

# Liability traps that employers need to recognize, learn to avoid



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 Special to the Business Journal

Criminal background checks are a common sense-tool available to Pennsylvania employers to screen applicants for employment. Their use seems harmless enough. After all, which employer does not want to know that he or she may be about to hire or promote an ex-convict?

## COMMENTARY

But, as with so much else in the world of employment law, the use of criminal background checks by Pennsylvania employers is a legal minefield fraught with liability traps for the unwary employer.

The most dangerous trap for employers is not knowing when use of criminal background checks of applicants and employees is mandatory. Numerous ex-offenders are barred by Pennsylvania and federal law from engaging in some occupations, especially in the health-care, childcare and financial services industries. If you don't know which ex-offenders may be barred by law from working in your business, you need to find out quickly. The consequences to your business of not knowing who is prohibited from working for you could be disastrous, including exposure to civil fines and criminal penalties arising from your ignorance.

Your obligation to know whether a person may be barred by law from working for you is permanent. Pennsylvania occupational licensing boards regulate many Pennsylvania-based professionals, from accountants to waste disposal facility operators. These agencies are authorized to suspend or revoke licenses bestowed upon individuals who are subsequently convicted of certain crimes. An employer who learns of an employee's criminal conviction may have a duty to report the employee's criminal conviction to a licensing board. It is the employer's responsibility to know which licensing board regulates the employee's occupation and how and when to report the employee's criminal conviction to the appropriate commonwealth agency. Ask legal counsel for assistance if you are unsure whether you are meeting your obligations to Pennsylvania licensing agencies.

Another liability trap for Pennsylvania employers who use criminal background checks is an obscure Pennsylvania law known as The Criminal History Record Information Act of 1980. That act provides that employers may only consider an applicant's felony and misdemeanor convictions if "they relate to the applicant's suitability for employment in the position for which he has applied." Violators of this act may be sued in court, and assessed penalties and attorney fees, including punitive damages of up to \$10,000 for any violation.

Whether a conviction relates to an "applicant's suitability for employment in the position for which he has applied" is an issue of fact and subjective judgment about which people may disagree. It is critically important therefore and unfortunately not easy for an employer to review carefully and be able to articulate:

- 1.) The essential functions of an advertised position, and
- 2.) Why a criminal conviction renders an applicant unsuited for the position. You may need professional guidance to complete these analyses correctly.

A third liability trap for Pennsylvania employers is surely the most controversial. The Pennsylvania Human Relations Act (PHRA) and its federal counterparts — the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1991 — prohibit employers from administering tests and other hiring selection procedures that are designed, intended or used to discriminate based on someone's race, color, religion, gender, age, disability or national origin.

A complaining party will usually present a statistical analysis suggesting that a selection procedure has a "disparate impact" on a protected group of applicants, such as an ethnic group. The responding employer must then demonstrate that the challenged selection procedure is job-related and consistent with "business necessity."

Not surprisingly, employers' use of criminal background checks has received judicial scrutiny. But courts have struggled to determine whether and when the challenged use of criminal background checks is consistent with "business necessity."

In its 1987 "Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment," the federal Equal Employment Opportunity Commission (EEOC) sought to aid employers to appropriately use criminal

background checks by suggesting that they consider three criteria in deciding whether to exclude an applicant for an available position on the basis of his criminal background:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.

Such an assessment is intended to yield a "contextual analysis" of a criminal conviction and an applicant's suitability for employment. For example, an applicant's criminal background may render him not unsuitable for hire as a warehouse clerk, but disqualified for hire as a driver of senior citizens.

In 2009, the Pennsylvania Human Relations Commission (PHRC), which is responsible for enforcing the Pennsylvania Human Relations Act, weighed into the debate by publishing a request for comments on its proposed adoption of "Policy Guidance Concerning the Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record." The proposed policy guidance is astonishingly unhelpful, in part because it proposes to presume that an employer's rejection of an African-American or Hispanic applicant because of his or her criminal record is an act of unlawful discrimination against the applicant in violation of the PHRA.

Although the public comment period on the proposal ended Jan. 26, the commission has not scheduled a vote on the proposed guidance, a spokesman said recently. Instead, the PHRC is contemplating scheduling a vote to authorize public hearings to discuss the proposed guidance further.

Explains the commission:

It is the position of the Pennsylvania Human Relations Commission ... that an employer's policy or practice of excluding individuals from employment on the basis of a prior criminal conviction has a disparate impact on blacks and Hispanics in light of statistics that demonstrate that they are convicted at a rate disproportionately greater than their representation in the population.

Under the PHRC's proposed new policy guidance, therefore, Pennsylvania employers who reject minority applicants because of their criminal past would be presumed to have violated the state's human relations act, and, if challenged by the PHRC, would be required to demonstrate that their hiring decisions are justified by "business necessi-

ty." Among the "factors" that the PHRC would consider in deciding whether such employers established a "business necessity" defense are:

- The circumstances, number and seriousness of the disqualified individual's prior criminal offense or offenses;
- Whether the disqualified individual's prior conviction substantially relates to his or her suitability for the advertised position;
- The length of time that has elapsed subsequent to the disqualified individual's conviction, or release from prison;
- Evidence of the disqualified individual's rehabilitation; and
- The manner in which the employer solicited the disqualified individual's criminal history during the hiring process.

Make no mistake: the commission's proposed new policy guidance creates a new protected class under the PHRA — minority ex-convicts — and puts Pennsylvania employers on a collision course with their existing legal duty to exercise reasonable care in selecting, supervising and controlling their employees. It is, after all, settled law in Pennsylvania that an employer who knows or who should know of an employee's propensity for violence may be held legally accountable for an employee's violent outburst if the outburst is committed in the course and scope of employment.

That's right. The PHRC's proposed policy guidance essentially asks Pennsylvania employers to choose among litigation risks: being sued for using a criminal background check, or being sued for not using a criminal background check. The choice is absurd; no employer should have to make it.

But the PHRC's proposed "policy guidance" must be taken seriously by Pennsylvania employers. Beginning now, every employment decision taken based on an applicant's or employee's criminal past must be explained, in writing, preferably to the satisfaction of employer's legal counsel, using the PHRC's five factor "business necessity" test. Nothing less will do anymore, because of the growing tension between a Pennsylvania employer's duty to maintain a safe workplace and the commission's proposed increased scrutiny of an employer's efforts to meet its workplace responsibilities.

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