

**LEGAL IMPLICATIONS OF  
HIRING – OR REFUSING TO HIRE – EX-OFFENDERS**

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No doubt, there is reluctance by employers to hire individuals with a criminal history. Often this is prompted by a fear of litigation. The following addresses, in summary form, the potential legal implications arising from the hiring of ex-offenders, balanced against the potential liability for failing to hire based solely on an individual's criminal history.

**I. CONCERNS OVER HIRING EMPLOYEES WITH A CRIMINAL HISTORY**

**Negligent Hiring**

A. Under a theory of negligent hiring, courts may hold Pennsylvania employers directly liable for harm their employees inflict on others (even if outside the scope of employment) if the employer knew, or should have known of an employee's potential risk, or if the risk would have been discovered by a reasonable investigation. This theory focuses on the hiring process itself.

B. In considering whether or not to hire an applicant based on his or her prior conviction history, the main question is whether, based on the information received, the applicant poses an "unacceptable level of risk." Employers should consider the following factors:

1. Whether the conviction substantially relates to the applicant's suitability for the job:
  - a. what are the duties and responsibilities of the job.
  - b. the bearing, if any, of the criminal offense on the applicant's suitability for the job.
2. The length of time that has elapsed since the applicant's conviction or release from prison. (Some research has shown that after seven years of law-abiding behavior, an individual with a criminal record has essentially the same risk of committing a new offense as a person who does not have a criminal record.)
3. What evidence there is of the applicant's rehabilitation (readiness for employment):
  - a. satisfactory completion of all terms / conditions of parole

- probation
  - b. maintenance of steady employment since the conviction or release from prison
  - c. educational attainment or professional training since the conviction
  - d. completion of rehabilitative treatment (e.g., alcohol or drug treatment)
  - e. letters of recommendation from employers, parole, or probation officers who have been in contact with the applicant since his or her conviction or release from prison
4. The circumstances, number, and seriousness of the prior convictions.

### **Other Causes of Action**

C. Similarly, Pennsylvania recognizes causes of action for negligent retention and/or supervision. Employers also may be liable indirectly under a theory of respondeat superior.

D. OSHA regulations require employers to provide a safe workplace for their employees.

E. Under the Americans with Disabilities Act, employers may refuse to hire or may fire an employee who poses a direct threat to others, because of his or her disability.

F. Under federal, state and local anti-discrimination statutes, it is discriminatory to treat any employee in a protected category less favorably than others, because the employee is in the protected category.

## **II. REFUSING TO HIRE A JOB APPLICANT BASED ON CRIMINAL HISTORY**

### **Federal Law**

A. A blanket policy of denying employment to any person having a criminal conviction is unlawful (because of the disparate impact on Blacks and Hispanics).

B. It is the position of the Equal Employment Opportunity Commission ("EEOC") and federal courts interpreting Title VII of the Civil Rights Act of 1964 ("Title VII") that even a facially neutral policy banning the hiring of any person with a prior criminal conviction is a presumptive violation of Title VII.

1. Employers can rebut the assumption that a hiring policy has a disparate impact by citing statistics or demonstrating that the hiring policy is justified by business necessity.

2. To demonstrate business necessity, employers must show that they took into consideration: (a) the nature and gravity of the offense; (b) the time that has passed since the conviction; and/or (c) completion of the sentence and the nature of the job for which the applicant has applied.

3. Similarly, business justification can rarely be demonstrated for a blanket exclusion on hiring applicants with arrest records. To rebut a discrimination claim, an employer must show not only that the arrest charges are related to the position being sought, but also the likelihood that the applicant actually committed the offense.

### **State Law**

C. Under the Pennsylvania Human Relations Act (“PHRA”) and state case law, an employer may only consider felony and misdemeanor convictions if they relate to the applicant’s suitability for employment in the position for which he/she has applied.

1. At least one court has interpreted the PHRA as precluding employers from considering arrests not leading to conviction.

2. The PHRC (Commission) has issued a Proposed Policy Guidance mirroring the EEOC guidelines.

### **Local Law**

D. The City of Philadelphia’s Fair Criminal Record Screening Standards (“Ban the Box” Law), prohibits certain employers (public and private employers with 10 or more employees within the City of Philadelphia) from including criminal history questions on job applications.

1. Employers cannot make any inquiry regarding or require any person to disclose or reveal any criminal conviction during the application process. (The application process begins when the applicant inquires about the job being sought and ends when the employer has accepted an employment application.)

2. Employers cannot make any inquiry regarding or require any person to disclose or reveal a criminal conviction before or during the first interview (in-person or by telephone).

3. Employers who do not conduct an interview are barred from making any inquiries or gathering any information regarding criminal convictions.

4. If the applicant voluntarily discloses a conviction at the initial interview, the employer may ask questions about that conviction.

5. Even after the first interview, employers may not: (a) intentionally or knowingly making an adverse employment decision based on any arrest or criminal accusation which is not then pending and which did not result in a conviction; nor (b) require an employee to reveal or disclose any arrest or criminal accusation which is not pending and which did not result in a conviction.

### III. **MINIMIZING THE RISK OF LIABILITY**

A. Develop a written policy regarding the screening of job applicants (i.e., on a job application and in an employee handbook; and have written job descriptions for all positions).

B. At the hiring stage, conduct a narrow inquiry, targeting information that is job-related.

C. Decisions on whether to hire should be made carefully, taking into consideration the employer's type of business / business necessity.

D. DOCUMENT the legitimate reasons for any adverse employment action (pre-hire and post-hire).

E. Maintain all information obtained in a background check as confidential as possible and use the information only in a manner consistent with the law.

F. The manner in which an employer solicited the applicant's criminal history during the hiring process is important. The later in the process (i.e., after the 1<sup>st</sup> interview) the employer considers the criminal history, the more favorably it will be looked upon, if the hiring process or the rejection of a particular applicant is challenged.

(This is not intended to be nor should it be construed to be legal advice to any individual or about any particular matter. If you have any questions, you may contact Ms. Fisher at [jfisher@zarwin.com](mailto:jfisher@zarwin.com).)