
PUBLIC INTEREST LAW CENTER

MEMO

DATE: APRIL 17, 2017

RE: LAWS GOVERNING CRIMINAL RECORD INQUIRIES IN EMPLOYMENT

Introduction

This memorandum provides a brief overview of key federal, state, and local laws protecting the rights of job applicants with criminal records. It is not meant to be exhaustive; rather, it is to alert the reader to the most important laws, as a starting point. Other references include the EEOC's 2012 Enforcement Guidance, *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf, and a report of the Lawyers' Committee for Civil Rights Under Law, *Best Practice Standards: The Proper Use of Criminal Records in Hiring* (2013), *available at* <https://lawyerscommittee.org/wp-content/uploads/2015/07/Best-Practices-Standards-The-Proper-Use-of-Criminal-Records-in-Hiring.pdf>.

Title VII

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, restricts employers' use of criminal records in employment decisions. *See* EEOC Enforcement Guidance (2012). Because discrimination on the basis of criminal record has a disparate impact on racial minorities, it can be a form of race discrimination under Title VII. If an employer's policies or practices disproportionately screen out members of Title VII-protected groups, a presumption of discrimination arises. Once this presumption is present, the burden shifts to the employer to show that its policies or practices are not discriminatory. In order to avoid Title VII liability, the employer must overcome the presumption of discrimination by demonstrating that the policies or practices are job-related and consistent with business necessity. (The employer may demonstrate

this business necessity in a number of ways.) According to the EEOC Enforcement Guidance, an employer may use a conviction record to make an adverse employment decision only if the conviction makes the employee unsuitable for the position.

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681 *et seq.*, places additional restrictions on how employers may use criminal record information obtained through background checks to make employment decisions. FCRA governs employers' use of "consumer reports," including background checks and criminal records. Before an employer runs a background check on a current or potential employee, the employer must give written notice that this information might be used for employment decision and obtain the employee's written consent. Before an employer takes an adverse employment action based on information found in a background check, the employer must provide the employee with notice that it is considering making the decision, a copy of the report it relied on to make the decision, and a description of the employee's rights under FCRA to dispute the accuracy of the information in the report with the reporting agency. 15 U.S.C. § 1681b(b)(3). This requirement ensures that the employee has a timely opportunity to review the information in the report for accuracy. If an employer then takes an adverse action based on information found in a background check, the employer must provide notice to the employee. 15 U.S.C. § 1681m(a).

Criminal History Record Information Act

In Pennsylvania, the Criminal History Record Information Act (CHRIA), 18 Pa. C.S. §§ 9101 *et seq.*, further restricts how employers may consider criminal records in hiring. This law states that "felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for

which he has applied.” 18 Pa. C.S. § 9125(b). CHRIA also forbids employers from “denying employment on the basis of an arrest not resulting in a conviction.” *Commonwealth v. D.M.*, 548 Pa. 131, 137 n.2 (1997); accord *Foxworth v. Pa. State Police*, 228 F. App’x 151, 155 (3d Cir. 2007). Section 9125(c) of CHRIA requires employers to give written notification when a decision not to hire is based in whole or in part on the applicant’s criminal history.

“Ban the Box” Ordinance

In Philadelphia, the Fair Criminal Record Screening Standards Ordinance, Philadelphia Code §§ 9-3501 to -3507 (the “Ban the Box” Ordinance), restricts when and to what extent employers may inquire about applicants’ criminal records. This ordinance applies to all employers in the city of Philadelphia except criminal justice agencies. On employment applications and during initial interviews, an employer is prohibited from inquiring about any convictions and about arrests or criminal accusations that are not then pending. The employer is not allowed to check the job applicants’ criminal background until it had made a conditional offer of employment. Employers must not consider convictions that are more than seven years old, and must give individualized consideration to each applicant’s criminal history.

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