.

Pennsylvania’s Criminal History Record Information Act (CHRIA)⁹

provides considerable protections to individuals with criminal records. The laws regarding employment discrimination based upon criminal history differentiate between employers and state licensing agencies. In making hiring decisions, neither public nor private employers may consider arrests that did not result in conviction, absent a **business necessity**. For an employment practice to be considered a “business necessity,” an employer must be able to show that no less discriminatory alternative practice can achieve the same objective.

Generally, both **public and private employers** may consider only **job-related** felony and misdemeanor convictions. Job-related convictions are those relevant to the individual’s suitability for employment in the particular position. However, employers may still inquire about any arrest or conviction.¹⁰

An example of a job-related conviction affecting one’s suitability for employment is a person who applies for a job as a school bus driver and who has a conviction for driving while intoxicated (DWI). This individual’s DWI conviction can be considered job-related in this

⁹ CHRIA, 18 PA. CONS. STAT. ANN. §§ 9101 *et seq.*

¹⁰ 18 PA. CONS. STAT. ANN. §§ 9125(b) and (c).

instance, but not if he were applying for a job as a stock clerk with no driving duties. Whether a conviction is job-related must be determined on a case-by-case basis.

State licensing agencies, however, may consider a broader range of criminal history than employers. Like employers, state licensing agencies may not consider arrests that did not result in convictions when deciding whether to grant, renew, or revoke a license, absent a business necessity. Refusal or revocation of a license may only be based upon job-related misdemeanor convictions. However, unlike employers, state licensing agencies may refuse or revoke a license based upon any felony conviction, regardless of whether it is job-related.¹¹

Under Pennsylvania law, individuals denied jobs or licenses based upon their criminal history record information are entitled to notice in writing of the reasons for the denial.¹²

How can you use Pennsylvania law to assist John in his job search? The first step in preventing ex-offender employment discrimination is to obtain John's rap sheet so you can familiarize yourself with its contents and ensure its accuracy. John's criminal history must be reviewed and considered when making a job referral to determine whether the offense is related to the job or an occupational license he may need. This will enable you to make the most appropriate job referrals. If John is then denied a job or a license, advise him of

his right to written notice of the reasons for the denial.

The remedies available for persons who believe they have been illegally denied employment or licensure because of their criminal history are discussed in Chapter V.

Illegal Pre-employment Inquiries

The simplest way for a prospective employer to learn about John's criminal record and substance abuse history is to ask about it on a job application or during an interview. One of the most serious practical barriers to employment John might face is the bias and stigma associated with his criminal and substance abuse history. Many employers are hesitant to hire applicants like John because of stereotypes unrelated to his ability to perform the job. However, if you and John are familiar with the legal standards that govern what employers may ask about criminal records and substance abuse history, you can prepare John for a successful job search.

Inquiries About an Alcoholism or Drug Dependence History

The federal **Rehabilitation Act**, the **ADA** and the **PHRA** all limit the kinds of pre-employment inquiries an employer can make to determine whether a job applicant has a current or former disability. Employers may **not** ask job

¹¹ 18 PA. CONS. STAT. ANN. §§ 9124 *et seq.*

¹² 18 PA. CONS. STAT. ANN. §§ 9124(d), 9125(c).

applicants about whether they have or have had a disability, or about the nature or severity of a disability, before a job offer is made. An employer may only ask questions about whether an applicant can perform the duties of the job prior to making an offer of employment.

As discussed above, the Rehabilitation Act's and the ADA's definition of "disability" includes a history of alcohol or drug dependence (see pp. 1-2). Asking job applicants a question such as "Have you ever had an alcohol or drug problem?" is therefore an illegal pre-

employment inquiry under these federal laws. Employers could, however, ask about current illegal drug use because individuals with current problems are not protected against discrimination.

Pre-employment medical examinations are also prohibited by

these federal laws. However, after making a job offer to an individual, an employer may make medical inquiries and/or require the individual to undergo a medical examination before beginning work; and the employer may condition the job offer on the satisfactory results of such medical examinations or inquiries. This information may not be used in a discriminatory manner by the employer. Remedies for violations of the Rehabilitation Act and ADA are discussed in Chapter V of this manual.

NOTE: The ADA explicitly provides that a **drug test** (such as a urinalysis) is **not** a medical examination for purposes of these provisions. This means that employers **may** require job applicants to undergo pre-employment drug tests and may require employees to submit to drug tests without violating the ADA (although other laws may govern whether and when such testing by employers is permitted). But if a drug test reveals information about an applicant's or employee's disability — for instance, a test may reveal an individual's participation in methadone treatment and, if so, his history of heroin addiction — it is illegal for the employer to use this information in a discriminatory manner (to refuse to hire or fire the individual on the basis of this information). On the other hand, a test to detect alcohol use is considered a medical examination under the ADA, and therefore cannot be performed prior to a conditional offer of employment.

The PHRA also limits the kinds of inquiries that employers may legally make about job applicants' disabilities, which include alcoholism and (most likely) past or perceived drug dependence (see pp. 3-4). The law is designed to prevent employers from discriminating against any individual on the basis of any past or present disability that does not prevent that person from reasonably performing the duties of a job.

Under the PHRA, prior to an offer of employment, an employer may not inquire into the existence or severity of a disability. Consequently, it is illegal in

These laws are designed to prevent employers from discriminating against any individual on the basis of any past or present disability that does not prevent that person from reasonably performing the duties of a job.

most circumstances for employers to make general inquiries about an individual's past, perceived, or actual disability. Before an offer is made, employers may only inquire about fitness to perform specific job-related functions. Consequently, questions such as "How many sick days did you take last year?" or "Have you ever been treated for drug or alcohol problems?" ordinarily violate the PHRA.¹³

Under the PHRA, after a conditional offer is made, an employer may request a medical examination and make disability-related inquiries. To exclude an individual based on disability, the exclusionary criterion must be job-related and consistent with business necessity. The employer must also show the employee could not perform the essential functions of the job with reasonable accommodation.¹⁴ Because disability-related information is analyzed virtually the same under the PHRA as it is under the ADA, any information obtained regarding a history of alcohol or drug dependence may not be used in a discriminatory manner when making employment decisions.

In John's case, as with all applicants, he should be advised that under the state and federal law, an employer may not lawfully ask about his history of drug or alcohol dependence and treatment prior to a conditional offer of employment. An employer may ask on an employment application whether he currently uses drugs illegally.

It is unclear how **pre-employment drug and alcohol tests** would be handled under the PHRA because neither the Pennsylvania courts nor the PHRC has addressed this issue. Because the PHRA prohibits pre-employment medical examinations like the ADA, it is possible that the PHRA would offer the same protections from drug and alcohol tests. However, Pennsylvania law offers no guidance on the legality of these tests.

The remedies available for persons who believe they have been asked about or denied employment because of illegal pre-employment inquiries about their alcohol or drug problems are discussed in Chapter V.

Inquiries About a Criminal History

No federal or state law prohibits employers from asking job applicants if they have ever been **convicted** of an offense; and employers may legally consider an applicant's conviction(s) in making hiring decisions. And, if an applicant provides false information about his criminal history, either on an application or in an interview, and the employer discovers the deception, the employer can deny employment to or fire the individual.

The **Pennsylvania CHRIA** does not prohibit employers or state licensing agencies from making pre-employment inquiries about arrests, regardless of whether they led to conviction. Inquiries

¹³ 43 PA. CONS. STAT. ANN. § 951(b)(1).

¹⁴ *Commonwealth v. Pennsylvania Human Relations Comm'n*, 510 Pa. 401, 408 (1986).

regarding misdemeanor and felony convictions are also legal. However, employers are prohibited from considering **arrest** information when making hiring decisions unless justified by a **business necessity**. Employers also may not consider convictions unless they are job-related. State licensing agencies, however, may consider any felony conviction.

In John's case, although employers may ask him about his entire criminal history, he should be advised that they are prohibited from considering his arrest

absent a business necessity. In addition, unless his drug possession conviction is related to the job in question, employers may not consider his conviction in making hiring decisions. However, if John applies for a cosmetology license, the state occupational licensing authority may consider his drug possession conviction, if it is a felony.

Individuals who have been denied employment on the basis of criminal history may file a complaint with the state's Human Rights Division or may file a lawsuit in state court (see pp. 48-49).

II. Dealing with a Criminal Record

Kinds of Offenses

Being familiar with your client’s criminal record will help you make appropriate job referrals for your client. It is, therefore, important to understand the process for obtaining a rap sheet in Pennsylvania, as well as what it contains.

In particular, it is useful to know the type of offense(s) your client has been convicted of, as employment restrictions are sometimes defined by the class or severity of offense. For the sake of this discussion, let us assume that John, in addition to being convicted for drug possession (a felony) two years ago, was arrested, but not convicted, for petty theft (a misdemeanor) five years ago. An “offense” is any disposition for which a fine or imprisonment may be ordered. “Criminal” offenses are limited to misdemeanors and felonies. In Pennsylvania, the following types of offenses are recognized:

Summary Offense: A minor offense for which a person may be sentenced to a term of imprisonment for not more than ninety days. Common summary offenses include disorderly conduct, criminal mischief, underage drinking, and a **first** offense for retail theft of goods valued at

less than \$100 (shoplifting). Conviction of a summary offense is considered a conviction of a crime only if the individual is sentenced to any period of incarceration.¹⁵

Misdemeanor: A lesser criminal offense, for which a person may be sentenced to a term of imprisonment of not more than five years. Common misdemeanors include certain drug possession offenses, driving under the influence of alcohol, certain kinds of theft, and prostitution. Conviction of a misdemeanor is considered a conviction of a crime.¹⁶

Felony: A serious criminal offense, for which the length of imprisonment varies according to the crime. Some common felony charges are possession or sale of certain drugs, auto theft, burglary, and robbery. Conviction of a felony is considered a conviction of a crime.¹⁷

Special Dispositions of Charges

Often criminal charges are disposed of by procedures other than a conviction or acquittal at trial. In Pennsylvania, these procedures include:

¹⁵ 18 PA. CONS. STAT. ANN. § 106.

¹⁶ 18 PA. CONS. STAT. ANN. § 106.

¹⁷ 18 PA. CONS. STAT. ANN. § 106.

Dismissal: The equivalent of an acquittal. All charges are dropped and the accused retains the same status he had prior to the arrest.

Accelerated Rehabilitative Disposition

(ARD): The court defers the criminal proceedings against an accused person and places him on a form of probation for up to two years or requires him to fulfill other conditions such as making restitution. If the person successfully completes probation or fulfills the other conditions imposed by the court, the court will dismiss the charges. Failure to complete the program or fulfill the conditions will result in criminal prosecution. This disposition is usually only available for first offenses and specific crimes (not including drug offenses). The dismissal of these cases is not automatic; a person must apply to the court to get a dismissal. However, once an individual's ARD case is dismissed, expungement of these records should be automatic.¹⁸

Nolle Prosequi or Prosecution

Withdrawn: A dismissal based upon the prosecutor's decision (with the court's consent) to not prosecute. It clears the charges against the accused, wiping the slate clean. To reinstate charges against the accused following "nolle prosequi," the prosecutor must seek a new indictment.¹⁹

Suspended Sentence: A conviction for which the court imposes a sentence but then waives the person's obligation to

serve it. (These are not provided for by rule or by the statute providing sentencing alternatives.) One Pennsylvania court has even held them to be illegal, but apparently courts continue to utilize them.²⁰

In addition, certain special dispositions are available for persons who are found by the court to be drug dependent. These include:

Probation Without Verdict (PWV): An individual found by the court to be drug dependent following expert witness testimony, who is charged with a non-violent drug offense, may be given "probation without verdict" if s/he has not been convicted previously of any other offense. In these cases, the court defers the criminal proceeding against the accused person and places the individual on probation for a specified time (not to exceed the maximum sentence for the offense in question). If the person successfully completes probation, the court will dismiss the charges. Upon dismissal, a case resolved as probation without verdict is not considered a conviction for any purpose. Expungement should be automatic following dismissal of a PWV case. This disposition is available to an individual only once.²¹

Disposition in Lieu of Trial (DLT): This disposition is available only to drug dependent individuals and drug abusers who are charged with a nonviolent crime and seek this disposition **before** trial. The court may withdraw or hold the criminal

¹⁸ PA. R. CRIM. P. RULE 178 and 320.

¹⁹ 16 P.S. § 9952.

²⁰ *Commonwealth v. Tessel*, 347 Pa.Super. 37, 52, 500 A.2d 144, 150 (1985).

²¹ 35 PA. CONS. STAT. ANN. §§ 780-117.

charges in abeyance on the condition that the accused person participates in a drug treatment program for a specified time (not to exceed the maximum sentence for the offense in question or the statute of limitations). At the end of that period, the charges will be automatically dismissed.

The court may withdraw or hold the criminal charges in abeyance on the condition that the accused person participates in a drug treatment program . . .

Dismissal pursuant to this section is not considered a conviction. Expungement should be automatic following dismissal. This

disposition is also available to an individual only once.²²

Disposition in Lieu of Criminal Punishment (DLCP): This is available to drug dependent individuals who have been **convicted** of an offense. A court may give the individual a suspended sentence and probation instead of imprisonment on condition that s/he participates in a drug treatment program. Expungement should be automatic following the suspended sentence.²³

Getting and Cleaning Up Arrest and Conviction Records

As part of the pre-application process for clients with criminal histories, your client should obtain copies of arrest and

conviction records. This is extremely important for several reasons.

First, although there are restrictions on the release of criminal records by the Pennsylvania State Police Central Repository (PSPCR), the agency responsible for keeping the centralized file of such records in Pennsylvania (see below), employers often obtain this information from several sources, including local law enforcement agencies, the FBI, the Internet, and consumer reporting agencies. It is important to ascertain exactly what information the employer will obtain so that problem areas can be addressed directly. This is especially crucial if the criminal record reveals a history of alcohol or drug dependence. Some examples might be a criminal record that reveals a conviction for possession of drugs or driving while intoxicated, or shows that an individual was required to enter or remain in a treatment program as a condition of Probation Without Verdict or Disposition in Lieu of Trial.

Second, arrest and conviction records often contain errors or information that should not be reported. If your client discovers this in time, steps can be taken to correct the records before the employer sees them.

Third, often your client will not know the disposition of certain charges or will have forgotten some arrests. Finding out the details will enable the client to present his

²² 35 PA. CONS. STAT. ANN. §§ 780-118.

²³ 35 PA. CONS. STAT. ANN. §§ 780-118.

criminal record to employers in the most accurate and straightforward way possible. Clients who present inaccurate information to employers are frequently rejected or fired for “lying” during the application process, even though they did not intend to mislead. There is often little anyone can do to help a client in this situation (see pp. 33-34).

NOTE: Obtaining and cleaning up criminal records often takes a long time — frequently as long as several months. Clients, like John, should begin the process as early as possible in the search for employment — perhaps even before beginning the actual job hunt.

How to Get Copies of Arrest and Conviction Records

The Pennsylvania State Police Central Repository (PSPCR) maintains all state criminal history data in Pennsylvania. If a person has ever been arrested and fingerprinted for violating a state or local law in Pennsylvania, he has a rap sheet on permanent file at PSPCR. This is true even if the arrest did not lead to conviction. **These records cannot be destroyed.** Pennsylvania is an “open” state — meaning that an individual’s rap sheet is distributed to anyone who wants to see it.

A PSPCR record contains information about arrests, whether the person was convicted, and, if so, what sentence the person received. Individuals in Pennsylvania are entitled to see their own PSPCR records.

Clients throughout Pennsylvania can obtain their rap sheets at the offices of the PSPCR in Harrisburg. Clients can file a formal “Request for Criminal Record Check” form with PSPCR, along with a \$10 fee. Only certified checks and money orders will be accepted as payment. The fee cannot be waived for incarcerated persons or for financial hardship.

Clients can obtain the “Request for Criminal Record Check” form by telephone, mail, or the internet. Search request forms can be downloaded at <http://www.psp.state.pa.us/>. To request a copy of a rap sheet, the client must mail a completed form and payment to:

Pennsylvania State Police Central
Repository – 164
1800 Elmerton Avenue
Harrisburg, PA 17110-9758
(717) 783-9973

The Central Repository will then send your client a copy of his rap sheet, along with a “Statement of Challenge” form that can be used to ask PSPCR to correct any mistakes or problems that are found on the rap sheet. PSPCR will then send the individual another copy of his rap sheet within three to four weeks.

Clients with a criminal history in more than one state must get a rap sheet from each state in which they were arrested or request a copy of their federal rap sheet from the FBI.

Your client may obtain a copy of his **FBI rap sheet**, which contains arrest and conviction records from all fifty states

plus any federal criminal history information, by requesting it in writing from:

U.S. Department of Justice
Federal Bureau of Investigation
1000 Custer Hollow Road
Clarksburg, WV 26306

The letter must specify that the individual is making a request “under the Freedom of Information Act” for his FBI record. Included with the request for records should be the applicant’s name and current home address, the place and date of birth, and a set of fingerprints. Fingerprints can be obtained from a local police department or criminal court, but charges for this service vary. Include a certified check or money order for the \$18 processing fee (payable to the U.S. Treasurer) with the letter. The fee can be waived if proof of indigence is included with the application. Also include a stamped, self-addressed envelope.

Federal rap sheets contain state arrest and conviction records and records of federal offenses. However, it is worthwhile to consider whether the information contained in the federal rap sheet is worth the time and expense to obtain it. Except for banks and federal agencies, most employers will obtain state rap sheets. In addition, FBI records are often more incomplete or inaccurate than state records. As discussed earlier, it is best to ascertain exactly what information the employer will have and plan accordingly.

Juvenile court records — records of offenses involving children less than

eighteen years of age who have been adjudicated delinquent (see p. 27) — are not usually available to the public. However, as discussed earlier, records of individuals adjudicated delinquent for certain violent offenses and offenses involving firearms are open to the public. In addition, if a juvenile was tried as an adult, the child’s criminal history record information is reported on PSPCR rap sheets (see p. 27).

Access to, and Limits on Dissemination of, Criminal History Records and Information

Employers in Pennsylvania have broad access to individuals’ criminal records.

PSPCR Records

Criminal justice agencies may access an individual’s complete criminal history, including all arrests and convictions that have not been expunged. Noncriminal justice agencies and other employers may also obtain information about all convictions that have not been expunged. By contrast, they may also obtain most arrest information except for those arrests in which:

- three years have elapsed since the date of arrest;
- no conviction has occurred; and
- no proceedings are pending.

This exception does not apply, however, to the Department of Public Welfare and other county agencies relating to children and youth. These agencies may obtain an individual’s complete criminal history,

including all arrests, in the course of their employment relating to children.²⁴

In addition, arrests that did **not** result in a conviction may be expunged, and those that are will not appear on the rap sheets PSPCR disseminates to criminal and noncriminal justice agencies (see p. 17 for discussion of expungement). In addition, dismissals resulting from successful completion of the ARD program, PWV cases, and DLT cases (see p. 18) should also be omitted from such PSPCR rap sheets. John's arrest may be the type of arrest information that is not included on reports disseminated to noncriminal justice employers. To be sure, though, he must get a copy of his rap sheet to determine whether he satisfies the three requirements. His felony conviction will, under all circumstances, be listed on his rap sheet.

In sum, all employers in Pennsylvania are entitled to obtain some level of criminal history record information. All adult convictions for misdemeanors and felonies may be and are reported in the PSPCR rap sheets employers obtain. Convictions for summary offenses will also appear in those rap sheets.

NOTE: Pennsylvania employers can obtain criminal records easily.

PSPCR provides rap sheets via the Internet through its “**Pennsylvania Access to the Criminal History**” (PATCH) website. Both criminal and non-criminal justice agencies may register

to access criminal history record information using PATCH. An employer requires only the following information to access an individual's criminal record: (1) name; (2) date of birth; and (3) social security number. Most employment applications ask applicants to supply the employer with this information, which then provides the employer with access to the individual's rap sheet.

Consumer Reports

Some employers routinely screen prospective employees by obtaining background investigation reports from a consumer reporting agency. “**Consumer reporting agencies**” (also known as credit reporting or background investigation agencies) are firms that prepare reports on individuals for employment, credit, or insurance purposes. Their reports often contain information about the individual's criminal record, employment history, credit rating, and sometimes past drug or alcohol problems. The agencies gather this information by checking public records (such as court files) and by talking to former employers and others about the person.

Consumer reporting agencies are regulated by the **federal Fair Credit Reporting Act**.²⁵ This law limits the information about an individual's criminal record history that can be included in a “consumer report.” This law also limits the uses of consumer reports. While many states have their own version of the

²⁴ 18 PA. CONS. STAT. ANN. § 912.1.

²⁵ 18 PA. CONS. STAT. ANN. § 912.1.

federal law, Pennsylvania does not. Pennsylvania relies entirely upon the federal regulations for consumer protection.

The Fair Credit Reporting Act forbids the reporting of certain negative information that is more than seven years old. For example, information about arrests not leading to conviction may only be reported if they have occurred in the last seven years or the statute of limitations has not expired. Conviction information can be reported regardless of when it occurred. The federal law's restrictions on reporting this information do not apply if the job has a salary of \$75,000 or more.²⁶

In addition, the Fair Credit Reporting Act contains protections against inaccurate reports. It is a violation of the federal law for a consumer reporting agency to report any information which it has reason to know is inaccurate. The law requires that agencies "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual. . . ."²⁷

Before requesting a report about a job applicant from a consumer reporting agency, an employer must notify the applicant that a report may be requested. If an "investigative consumer report" is to be obtained, the applicant must first sign a written authorization consenting to the preparation of the report. (An "investigative consumer report" is a consumer report for which information is

gathered through personal interviews and written records.) If an employer does obtain a consumer report, the employer must give the individual the consumer reporting agency's name and address upon written request.

The person can then contact the consumer reporting agency, which is required to give the individual a copy of the report and any other information in the agency's files concerning that individual.

If inaccurate or incomplete information appears in a consumer reporting agency's file, the individual should notify the agency. The agency has an obligation under the Fair Credit Reporting Act to promptly reinvestigate and correct any errors. If the agency finds that an item was in error, it must, upon request, notify any employer who was given the information during the previous two years about the correction. If the agency, after reinvestigating, still believes that the information is complete and correct, the individual has the right to file a statement with the consumer reporting agency concerning the dispute. Any future reports made by the agency containing that information must state that the information is disputed and include the person's statement.

It may be wise for John to obtain a copy of his consumer report prior to beginning his job search. First, John can familiarize himself with the contents of his report so that he will be aware of the information prospective employers are receiving. He

²⁶ 15 U.S.C. § 1681.

²⁷ 15 U.S.C. § 1681(c)(a).

Correcting inaccuracies before the potential employer discovers them will alleviate the damage caused by an inaccurate report.

will also be prepared to dispute any inaccurate information or items with either the consumer reporting agency or the source of the information. Correcting inaccuracies before the potential employer discovers them will alleviate the damage caused by an inaccurate report. If John certifies that he is on welfare or unemployed and planning to seek employment within sixty days, he can receive one free report within a twelve-month period.

How to Correct Mistakes on a Criminal Record

Once your clients have familiarized themselves with their criminal record, they should try to clean up any mistakes that appear on their rap sheet. Some common mistakes are arrests that have no dispositions, erroneous or incomplete sentencing information, and duplicate entries (which may make one arrest and conviction look like several). Such errors or omissions may make your client's record appear more serious than it really is.

Sometimes an employer will find out about a person's arrest, but the rap sheet will not have information about its final outcome or will contain incorrect information. In those cases, it may be useful for your client to give the employer a certified copy of a court order to confirm that the arrest did not result in a conviction.

A court order contains the arrest charge(s), the docket number of the case,

and the disposition of the case (for example, dismissal or conviction). If the case led to conviction, it will describe the conviction charge(s) (which may be different from the arrest charge), the date of conviction, and the sentence. Orders can be used by your client to correct errors on their rap sheets or an employer's inaccurate information about arrests or convictions.

Your client can request an order from the clerk of the court in which he appeared after having been arrested. In Pennsylvania, misdemeanors are handled in the municipal courts or court of common pleas, and felonies are disposed of in the court of common pleas. All summary offenses except summary traffic offenses are tried in the municipal courts. Also, the City of Pittsburgh has its own criminal court called the Pittsburgh Magistrates Court, which has jurisdiction over all summary offenses, misdemeanors, and felonies committed within the Pittsburgh city limits. The fee for orders is \$4.50. To help the clerk locate an individual's records, the client should provide his name, the date of arrest, and the charge(s). Clients should have identification when seeking records from the court.

If errors are detected in the PSPCR records, a request for correction can be made by writing to PSPCR (see below) or by completing and sending in the "Statement of Challenge" form that is attached to the rap sheet sent by PSPCR. Clients should send a certified copy of a court order for each record they are challenging, even though documentation of correct case disposition is not required.

(Photocopies are not acceptable for record correction.) PSPCR will investigate the case under dispute and inform the applicant of the result of the investigation within sixty days. If the challenge is considered valid, PSPCR must correct the rap sheet and send a corrected copy to the individual, along with the names of all agencies and individuals who received the inaccurate rap sheet. If the challenge is denied, your client may appeal the decision to the Attorney General (see contact information below) within thirty days of the adverse decision. The Attorney General's decision is then subject to review by the Commonwealth Court.²⁸

Pennsylvania Office of Attorney General
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

If your clients find errors in their federal (FBI) records, they should contact the agency that reported the information to the FBI (for example, the local police department that reported an arrest in a case in which no disposition is reported on the FBI record).

How to Get Criminal Records Expunged

Clients with arrests that were resolved in their favor may be eligible to have their records expunged. Records of individuals who have successfully completed the ARD program and dismissals in PWV and DLT cases (see pp. 10-11) should have

been automatically expunged (although mistakes do occur). Having a case expunged means that information about the arrest is removed from the version of the rap sheet that will be sent to employers and others. However, it is important to understand that the record of an expunged arrest is never completely destroyed. A record of all arrests will remain in a confidential file in the PSPCR computer. Expunged information is retained and can, under limited circumstances, be used against an individual. For example, prosecutors and PSPCR keep lists of expunged ARD, PWV, and DLT cases to determine future eligibility for these programs.

Misdemeanor and felony convictions cannot be expunged in Pennsylvania.

However, there are six types of records that may be expunged:

1. Arrests that were resolved in the individual's favor. Cases that resulted in acquittal, dismissal, or a decision by the police or prosecutor not to prosecute within eighteen months of arrest are examples. Expungement is not automatic in these circumstances. You must file a petition and order in court and appear before a judge.²⁹

2. Withdrawal, dismissal, or acquittal of certain minor drug offenses falling under the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act. ARD, PWV, and DLT cases should be expunged automatically pursuant to this section, unless the Commonwealth

²⁸ 18 PA. CONS. STAT. ANN. § 9152.

²⁹ 18 PA. CONS. STAT. ANN. § 9122.

Attorney shows compelling reasons why the record should be retained. However, this type of expungement is available as a matter of right only once. Thereafter, individuals must petition for expungement under this law.³⁰

3. Dismissals based upon successful completion of the ARD program (see

p. 10). Unless the Commonwealth Attorney shows compelling reasons why the record should be retained, the judge will order expungement of these records at the time of dismissal. Consequently, expungement should be automatic for these cases.³¹

4. Records of juvenile delinquency may be expunged in four circumstances:

(i) unsubstantiated, dismissed complaints;

(ii) six months have elapsed since final discharge from supervision under a consent decree (a court order committing a child to supervision in his own home);

(iii) five years have elapsed since final discharge from any other disposition, the individual has not had any other convictions or juvenile delinquency adjudications, and no other proceedings are pending against the individual; or

(iv) the individual is eighteen years of age or older, the Commonwealth Attorney consents, and the court orders expungement after considering the following factors:

- the type of offense;
- the individual's age;
- employment history;
- criminal record;
- history of drug or alcohol dependence;
- adverse consequences of retaining the record; and
- whether record retention is necessary for public safety.³²

5. Individuals who have reached seventy years of age and have been free of arrest or prosecution for ten years since release may petition for expungement of their entire criminal record.³³

6. The complete criminal history record information of individuals who have been dead for three years may also be expunged.³⁴

It may be necessary to file an expungement motion to expunge the records of those cases that are not done automatically. However, in circumstances where expungement should be automatic, if a mistake is made, your client will still have to file a motion and order in court and appear before a judge. Each court is free to establish its own procedures for the expungement of cases. Your client should call the court in which his case was heard and ask the court clerk how to apply for expungement in that court. Some courts require written expungement motions; others will expunge records on the basis of an oral request. Check with the clerk of the court that dealt with the case to find out the proper procedure.

³⁰ 35 PA. STAT. §§ 780-119.

³¹ PA. R. CRIM. P. RULE 320.

³² 18 PA. CONS. STAT. ANN. § 9123.

³³ 18 PA. CONS. STAT. ANN. § 9122.

³⁴ 18 PA. CONS. STAT. ANN. § 9122.

The clerk will know whether the services of an attorney will be needed to file an expungement motion or whether the clerk can help the applicant prepare and file the motion without an attorney. The county public defender or pre-trial services office at the courthouse may also be able to assist your client with an expungement motion. (Clients who want to expunge arrests or correct information on their rap sheets can consult [How to Get and Clean Up Your Pennsylvania Rap Sheet](#), prepared by the Legal Action Center.)

To assist John, you and he should review his rap sheet to determine if, based on the dispositions, any charge on it can be expunged. For instance, John's recent conviction that led to his incarceration would not be eligible for expungement relief because he was convicted of a felony, which can never be expunged. If his previous arrest was resolved in his favor, he would be eligible to file a petition seeking expungement.

Pardons (Executive Clemency)

If convictions cannot be expunged routinely in Pennsylvania, can an ex-offender do anything to mitigate the effect of these convictions? Although granted infrequently, a pardon (also known as executive clemency) is the only way to regain the rights lost upon conviction. The loss of rights, known as civil disabilities, include the right to vote, hold public office, serve on a jury, and be a notary public.

Any individual who has a criminal record or is incarcerated in prison is eligible to apply for a pardon. Although the ultimate

decision of whether an individual is granted a pardon rests with the Governor, the Board of Pardons (Board) must first recommend that a pardon be granted. Therefore, the initial step in the process of applying for a pardon is to obtain an "Application for Clemency" from the Board. Individuals must pay a \$4 fee to obtain an application. Only certified/cashier's checks or money orders made payable to the Commonwealth of Pennsylvania will be accepted as payment. A letter requesting the application, a self-addressed business-sized envelope, and payment should be sent to the address on p. 20.

Any individual who has a criminal record or is incarcerated in prison is eligible to apply for a pardon.

This application serves as a request for a hearing before the Board. If this request is denied, the applicant will not be granted a pardon. When considering whether to grant the applicant a hearing, the Board considers factors such as:

- severity of the offense for which convicted;
- recency of the conviction;
- financial stability;
- length of time elapsed since last arrest or conviction; and
- familial status.

The applicant must also demonstrate that he is a "responsible, contributing member of society." Participation in community organizations, volunteer work, child care, elder parent care, or membership in religious organizations can be evidence of such character. The process of applying for and receiving a pardon generally takes

more than a year to complete. Applicants must pay a \$20 fee to have the application processed. Applicants may have the fee waived by filing an “in forma pauperis” application, demonstrating financial hardship. Applicants may also have the fee waived if they are incarcerated. However, requesting a fee waiver may prejudice an applicant, because financial self-sufficiency is one of the factors the Board considers in deciding whether to grant a pardon.

The applicant must also submit five passport-size photos, ten copies of the application, and six copies of his criminal record. If any traffic violations are involved, the individual must include the original and five copies of his driving record. After these materials are compiled, the client should make copies of these materials for his records. The application, photos, criminal record, driving record (if necessary), and copies should be sent to the following address:

Board of Pardons
333 Market Street, 15th Floor
Harrisburg, PA 17126
(717) 787-2596

After an application is filed, a probation officer conducts an investigation. Once the probation officer prepares a report, the applicant’s file is sent to the Board for review. The Board consists of five members, and two must vote to grant a hearing. If a hearing is granted, the applicant must appear for it. Hearings are

public and last for only fifteen minutes. Prior to the hearing, a notice will appear in the newspaper of the county in which the individual’s trial was held. While representation by an attorney is not necessary, an individual may be represented by an attorney or anyone else. At the hearing, the Board will examine whether the individual feels remorse and assess whether he is likely to commit another offense. In addition to addressing these issues, the applicant should inform the Board of the barriers presented by the criminal conviction(s), particularly with respect to employment. The Board’s review may take from four to eight months.

If three members of the Board agree that the individual should be pardoned, the Board will send a recommendation to the Governor. It can take up to a year for the Governor to issue a final decision. If the Governor grants the individual a pardon, a signed charter is issued. The individual can then proceed to the clerk of the court in the city where the offense was committed and petition for expungement of the criminal record.³⁵

The Board may reconsider a denied application if the applicant can demonstrate changed circumstances or other compelling reasons. Requests for reconsideration of an application may be made to the Board at any public hearing, and will be granted based upon a majority vote. Public hearing notices appear in local newspapers daily. However, it is

³⁵ 37 PA. STAT. §§ 81.211-304.

unlikely that an application will be reconsidered following a request at a general public hearing.³⁶

In John's case, it may not be advisable for him to seek a pardon since at least two of the factors the Board considers when determining whether to grant a hearing are not satisfied. First, his criminal history is fairly recent — he was released just four months ago. He also cannot demonstrate financial stability because he is unemployed. The process of obtaining a pardon is also time-consuming, costly, and infrequently successful. John's chances of receiving a pardon may improve with time and change of circumstances (for example, once he has been employed for awhile).

How to Upgrade a Less Than Honorable Military Discharge

Employers often request military records, especially when an applicant has little work experience. Frequently employers ask for copies of discharge papers (form DD-214) and ask about discharge status. Several types of discharges exist:

- Honorable
- General
 1. Under Honorable Conditions
 2. Administrative
- Undesirable
- Bad Conduct (determined by court martial)
- Dishonorable (determined by court martial)

Most veterans receive honorable discharges, so if your client has a less than honorable discharge (General or Undesirable), it can pose a serious problem. Discharges are upgraded frequently, so encourage your client to apply.

Any person who leaves military service with less than an honorable discharge can file an application to have it upgraded with the appropriate branch of the service. To apply, your client will need copies of his military records, which can be obtained from:

Military Personnel Records Center
9700 Page Avenue
St. Louis, MO 63132
(314) 263-3901

To facilitate the request, clients should use a Department of Defense Form 180, "Request Pertaining to Military Records." This form can be obtained by calling the Department of Defense at (703) 697-5737 or by picking one up at a veterans organization. **Having all one's military records is essential for success.** Some veterans groups advise applicants who have not secured copies of their records to withdraw their application and resubmit it when they have obtained their records.

People who have a bad conduct or dishonorable discharge that resulted from a **special court martial**, or those who received less than honorable discharges because of **disciplinary action** short of

³⁶ 37 PA. STAT. § 81.271.

court martial, should apply to the **Discharge Review Board (DRB)** of the appropriate branch of service for a review of discharge. Your client should use Department of Defense Form 293 (DD-293). These forms are available at local VA regional offices or by calling the Department of Veterans Affairs at (800) 827-1000. Ordinarily, one must apply within fifteen years of the date of discharge from the service.

However, anyone wanting to upgrade a discharge that occurred more than fifteen years ago may file a motion with the **Board for Correction of Military Records (BCMR)** of the appropriate branch of service (see address below). Department of Defense Form 149 (DD-149) should be used if the veteran was discharged more than fifteen years ago.

If your client's discharge was the result of a **general court martial**, then he must apply to the BCMR for upgrading. There is no time limit on this application. One also applies to the BCMR to correct any errors found in the discharge papers.

Board for Correction of Military Records
(C-60)
400 7th Street SW
Washington, DC 20590
(202) 366-9335

After a client applies to upgrade a discharge, the appropriate panel will evaluate the case. If the DRB is handling the case, there will probably be a hearing on the application. Applicants should

have representation from an attorney, legal services agency, or a lay advocate.

If the BCMR is handling the case, there will probably not be a hearing. Rather, the matter is likely to be decided based upon the written materials submitted on the applicant's behalf. It is best to seek legal assistance in preparing these materials.

For further assistance, contact the following agencies:

Southwestern Pennsylvania Chapter of the
American Red Cross
225 Boulevard of the Allies
P.O. Box 1769
Pittsburgh, PA 15320-1769
(412) 263-3100
(or check phone book for the office
nearest you)

Bureau for Veterans Affairs
Pennsylvania Department of Military and
Veterans Affairs
Annville, PA 17003
(800) 54-PA VET

Vietnam-era veterans may also call:

Vietnam Veterans Leadership Program
1323 Forbes Avenue, Suite 202
Pittsburgh, PA 15219-4725
(412) 281-3144

Vietnam Veterans Leadership Program
Westmont Professional Building
1650 Menoher Boulevard
Johnstown, PA 15905
(814) 255-7892

III. Preparation to Prevent Discrimination

Once an employer has rejected an applicant, it is much harder to get the decision reversed than it would have been to prevent it initially. Preparing your client for the hiring process can often avert a rejection based on the client's alcoholism or addiction history or criminal record. So, before your client applies for employment, learn about the job seeker and the prospective job and hiring process.

Learn About the Job and the Hiring Process

Exploring the requirements of the job in advance enables you to anticipate the employer's concerns and to help your client assemble the information and documentation that will address those concerns. The information you need to gather about prospective employers may be obtained by asking the same type of questions that any good job developer would ask as a matter of course.

Understanding the hiring process can reduce the anxiety that everyone feels when applying for a job. In addition, knowing how the employer makes hiring decisions will enable you to ascertain whether an employer is treating your clients differently than other applicants. Some questions you should ask include:

- What kinds of jobs are available?
- How many positions are open?
- What duties does the job entail?
- Is there a standard application form? (The applicant should secure an extra copy whenever possible.)
- Is there an interview? Who conducts it?
- Who makes the final hiring decision?
- How long does the process usually take?
- How are applicants usually notified about hiring decisions?
- Is a medical examination required? Does it involve urine testing or other screening for drug use? What drugs will be identified?
- Are applicants fingerprinted?
- Does the employer run a routine check with law enforcement agencies for applicants' criminal records?
- Does the employer obtain reports on applicants from a consumer credit reporting agency?

Learn About the Client

The importance of having a thorough interview with your client before he or she applies for a job cannot be overstated. The goal is, of course, to anticipate potential difficulties and help applicants present themselves in the best possible

light. You should explore every aspect of a job seeker's past that an employer might want to know about. This may require digging into the person's background beyond the point dictated by considerations of privacy or tact. Explore inconsistencies or improbabilities until you are convinced that you have the entire, unvarnished story. It is important to realize that clients may be reluctant to reveal potential problems out of fear that you will somehow disapprove or not assist them. Recognize this concern and confront it in a straightforward way.

What Questions to Ask: The Pre-application Interview

History of Drug or Alcohol Problems

Find out the exact nature and duration of your client's past alcohol or drug use. Review with your client all the treatment services he has participated in. If he has undergone treatment, find out where and when, and then contact the treatment programs to discuss your client's record in the program. You should confirm the client's treatment history and readiness for employment with the treatment program's medical and counseling staff. Remember that you must obtain your client's written consent before making contact with a drug or alcohol treatment program, or participating in a twelve-step program, such as Narcotics Anonymous (NA) or Alcoholics Anonymous (AA). Determine his progress and whether there is evidence of continued use.

Since John received substance abuse treatment while in prison, you should try to find out what kind of treatment he received and whether he has certification for completing the treatment program. Also, you may want to find out whether he has or is currently receiving community-based treatment or other after-care services and, if so, obtain any available progress reports.

Arrest and Conviction History

For each arrest, determine the date, the exact charges, and the disposition of the charges. (See "Dealing with a Criminal Record," p. 9.) If the arrest resulted in a conviction, obtain the name of the court in which the conviction was issued and sentence imposed, and learn how and where the sentence was served. Determine whether your client is still on probation or parole and, if so, identify his supervisor.

Like many clients, John is unclear about the date, disposition and exact nature of his first arrest. Advise him to get a copy of his official criminal record to determine this information, including whether this charge occurred when he was a juvenile. The criminal record will also refresh John's memory about other criminal charges he may have forgotten.

Employment History

Find out about all of your client's former jobs. Determine where the client worked, length of employment, and the job responsibilities. Pay special attention to the client's reason for leaving a position — make sure it is specific and that you

know all the circumstances surrounding it. For example, ask if your client resigned instead of being terminated. Determine if s/he was ever subject to disciplinary action at work or was ever denied unemployment compensation.

Military History

An employer may ask your client if he has served time in the military. Find out whether your client was subject to court martial or disciplinary action short of court martial. Ask whether any tours of duty were unexpectedly shortened. Determine the status of the discharge and, if possible, get a copy of the discharge papers (Form DD-214). Remember that “under honorable conditions” is **not** the same as “honorable.” (See “How to Upgrade a Less Than Honorable Military Discharge,” p. 21.)

Unexplained Time Gaps in History

If there are substantial periods of time not accounted for by employment, education, the military, incarceration, or treatment, investigate them thoroughly. These periods are often warning flags to an employer.

A pre-application interview should also explore positive traits and accomplishments that can be worked into an interview or can be highlighted on a job application form. The most important traits are those that counterbalance the applicant’s weak spots.

IV. Applying for the Job

The Job Application

After you have learned about your client's background, the job, and the hiring process, counseling him about how to apply for the job is crucial. If possible, get a copy of the job application from the employer. If not, ask the job-seeker to bring a copy so you can assist him in completing it. If the employer will not release the application, be sure your client understands how to answer all questions to his advantage.

In general, job seekers should limit their responses to the scope of the inquiry. For example, if an application form asks a person to list all "convictions" or convictions of all "offenses," the applicant should list all criminal convictions (summary offenses, misdemeanors, and felonies) but should not list any arrest not followed by a conviction (for example, an arrest resulting in acquittal or dismissal). If an application asks only about a current drug problem, past dependence should not be mentioned. It is, therefore, important for you and John to be familiar with his criminal record and his drug history so that you can prepare him to answer these types of questions.

Juvenile delinquency adjudications are probably not required on a job application that requests convictions. Under Pennsylvania law, a juvenile delinquency adjudication is not considered a conviction. Consequently, such an order does not impose any of the civil disabilities a conviction imposes, nor does such a finding disqualify a person from civil service employment. In addition, most juvenile proceedings are confidential, and thus not a matter of public record.³⁷

Two types of juvenile proceedings are public, however. First, if the child has been adjudicated delinquent for certain violent offenses, such as burglary, arson, rape, robbery, or kidnapping, the juvenile's criminal history record information will be available to the public. In addition, the records will be public if the child was adjudicated delinquent as a result of specific offenses relating to firearms.³⁸ These records will be available in the county clerk's office of the juvenile court in which the juvenile is tried. However, these records will not appear on an individual's rap sheet.

Under such circumstances, if an individual is asked on an application

³⁷ 42 PA. CONS. STAT. ANN. § 6354.

³⁸ 42 PA. CONS. STAT. ANN. § 6308.

whether he has ever been arrested, the individual should disclose the underlying arrest, and consider discussing the juvenile delinquency adjudication. Otherwise, if the individual does not acknowledge the adjudication, and the employer discovers it, the employer might consider the individual's failure to disclose criminal history information to be lying. On the contrary, if an employer inquires about convictions (not arrests), the individual would not be required to reveal these types of juvenile delinquency adjudications because no juvenile delinquency adjudication is considered a conviction.³⁹

As discussed later, many records of juvenile delinquency may be expunged. If an individual's juvenile delinquency adjudication is expunged, an employer is prohibited from considering the adjudication as part of the hiring process. Consequently, an individual would not be required to acknowledge an expunged juvenile record on an employment application or in a job interview.

If the juvenile's case is transferred to criminal court, the juvenile may be convicted of criminal charges as if he were an adult, and the offense will appear on his rap sheet. Consequently, if a juvenile is adjudicated as an adult, he should reveal the conviction if asked about it on an employment application. Since these criminal convictions are considered to be adult criminal convictions, they cannot be expunged (see discussion on p. 17 about expungement).

When in doubt, however, it is usually more prudent to reveal than to withhold; an employer who discovers anything that the applicant has not disclosed may give it more attention than it deserves, and may even accuse your client of willful misrepresentation. Advise clients that they are under no obligation to volunteer information about their drug or alcohol histories or criminal records, or about any other troublesome aspect of their past. However, a job seeker should not attempt to evade an ambiguously worded inquiry when the questioner's intent is clear.

Many employers have access to your clients' criminal records. Because rap sheets may be incomplete or inaccurate, one of the most important things many of your clients can do to dramatically increase their chances of getting a job is to clean up their criminal record. (See Chapter II, "Dealing with a Criminal Record," p. 9.)

Disclosing Alcohol or Drug Dependence or Criminal History

Employers may ask questions concerning a person's history of alcohol or drug dependence after making a conditional offer of employment. Employers may ask pre-employment questions about arrests and job-related criminal convictions. When preparing to discuss their alcohol or drug use or criminal history, clients, like John, should bear in mind some common

³⁹ 42 PA. CONS. STAT. ANN. § 6354.

employer prejudices and beliefs about people in recovery or ex-offenders:

- the job seeker continues to abuse alcohol or drugs or is still committing crimes;
- the job seeker will relapse or revert to crime;
- drug dependence, alcoholism, or a criminal record stems from a fundamental character flaw;
- alcoholism or drug dependence results in lasting physical and/or psychological impairment; and
- all persons with former alcohol or drug problems and ex-offenders are unreliable and irresponsible.

Your client can overcome these prejudices by minimizing the negative aspects of his record and emphasizing the positive.

Your client can minimize an addiction or alcoholism history by describing it honestly and succinctly. He can put it into perspective by describing briefly any family problems or other circumstances that helped cause or foster the problem. If relevant, a client can also mention his relative youth at the time he was using, and stress the length of time he has been drug or alcohol-free, or successfully participating in treatment.

If some of your clients have a criminal record, they should reduce its negative aspects by attempting to place it in context. Your clients **should not** try to rationalize their behavior after the fact, or assert innocence of crimes for which they have been convicted, or dispute the seriousness of any conviction. Advise clients that these tactics are usually

counterproductive. The average employer will assume that the job seeker either has difficulty facing reality or thinks the employer can be conned.

Your clients **should** inform the employer of any mitigating circumstances connected with a criminal record. For example, a client can point out the relationship between his convictions for driving while intoxicated and his then-untreated alcoholism; this allows him to argue persuasively that, having successfully conquered the underlying alcoholism, he has conquered both. Another client might successfully emphasize that his last conviction was ten years ago. A third individual could note that he was only seventeen years old when he committed the only serious offense for which he was convicted.

In John's case, he should emphasize the substance abuse treatment, vocational training, and educational courses he successfully completed while incarcerated. If he has continued to participate in community-based substance abuse treatment, he should obtain letters from those providers and provide them to the employer as well.

Demonstrating Rehabilitation

Your client can emphasize the positive by demonstrating his rehabilitation. Make sure your client meets an employer only when ready with a firm statement of his rehabilitation efforts. To help your client

stress the positive parts of his background, look carefully at the following items:

Progress in Treatment Program

If your client has decided to reveal his addiction or criminal history, he should consider mentioning his participation in treatment or counseling. If your client has a good record in the program, he will almost certainly want to inform a potential employer of this. For example, your client might want to mention that he has participated voluntarily in drug treatment for three years, particularly if periodic testing at the program verifies that he has not reverted to drug or alcohol abuse during that time.

Previous Employment Record

If your client had been consistently employed during any period, either before or after becoming involved with alcohol, drugs, or crime, emphasize the fact. Highlight good performance and low absenteeism in previous positions, especially if the jobs involved difficult working conditions such as irregular hours or compulsory overtime.

Educational Achievements

What your client studied may not be nearly as important as the fact that he attended a school or training program. For example, if an individual's two-year residence in an alcoholism treatment program appears on his resume as a two-year gap between jobs, he can effectively stress his faithful attendance at a community college during the same two years.

Social and Religious Activities

Your client should stress any such activities, particularly those that demonstrate reliable performance in tasks that would be related to the particular crime. For example, if he has a conviction for larceny or embezzlement, the fact that he handles the cash at a neighborhood fund-raising event will be impressive.

Military Achievements

A good military record, especially if it displays commendations, educational achievements, or other special accomplishments, can be helpful. It shows an ability to work well in a structured environment. The job seeker should also include letters of recommendation from former employers if they are willing to provide them. Your client should send letters of recommendation from clergy, community leaders, or anyone else who might impress an employer. Employers tend to worry about whether applicants will make stable and reliable employees, so letters of recommendation should address that issue as favorably as possible.

You should also be aware of a federal program that encourages the employment of people in recovery and ex-offenders: the **Work Opportunities (or Welfare-to-Work) Tax Credit Program**. Under the program, employers receive substantial tax credits over two years for each person hired from the target group before January 1, 2002. Educating the employer about such tax advantages could make the difference in a job decision for a marginal

client. To find the specific requirements for the tax credit in your area, contact the Pennsylvania Department of Labor and Industry at (800) 345-2555.

Another federal program helps ex-offenders and individuals in recovery to obtain bonding. Employers often require bonding for employees in positions as messengers, cashiers, or stockbrokers, to name just a few.

The FBP will insure individuals for up to \$5,000 or \$10,000 (depending on the nature of the job) for up to six months.

The Federal Bonding Program (FBP) may bond a person who has been offered a job conditioned upon his being bonded, even if

he has been denied bonding by a private insurance company. The FBP will insure individuals for up to \$5,000 or \$10,000 (depending on the nature of the job) for a maximum of six months. The FBP is available at no charge to either employer or employee. After six months, the bond can be renewed through the FBP, but the employer or employee must pay for it. There are a limited number of bonds available per year. Contact the Pennsylvania Department of Labor and Industry for eligibility and availability information.

Some Special Problems

Correcting an Employer's Misinformation

Even if your client both discloses his alcohol or drug or criminal history and

presents evidence of rehabilitation to a potential employer, he may still encounter difficulties. Frequently an employer obtains criminal record information or information about a client's alcohol or drug problem from an independent source. In these cases, what the employer knows about an applicant may be more extensive than what the applicant has been asked to reveal.

As stated previously, the employer may obtain a rap sheet that contains errors, information that should have been expunged, information about commitments to alcohol or drug treatment programs, or data about alcohol- or drug-related charges that an employer may interpret as evidence of drug or alcohol dependence. This leaves the applicant in an awkward position, since he may not have an opportunity to comment on information — some of it incorrect — that may adversely affect the employer's decision.

There is no blanket prescription for handling this problem. Usually, if the applicant knows that the employer has obtained damaging misinformation, it is prudent to correct it even if the explanation carries him beyond the scope of the initial inquiry. In less clear-cut situations, what an applicant should do depends upon such factors as:

- whether he can determine what information the employer has obtained;
- whether that information is accurate;
- whether it can be explained effectively;
- whether the explanation is potentially more damaging than what the employer has already discovered.

Your client should certainly correct any errors that appear on his criminal history record before the employment process begins. If that is not possible, and your client knows that the employer will obtain his rap sheet, it is advisable to provide the potential employer with copies of court records for the items in error, even if the employer does not request them. Doing so at the outset will demonstrate to the employer that your client wishes to be candid about his record and should minimize the damaging effect of erroneous information.

Polygraph Tests

Many people with histories of drug or alcohol dependence or criminal histories worry about being subjected to polygraph (“lie detector”) tests by employers. You should know that — with two exceptions — it is illegal for employers in Pennsylvania to require job applicants or employees to submit to a polygraph examination as a condition of obtaining or keeping employment. The first exception applies to the field of “public law enforcement” (for example, police). In addition, individuals seeking positions involving access to or dispensing of narcotics or dangerous drugs may also be subjected to polygraph tests.

Under Pennsylvania law, it is a misdemeanor for any other employer to require applicants or employees to take lie detector tests.⁴⁰ If an employer violates this law, the applicant may file a criminal complaint and/or a civil lawsuit.

In addition, the federal **Employee Polygraph Protection Act of 1988 (EPPA)** makes it illegal for virtually all private employers to require job applicants to submit to polygraph tests, and severely restricts their use with employees.

Employers are generally prohibited from requiring or requesting any employee or job applicant to take a polygraph test and from discharging, disciplining, or discriminating against an employee or prospective employee for refusing to do so. Federal, state, and local governments are **not** affected by the law. Therefore, government employers may impose polygraph tests.

The EPPA permits polygraph tests to be administered in the private sector to prospective employees of certain companies providing security services (armored cars, alarm systems, or guards), and to certain prospective employees of pharmaceutical manufacturers or distributors. The EPPA also permits private firms to ask an individual employee to take a polygraph test when the employee is reasonably suspected of involvement in a workplace theft that resulted in economic loss to the employer.

Where polygraph tests are permitted, they are subject to numerous strict standards concerning the conduct of the test. People being examined have a number of specific rights, including the right to written notice before testing, the right to review the questions before being hooked up to the

⁴⁰ 18 PA. CONS. STAT. ANN. § 7321.

polygraph machine, the right to refuse or discontinue the test, and the right not to have the results disclosed to unauthorized persons.

Employers who violate the EPPA are subject to civil penalties of not more than \$10,000 and injunctive actions by the Secretary of Labor. Individuals subjected to polygraph examinations in violation of the EPPA may also file civil lawsuits within three years of the violation.

How to Respond to Illegal Questions

Now that you know how to recognize illegal questions (see p. 5), you and your client must confront the real issue: how to respond. If you anticipate the problem far enough in advance, you may be able to get the employer to eliminate an illegal question. You or an attorney can, without revealing the identity of the client, advise the employer of the illegality of the inquiry and the employer's potential legal liability.

If that approach is unsuccessful, or if time is of the essence, what should an applicant do? He can assert the legal right to refuse to answer the question, but the employer's response may be to deny employment for failure to cooperate. You could then elect to challenge the denial by filing a complaint or lawsuit under the laws discussed in Chapter V, "Job Rejection." Or the applicant can simply answer the question, recognizing that doing so helps the employer defeat the very purpose of the law at issue. When deciding which approach to take, consider:

- how badly the applicant needs the job;
- how damaging his answer would be;
- how likely it is that the applicant would prevail in a legal challenge arising from a refusal to answer the question; and
- how committed your program is to pursuing the matter to a hopefully-not-bitter end.

Lying

Everything we have said so far presupposes that the job seeker candidly and fully responds to questions concerning alcohol or drug problems or convictions. A question that frequently comes up is, "Should my client lie about his record?" The best advice is to tell the truth. Wholly apart from ethical considerations, a number of factors militate against lying. Where statements on an application or elsewhere are made under oath, knowingly making a material misstatement leaves one open to the risk of criminal prosecution. While it is unlikely that criminal charges would be brought against someone who lies on an employment application, the severity of the possible sanction suggests that it is a gamble not worth taking. The chances of successfully reversing such a rejection are almost non-existent.

Even if a client doesn't actually make false statements on an application, failing to answer specific questions may cause an employer to reject the person for omitting material information. These decisions are also difficult to challenge.

If your client manages to obtain the job without the employer detecting his record, his problems may not be over. Some employers do not fingerprint people until after they are hired. Others routinely encounter delays in securing criminal record information, scheduling physical examinations, and verifying statements on the application. If the criminal record or drug or alcohol history subsequently comes to light, the employer may fire

your client for having lied or omitted material information on the application. Even if you suspect that your client's history was the primary factor motivating the employer, the employer will almost certainly win an administrative hearing or lawsuit challenging the dismissal; nearly all administrative agencies and courts consider misrepresentation on an application a legitimate reason for terminating an employee.

V. Job Rejection

Informal Resolution

If a potential employer rejects your client when he applies for a job, try to determine if the client's alcohol, drug, or criminal history affected the decision. When making this determination, consider your client's qualifications for the job. For example, John has some experience working in food services jobs. If he applies for a job as a restaurant cashier after revealing his conviction for drug possession and arrest for petty theft, and he is denied the job, you can be fairly sure that his criminal history influenced the decision regardless of the reason given for rejection.

When you feel reasonably certain that your client's history contributed to his rejection, the next step is to get the employer to admit this. Without such an admission, your efforts to resolve the matter informally (without resorting to formal legal proceedings) will probably fail. Moreover, even when formal legal measures are available, pursuing such remedies requires time, energy, and money. Attempt an informal resolution first.

Sometimes if your client politely asks why he was not hired, he will be told that it was because of his alcohol or drug use and/or criminal history. As noted earlier, Pennsylvania law requires employers to

notify individuals in writing when they are excluded from employment based upon criminal records.⁴¹ If your client feels the employer's rejection was founded on criminal history information, he should request a letter explaining why he was not hired. If that does not work, it may help if you become directly involved.

The circumstances surrounding your client's rejection will determine how you should approach the employer to learn the reason for your client's rejection. In certain cases, it may be appropriate to refer your client to another employer. If you want to pursue the opportunity with the same employer, you may consider writing a nonthreatening letter — something on the order of “I'm anxious to do a better job preparing people for employment and would therefore like to know what it is about Mr. Doe that made you decide not to hire him.” You may want to use a more indirect approach if you suspect the employer may have an absolute ban on hiring ex-offenders. In these cases you may send a letter stating your interest in placing former offenders in meaningful jobs, and inquiring about possible openings. Another option, to avoid alienating the employer, is to have someone unconnected with your agency (such as a legal services attorney) ask the employer about its policy toward your client groups.

⁴¹ 18 PA. CONS. STAT. ANN. § 9125(c).

If the employer is uncooperative or continues to claim that the applicant's history did not affect the decision, you may have to turn to the more formal measures discussed later. If, however, the employer admits (or the records show) that your client's record may have influenced the rejection, ask for an opportunity to discuss the matter. You are an excellent mediator for this task. You know your client well and have researched the duties of the job. Thus, you can explain to the employer that your client's abilities closely match the requirements of the job. Keep in mind the same employer prejudices and concerns you prepared the applicant to address.

Stress the qualifications and employability of the individual who has been rejected. Explain to the employer how your program operates. Help the employer understand that:

- the program is designed to get at the root of the alcoholism, addiction, or criminal problem;
- persons with former alcohol and drug problems who are in recovery can remain that way;
- ex-offenders can stay out of trouble with the law;
- employees stabilized on methadone are indistinguishable from their co-workers in every material respect; and
- other comparable employers have knowingly hired individuals in recovery and ex-offenders and have not regretted the decision.

In making a case for a particular client, do not forget to assure the employer that the applicant is in fact sober, drug-free, or successfully participating in treatment. Explain what the person has done to become job-ready and demonstrate that he is responsible, stable, and respectful of others. Demonstrating this will vary from case to case, but remember that simply asserting that the job seeker possesses these traits is usually insufficient. Highlight activities (consistently arriving on time for therapy), accomplishments (successfully completing a series of courses), and experiences (getting married) that support your assertions. For instance, you should discuss the vocational training and substance abuse treatment he completed in prison. If it is applicable, you may also want to tell the employer about your positive experiences as John's job developer.

Sometimes it is appropriate to remind the employer of potential legal liability if he or she persists in denying your client a job. Approach this issue carefully. If you are too heavy-handed, the employer may take offense and refuse to try to work things out amicably. If, on the other hand, you soft-pedal the issue by mentioning potential liability as "a factor that everyone must be aware of," you may succeed in engaging the employer's full attention.

If the employer is recalcitrant or if your attempt to persuade him or her to reverse his or her initial decision proves unsuccessful, decide whether it is worth it to the job seeker and to the program to press the matter further. Among the factors you should consider are:

- Is the applicant able to do the job satisfactorily?
- How strong is the applicant’s evidence of rehabilitation?
- How badly does the applicant want or need this particular job?
- What other jobs are available?
- Are there other factors that might make this applicant attractive to an employer?
- Have you sent other applicants to the same employer? If so, how have they fared?
- How many potential jobs does this employer realistically represent?
- How much time can you devote to resolving the problem?

Administrative Appeals to Public Employers and Occupational Licensing Agencies

Sometime in the future, John may decide to apply for a cosmetology license to make use of the vocational training he received in prison. If he does, he may experience difficulties getting a license because of his criminal record. In Pennsylvania, the occupational licensing

board is entitled to deny, suspend, or revoke the licenses of individuals with certain drug-related felony convictions.⁴² John would, however, be entitled to a hearing in front of the occupational licensing board if any of these adverse actions were taken against him.

If John is denied a job with a governmental or quasi-governmental employer (for example, a public school, a public hospital, or a regional transportation authority), he may be entitled to challenge the decision in an administrative appeal to that agency or one designated to hear such appeals, such as the Civil Service Commission (see contact information below).⁴³

An administrative appeal may include a hearing or it may simply be an opportunity to submit documents and written statements John thinks are appropriate. A licensing agency almost always allows an unsuccessful applicant to appeal his license denial at a hearing before an impartial hearing examiner or panel.

Civil Service Commission
 Second Floor
 Strawberry Square Complex
 P.O. Box 569
 Harrisburg, PA 17108-0569
 (717) 783-3058

Civil Service Commission
 Room 1503
 State Office Building
 300 Liberty Avenue
 Pittsburgh, PA 15222-1210
 (412) 565-7666

⁴² 49 PA. CODE § 7.98 and 63 PA. CONS. STAT. ANN. § 519.

⁴³ 71 PA. CONS. STAT. ANN. § 741.951.

Civil Service Commission
Second Floor
10 South 11th Street
Philadelphia, PA 19107-3618
(215) 560-2253

Appeals to public agencies are likely to be available to those who have been denied a job because of their alcoholism or addiction history, and because of past arrests or convictions.

If an administrative appeal is available, encourage John to pursue it; such appeals are frequently successful. Try to get a lawyer to represent him. If you are unable to do so, have him request the appeal anyway, making sure the request is on time. Frequently an individual has as little as thirty days to request an appeal, and sometimes even less time. Once John has requested the appeal, you can return to the question of who should represent him. In most cases the answer is simple: **you** do it. You will already be familiar with the pertinent facts about John. You are already something of an expert on drug or alcohol treatment and ex-offender issues. You will probably already have a general understanding of the applicable law. In short, you fit the bill.

If there is a hearing, it will probably be informal, and legal technicalities (such as the rules of evidence) will not apply ordinarily. You should, of course, identify yourself as a lay advocate, not a lawyer. Hearing examiners are often not lawyers, so do not be intimidated by them. Even if they are lawyers, they will probably be less interested in discussing the law than in hearing your client's version of the facts.

In general, you should address the hearing officer as you would a private employer whom you are trying to persuade to reverse an initial decision rejecting an applicant. Educate the officer about drug or alcohol treatment (if it is an issue in the appeal). Emphasize John's strengths and rehabilitation.

The hearing officer will probably allow you to choose how to present John's case. Begin by telling the officer the areas or topics you want to cover and the order of your argument. This will help the examiner to follow your story and make him less inclined to interrupt your presentation with a line of questions that disturbs your train of thought. This introduction will also give you an opportunity to relax by covering material with which you are relatively familiar.

In presenting John's story, identify the general topics you want to cover and, taking each topic separately, decide what to emphasize. You and John can then prepare a statement covering all the relevant points, which he can read at the hearing. However, you should give serious consideration to drawing out John's story through questions and answers.

You and John should practice this question and answer technique in advance, so that you both feel comfortable with it. Don't worry about framing your questions elegantly. The more conversational your questions, the more relaxed both you and John will be. Tell John not to try to memorize the answers; otherwise, he will be too nervous about "blowing a line" to

concentrate on answering calmly and with assurance. The advantage of a question and answer format is that you can guide what John says and the level of detail. If he responds to a question less completely than you had hoped, and you feel that the answer is important, you may simply reword the question and ask it again.

NOTE: You and John should remember two things about these administrative remedies:

First, while John may ultimately get the job or license he wants, the appeal process

You and John should practice this question and answer technique in advance, so that you both feel comfortable with it.

takes time — sometimes months — before it results in a decision. John should not bank on a good outcome in the meantime. This

means that he should keep working or looking for work while the appeal is going forward. Also, keep in mind that the other remedies John may have the right to pursue — such as administrative complaints and/or lawsuits under the anti-discrimination laws discussed below — all have time limits of their own. Those time limits are likely to apply, and keep running, even if John has an administrative appeal pending. If he does not file a discrimination complaint or lawsuit within those time limits (see below), he may lose the right to challenge the employer’s decision under the anti-discrimination laws. So, stay mindful of those time limits even as your client pursues administrative appeals that may be available.

Second, successful administrative appeals may well get John the job or license he wants, but he may not be entitled to other remedies — like back pay or seniority retroactive to the date he was first denied the job or license. The antidiscrimination laws discussed below do offer this broader relief.

If the appeal is unsuccessful, John may be entitled to a further administrative appeal, or to challenge the administrative decision in court, under laws other than (or in addition to) the antidiscrimination laws discussed in this manual. In these circumstances, you should get advice from a lawyer on how best to proceed.

Legal Challenges to Discrimination Against Individuals in Recovery from Alcoholism or Drug Dependence

Formal Legal Challenge Under Anti-Discrimination Laws Against Public Employers

The federal and state laws that prohibit discrimination based on non-job-related “disabilities” may offer your clients a variety of remedies to choose from in challenging public employers’ and agencies’ discriminatory actions.

Federal Law

When the discriminating agency is a public employer, one or both of the federal laws that ban disability-based

If the appeal is unsuccessful, you should get advice from a lawyer on how best to proceed.

discrimination — the **Rehabilitation Act** of 1973 and the **Americans with Disabilities Act** of 1990 (ADA) — is likely to apply, and each of these laws gives your client a choice of

remedies. If the public employer receives federal grants or other federal financial assistance (and a significant number do), or is a federal agency, your client may file a lawsuit or an administrative complaint against it under Section 504 of the Rehabilitation Act. If the employer is a state or local government or governmental unit, your client may file an administrative complaint and a lawsuit against it under the ADA, regardless of whether it receives any federal funds.

Some public employers are covered by only one of these federal laws, but many are covered by both. Though each law has somewhat different rules for filing lawsuits and administrative complaints, the federal agencies charged with enforcing them are required to coordinate their efforts to ensure that complaints charging a violation of either or both laws are processed by the proper federal agency (or agencies), and that consistent standards are applied in enforcing both laws. So if an administrative complaint charges an employer with violating the Rehabilitation Act, and the ADA also applies to that employer, the complaint will be deemed dually and simultaneously filed under both laws and will be processed accordingly; and vice versa. What follows is an overview of the rules and procedures for pursuing the remedies available under each of these laws.

Under Section 504 of the Rehabilitation Act, clients who are subjected to discrimination based on their alcohol or drug history by a public employer that receives federal grants or aid have the right to file an administrative complaint or a lawsuit against the employer. You may be able to find out whether an employer receives federal grants or aid by calling its financial, administrative, or public relations office.

The time limit for filing a lawsuit under the Rehabilitation Act in Pennsylvania is two years from the date the discriminatory act occurred. Individuals generally do not have to pursue an administrative complaint before filing a lawsuit under Section 504 of the Act (as is also the case with the ADA) if the lawsuit is against a public employer, such as a government agency. However, please be aware that a federal district court in Pennsylvania has held that federal employees must first pursue administrative remedies before proceeding to court under Section 504 of the Rehabilitation Act.

Administrative complaints alleging violations of Section 504 of the Rehabilitation Act must be filed with the federal agency that provides the federal grants or other funds to the employer or agency within 180 days of the discriminatory act. To find out where and when to file such administrative complaints, call the federal funding agency's headquarters in Washington, DC, or its regional office in your area. The Federal Information Center at (800) 688-9889 will know where the various federal funding agencies' regional offices are located.

FEDERAL AND STATE REMEDIES FOR EMPLOYMENT DISCRIMINATION BASED ON DISABILITY

Statute	Type of Employer		Where to File Complaint		Deadline for Filing	
	Private	Public (state/local)	Administrative Agency	Court	Agency	Court
FEDERAL ADA						
Title I	Yes (15 or more permanent employees)	Yes	EEOC or Pennsylvania Human Relations Commission (PHRC)	Following Right to Sue Letter	180 days if proceed directly to EEOC 300 days if filed PHRA claim first	90 days after Right to Sue Letter
Title II	No	Yes	Not Required	Immediate/no exhaustion	N/A	2 years
Rehabilitation Act						
Sections 501 & 504 (Federal Employer)	Federal gov't only	Federal gov't only	Federal agency	Exhaustion required	Generally 180 days	90 days - if final agency action 180 days - if no final agency action
Section 503	Federal contract	Federal contract	Dept. of Labor OFCCP	No private action	300 days	N/A
Section 504 (Non-federal Employer)	Federal assistance	Federal assistance	DOJ or funding agency	Exhaustion may be required	180 days	2 years
PENNSYLVANIA						
Pennsylvania Human Relations Act (PHRA)	Yes (4 or more employees)	Yes	PHRA	Exhaustion required	1 year	If the PHRA fails to resolve or dismisses the complaint within 1 year of filing, the PHRA must give notice of right to sue within 2 years

One advantage of filing an administrative complaint under the Rehabilitation Act is that you do not need a lawyer. The

Some public employers are covered by only one of these federal laws, but many are covered by both.

complaint can be submitted in the form of a simple letter to the head of the federal agency that gives grants or aid to the employer. The letter should include:

- a statement that the letter is intended to be a complaint under the Rehabilitation Act of 1973;
- the name, address, and telephone number of the person who has been discriminated against;
- a statement that the person has a history of or is in treatment for alcoholism or drug dependence;
- the name and address of the employer who is being charged with discrimination;
- a description of exactly how the discrimination occurred, including a description of the job being sought, the qualifications of the person who was discriminated against, and how that person was treated differently from other job candidates;
- a statement of the date(s) the discriminatory act(s) occurred;
- a list of any questions about past or current alcohol or drug use, dependence or treatment, or other health conditions that appeared on the employment application or medical questionnaire;

- a description of what happened at any pre-employment medical examinations that may have taken place;
- the name, address, and telephone number of the job developer or counselor who may be helping with the complaint; and
- the signature of the person who has been discriminated against.

At the top of this letter write “Complaint under Rehabilitation Act of 1973.” Write the same thing on the envelope in which you mail the complaint. Once the complaint is filed, the government may ask for additional information or may request that the complainant fill out some simple forms.

If a federal agency is the discriminating employer, your client can file a complaint under the Rehabilitation Act with the equal employment opportunity (EEO) office of that agency. This must be done within thirty days of the discriminatory act being challenged. The Federal Information Center at (800) 688-9889 can direct you to the proper official. Some agencies may require written complaints; with others, you may be able to state your complaint orally. Check with the agency involved to be sure.

The Americans with Disabilities Act (ADA) does not apply to the federal government, but does apply to all other public employers and agencies, including all state and local governments and governmental units, like occupational licensing agencies and vocational rehabilitation and job training programs, regardless of the size of the employer or

agency. Clients claiming disability-based discrimination by one of these public agencies or employers in Pennsylvania must file an administrative complaint against it under the ADA with the federal Equal Employment Opportunity Commission (EEOC) (or with the U.S. Department of Justice, as described below). (In Pennsylvania, claims against public employers may not be filed under Title II of the ADA because the United States Court for the Eastern District of Pennsylvania has held Title II does not apply to employment.)

In addition, please be advised that your client cannot recover monetary damages in a Title I lawsuit against a state employer because of a United States Supreme Court decision issued in 2001. These lawsuits will also be most promising if pursued with legal representation.

Your clients do not need a lawyer to file an administrative complaint under the ADA. The time limit for filing an ADA complaint with the EEOC is ordinarily 180 days after the discriminatory act occurred. However, in Pennsylvania and other states that have laws that parallel the ADA, if the individual first files a complaint under state law with the state agency, the time limit for filing a complaint in the EEOC is 300 days after the discriminatory act. Clients can file complaints with the EEOC in person, by phone, or by mail. The EEOC will request the same kind of information that is set out above for Rehabilitation Act complaints (see p. 43), so your client should have that information at hand when he writes, calls, or goes to the EEOC to file a complaint.

ADA complaints should be filed at the nearest EEOC office. In Pennsylvania, the address of the EEOC regional office is:

Equal Employment Opportunity
Commission
Bourse Building
21 South 5th Street, Suite 400
Philadelphia, PA 19106-2515
(215) 451-5800

The U.S. Department of Justice will also accept complaints charging state and local government employers and agencies with employment discrimination under the ADA, and will refer them to the EEOC. ADA complaints filed with the Department of Justice may be sent to:

Coordination and Review Section
P.O. Box 6118
Civil Rights Division
U.S. Department of Justice
Washington, DC 20035-6118

Clients with questions about the ADA and its remedies and enforcement procedures may also call the Department of Justice's ADA Information Line at (202) 514-0301.

The Pennsylvania Human Relations Commission (addresses and phone numbers are listed on p. 45) has a work-sharing agreement with the federal EEOC. Therefore, the Commission will accept complaints charging discrimination in violation of the ADA and refer them to the EEOC. Clients have the option of filing directly with the Commission and asking it to refer their ADA complaints to the EEOC at the same time they file a discrimination complaint under Pennsylvania's Human Relations Act.

State Law

In addition to or in place of a federal Rehabilitation Act or ADA complaint, your client may pursue the remedies available under the **Pennsylvania Human Relations Act (PHRA)** to victims of discrimination based on non-job related history of or treatment for alcoholism or addiction. Since the PHRA applies to **all** state and local employers in Pennsylvania with four or more employees, its remedies are available against employers and agencies that may not be subject to the federal Rehabilitation Act (which applies only to recipients of federal funds or contracts) or the ADA (which applies to employers with fifteen or more permanent employees).

In Pennsylvania, individuals seeking recovery under the PHRA must file a complaint with the Pennsylvania Human Relations Commission (PHRC) before they can go to court. The time limit for filing a complaint is 180 days, unless an individual can convince PHRC the delay was “legally justified.”

An individual may file a complaint in the Court of Common Pleas after a year has elapsed if the PHRC fails to resolve a complaint, or after two years have elapsed if the PHRC dismisses a complaint. Voluntary settlement of complaints is, however, strongly encouraged.

Your client does not need a lawyer to file a complaint with the PHRC. Staff at the PHRC are available to assist clients draft complaints and prepare them in legal form. Complaint forms can be obtained

from the appropriate office. See the list on p. 45 for the nearest PHRC office.

Proceedings in the PHRC are relatively informal and normally complainants do not have legal representation. Your client should bring copies of any relevant documents he may have, such as a letter detailing the reasons for rejection. After a complaint is filed, the agency will investigate the charges. In addition to the investigation, a fact-finding conference is generally held shortly after an individual files a complaint. The conference consists of interviews and examination of other evidence, including documents and witnesses.

If the PHRC finds probable cause to believe discrimination occurred, the employer will be asked to: (1) refrain from further discrimination; and (2) otherwise remedy the situation according to PHRC orders. This process is called “conciliation.” Remedies can include hiring and monetary compensation for loss of work and out-of-pocket expenses. Compensatory damages for emotional distress are not available.

A public hearing will be ordered if this “conciliation” process fails. The Hearing Examiner will award damages at the hearing if discrimination is found. Otherwise, the complaint will be dismissed, and the individual may then appeal to the Court of Common Pleas.

To file a complaint under state law alleging discrimination based on an alcohol (and possibly drug) history or treatment, your client should contact the Pennsylvania Human Relations Commission at one of the following offices:

PHRC Headquarters
101 South Second Street, Suite 300
Harrisburg, PA 17105-3145
(717) 787-4087

PHRC
Harrisburg Regional Office
Riverfront Office Center
1101-1125 South Front Street, 5th Floor
Harrisburg, PA 17104-2515
(717) 787-9784

PHRC
Philadelphia Regional Office
711 State Office Building
1400 Spring Garden Street
Philadelphia, PA 19130-4088
(215) 560-2496

PHRC
Pittsburgh Regional Office
11th Floor State Office Building
300 Liberty Avenue
Pittsburgh, PA 15222-1210
(412) 565-5395

(See also *The Pennsylvania Human Relations Commission: History, Mission, Rights, Remedies and Procedures* (2001) at http://sites.state.pa.us/PA.Exec/PHRC/publications/web_phrchistory.htm.)

Formal Legal Challenge Under Anti-Discrimination Laws Against Private Employers

Federal Law

As is the case with public employers, the federal **Rehabilitation Act** reaches some, and the **Americans with Disabilities Act** reaches many more (but not all), private

employers. Again, because some private employers are covered by both federal laws, your client may have the option of filing a formal administrative complaint against the employer under either or both the Rehabilitation Act and the ADA. The federal agencies charged with enforcing these two laws (see below) are coordinating their enforcement efforts so that complaints will be referred to the proper agency for processing.

If the employer is a private company that holds a federal contract or receives federal funds, like the employer John applied to, your client can file a formal administrative complaint against the employer under the Rehabilitation Act. The form of the complaint can be a letter like that described on p. 42. In the case of a federal contractor (Section 503 of the Rehabilitation Act applies to those who hold federal contracts of \$2,500 or more), the client must file a complaint with the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) within 300 days of the discriminatory act. Address the complaint to:

U.S. Department of Labor
O.F.C.C.P./E.S.A.
Curtis Center, Suite 750 West
170 S. Independence Mall West
Philadelphia, PA 19106
(215) 861-5763

To determine whether an employer is a federal contractor, contact the OFCCP at the relevant number listed above.

Individuals claiming discrimination by federal contractors in violation of Section 503 of the Rehabilitation Act do not have

the right to bring a lawsuit against the employer. But if the ADA also applies to that employer — and it will if the company employs fifteen or more permanent employees — a lawsuit is permitted (see below).

If the private employer receives federal grants or aid, Section 504 of the Rehabilitation Act applies just like it does to a public employer. Your client should file a complaint with the regional office of the federal agency that provides the funds to the employer within 180 days of the discriminatory act. As noted above, your client can find the regional office of the various federal agencies by calling the Federal Information Center at (800) 688-9889. If the funding agency does not have a regional office, file the complaint with the agency's national headquarters in Washington, DC.

Regardless of whether a private employer is covered by the Rehabilitation Act (because it receives federal contracts or funds), your client may file an administrative complaint against that employer under Title I of the Americans with Disabilities Act if it employs fifteen or more people on a permanent basis. ADA complaints against private employers must be filed with the EEOC or the PHRC (see pp. 43-44). Individuals charging a private employer with violating the ADA can also file a lawsuit, but only after first filing a complaint with the EEOC. The EEOC will issue a “right-to-sue” letter to the complainant after a certain period of time. Thus, in John's case, if he believes the employer rejected him for a job he is qualified to perform

because of his past drug dependence, he could challenge that decision by filing a complaint with the EEOC alleging a violation of the ADA.

State Law

All private employers in Pennsylvania, as well as employment agencies and labor organizations with four or more employees, are subject to the requirements of the **Pennsylvania Human Relations Act**. Thus, clients who have been denied employment by private employers may file a claim with the Pennsylvania Human Relations Commission, in addition to or instead of filing a Rehabilitation Act or ADA complaint. See pp. 44-45 on how to file a complaint with the Commission and a subsequent lawsuit. In John's case, he could file a complaint alleging disability-based discrimination with the PHRC and raise claims under both the Pennsylvania Human Relations Act and the ADA.

Filing an administrative complaint with these federal or state agencies can have a relatively immediate effect, although it often takes time to resolve the legal issues involved.

From the employer's point of view, an investigation by a federal or state agency is a nuisance in that the agency may seek the testimony of employees involved in the hiring process; compel the production of corporate books and records; and require the employer to answer a seemingly endless series of questions. Since the prudent employer will retain an attorney to represent it in dealing with

these agencies, such an investigation can cost the employer a great deal both in attorneys' fees and in time spent complying with agency requests. Moreover, the employer runs the risk that an agency will, during the course of its inquiry, uncover a pattern and practice of discriminatory activity for which the employer can additionally be held liable. It is, therefore, often in the employer's interest to settle a claim if it is actively pursued.

Legal Challenges to Discrimination Against Ex-Offenders

As was mentioned earlier in this manual, there is no federal law that specifically prohibits employment discrimination against ex-offenders, but discrimination based on an arrest or conviction record may in some cases constitute illegal race discrimination. If your client is African-American or Hispanic and has been rejected by a private or public employer because of a criminal record, he may be able to bring a race discrimination claim under **Title VII of the 1964 Civil Rights Act**.

Title VII prohibits private employers and state and local governments from discriminating in employment based upon race, color, gender, national origin, or religion. The EEOC has ruled that employment policies that exclude individuals based upon their criminal history may violate the Civil Rights Act because such policies disproportionately

impact minorities, who are arrested and convicted at a significantly higher rate than their percentage in the population.

According to the EEOC, exclusion based upon a criminal conviction must be justified by a **business necessity**. To establish business necessity, the employer must show that three factors were taken into consideration in the hiring decision: (1) the nature and gravity of the offense(s); (2) the time that has elapsed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. For example, business necessity exists where the applicant has a fairly recent conviction for a serious offense that is job-related.

Employers are also prohibited from excluding individuals based upon their arrest records absent a business justification. A "business justification" is demonstrated by showing the applicant engaged in the conduct for which he was arrested, and that the conduct is both job-related and fairly recent. The EEOC guidance requires employers to provide applicants a chance to explain their arrest records before they are disqualified from employment.

For further details, you should contact a lawyer, the EEOC at (800) 669-4000, or the Pennsylvania Human Relations Commission (see pp. 44-45). The time for filing an EEOC complaint alleging a Title VII complaint is the same as that for filing a Title I ADA complaint.

Pennsylvania state law provides several different remedies to individuals

subjected to discrimination based upon their criminal history. First, a Pennsylvania case provides a cause of action for wrongful discharge based upon ex-offender discrimination by public and private employers.⁴⁴ The time limit for bringing a wrongful discharge action is two years from the date of the discriminatory act.⁴⁵

Under the **CHRIA**, individuals may also file a lawsuit in state court if an employer uses criminal history record information illegally; for instance, if an employer excludes an individual based upon a conviction that is not job-related. Employers, state licensing agencies, and others who violate the CHRIA are also subject to administrative sanctions. No time limit exists for filing a complaint under the CHRIA.⁴⁶

Depending upon the job John sought, he may be able to challenge his job rejection under the CHRIA if his drug conviction was not related to the job. If, for example, John applies for a job in food services and is denied the job based upon his drug conviction, he could file a complaint under the CHRIA because a drug possession charge is unrelated to food services positions.

Ex-offenders who are denied occupational licenses by state agencies may be entitled to an administrative appeal (see p. 37). Individuals should consider pursuing such an appeal before taking any other action.

If the individual also has a racial discrimination claim, he may file a complaint with the Pennsylvania Human Relations Commission. (See pp. 44-45 for the procedure for filing complaints with the Commission.) Individuals must file complaints with the Commission within 180 days of the job denial or other discriminatory action that is the subject of the complaint.

As discussed previously in this manual, the Federal Fair Credit Reporting Act restricts the scope of information about arrests, convictions, alcohol or drug history, and other matters that may be included in reports that consumer reporting agencies provide to employers (see p. 15). If the employer's actions violated the Fair Credit Reporting Act, the individual has the option of suing in federal court or filing a complaint with the Federal Trade Commission. You may contact the Federal Trade Commission toll-free at (877) FTC-HELP.

⁴⁴ *Cisco v. United Parcel Services, Inc.*, 476 A.2d 1340, 328 Pa.Super. 300 (Super. 1984).

⁴⁵ 42 PA. CONS. STAT. ANN. § 5524.

⁴⁶ 18 PA. CONS. STAT. ANN. §§ 9181, 9183.

When to Consult an Attorney

It is important to consult an attorney if clients like John intend to pursue any kind of formal legal action, including filing an administrative complaint and/or a lawsuit. A lawyer can advise your client on the appropriate place to file a claim. Also, since legal standards can change, it is important to have the most current information. Because there is a growing national trend toward expanding access to criminal records, procedures and rules governing this area, in particular, are subject to change.

If John, on the other hand, wants to act as his own counsel in a suit, he may proceed pro se. Some courts have a pro se clerk who provides limited legal assistance. Otherwise, contact the clerk of the court in which the suit is to be filed for information about how to do so. Given the importance and complexity of these actions, a client who proceeds pro se should still consult with an attorney for advice.

If lawyers are not easily available, contact a local law school, a legal services office, or Bar Association office. You may be able to find a law student, paralegal, or attorney willing to help for little or no charge. Sometimes larger law firms will make limited resources available to help agencies as part of their pro bono contribution to the community. At the very least, you should be able to enlist the assistance of a local law library (in a law firm, Bar Association, or law school) to help you look up laws and regulations.

Conclusion

This manual provides guidance in dealing with clients who want to obtain employment. You are now equipped to advise your clients about the kinds of questions employers are permitted to ask about drug and alcohol history, criminal records, and the kind of information they are obligated to divulge. You are also prepared to help your clients become familiar with the contents of their rap sheets so that they know how to correct information and answer pre-employment inquiries directly and completely. This information also helps you make appropriate job referrals. Finally, we hope this manual gives you and all your clients a better understanding of employment rights and the state and federal laws that may protect them against discrimination.

Employment Discrimination

and

What to Do About It

A Guide for Pennsylvania Counselors of Individuals
with Criminal Records or in Recovery from
Alcohol and Drug Dependence

**LEGAL
ACTION
CENTER**



This booklet was made possible through the generous support of the **Charles Stewart Mott Foundation**.

The Legal Action Center would also like to thank **Public/Private Ventures** for its advice and assistance in preparing this manual.

The **Legal Action Center** is the only nonprofit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of alcohol and drug dependence, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas.

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Foreword

This manual was prepared by the Legal Action Center, a nonprofit law and policy office whose mission is to fight discrimination against and protect the privacy of people in recovery from drug dependence or alcoholism, individuals living with HIV/AIDS, and people with criminal records. It is based on the Center's experience advocating for policies that help people in recovery from alcohol and drug dependence and ex-offenders get and retain jobs, and assisting those who face employment discrimination because of their background. Over the years, our efforts have gone a long way toward helping employees and job applicants become aware of their rights and responsibilities, while increasing employers' awareness of theirs.

Discrimination in employment remains a problem. This manual describes what can be done to maximize an individual's ability to get employment and challenge discriminatory employment decisions. Many public and private job opportunities which appear, at first, to be closed to people in recovery or those with criminal histories can be opened with the right preparation. This assistance need not come from lawyers. People like you can make the difference between an individual getting the job instead of the cold shoulder. This manual serves as a guide for people who want to help individuals with criminal records and histories of alcoholism and drug dependence find and retain jobs in Pennsylvania.

This manual was made possible through a generous grant from the Charles Stewart Mott Foundation. The Legal Action Center would also like to thank Public/Private Ventures for its advice and assistance in preparing this manual.

Introduction

Those who work with individuals with criminal records and histories of substance abuse know the challenge of helping them find appropriate employment. Often this challenge begins with identifying and understanding the legal standards that apply to the hiring of individuals with criminal records and histories of substance abuse. The following typical scenario will guide you through the applicable legal standards discussed in this manual.

Scenario:

John Doe comes to your office looking for a job. He tells you that he has been turned down for several jobs and he is convinced that it is because he has a drug-related criminal record. You ask him about his criminal history and he tells you that he was arrested four or five years ago but he cannot remember the charge. He also tells you that he was incarcerated for two years for a drug possession conviction and was released four months ago. While in prison, he received substance abuse treatment for heroin dependence. His work history is sporadic and mostly includes food services jobs, although he did get some vocational training in cosmetology while he was in prison. He is frustrated and thinks it is unfair that he is being discriminated against based on his criminal record and his past drug dependence. You are familiar with the employer, which is a large government contractor, and you know that the company regularly has positions available that include a generous benefit package.

What should you do?

The starting point for assisting clients like John is to understand the federal and state laws that prohibit discrimination on the basis of disability and criminal justice status.

