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Employment Law

Is Your Arrest Record Preventing You From Getting a Job?

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Jeffrey Campolongo

The expression "crime doesn't pay" has never been truer than it is today. In fact, for those who have been arrested, even when never convicted, it is probably more accurate to say that "being arrested could cost you for life." The cost for those who come into contact with the criminal justice system, both those convicted and those not convicted, results from the criminal record created by the arrest and the subsequent involvement with the

criminal justice system. Oftentimes, this information can blemish the individual for life and lead to significant adverse collateral consequences that expand an individual's involvement and/or punishment well beyond that which was originally contemplated by the criminal justice system.

With the seemingly perpetual existence of criminal history record information, coupled with the ease of accessing such information and the ever-growing use by employers, occupational licensing agencies, landlords, educational institutions, social service agencies and others, the collateral consequences of any arrest and/or conviction are the by-product of the blemish. The problem posed by such criminal history record information especially affects those who have been convicted of a crime at the point in time when they most need access to employment opportunities—their reentry into society.

One of the organizations combating the collateral consequences of a blemished arrest record is the Fair Employment Opportunities Project (FEOP). The project was the joint creation of the Philadelphia Lawyers for Social Equity, the Public Interest Law Center of Philadelphia and the Lawyers' Committee for Civil Rights Under Law. The FEOP brings cases on behalf of job applicants whose rights under Pennsylvania's Criminal History Record Information Act (CHRIA) may have been violated by potential employers.

CHRIA governs the collection, maintenance, dissemination and use of criminal history record information, defined under the law as "information collected by criminal justice agencies concerning individuals, and arising from the initiation of a criminal proceeding, consisting of identifiable descriptions, dates and notations of arrests, indictments, information or other formal criminal charges and any dispositions arising therefrom." The FEOP focuses on limiting the use of criminal record information for employment purposes. Specifically, the act declares that: "Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section. 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."

In the employment setting, when an employer decides that it will not hire an applicant based on his or her criminal information, the employer must provide written notice of the decision and the reasons. Most importantly, CHRIA provides for a private right of action against violators of the act and civil remedies in the form of actual and real damages of not less than \$100 for each violation, reasonable costs of litigation and attorney fees, and exemplary and punitive damages of not less than \$1,000 and not more than \$10,000 for willful violations.

As noted, the statute itself, in general, limits the right of employers to deny employment based on criminal convictions to those that would "relate to the applicant's suitability for employment in the position for which he has applied." Thus, employers cannot deny employment for summary offense convictions, nor for simply being arrested. Yet, under the same statute, such information is collected and disseminated by the Administrative Office of Pennsylvania Courts (AOPC) on its website for free. Accordingly, this information, which includes conviction and non-conviction information, is readily available to be reviewed by employers in the application process. In contrast, CHRIA requires that all criminal justice agencies, such as the Pennsylvania State Police, the commonwealth's central repository for criminal history record information, "extract from the record all notations of arrests ... where three years has elapsed from date of arrest ... no conviction has occurred; and no proceedings are pending."

According to Michael Hardiman, who is of counsel to the Philadelphia Lawyers for Social Equity, the Criminal Record Expungement Project (C-REP) continues to encounter clients who have been denied employment based solely on an arrest record or having been convicted of a summary offense. Hardiman advises that, contrary to

the statute, these clients have not been provided with any written notification informing them that the rejection was based on their criminal record/criminal history information (although a number indicated that they were advised verbally that their criminal history information was the reason for the rejection).

A second problem facing individuals who have been arrested, according to Hardiman, has to do with how the information is processed and stored by those responsible for maintaining such criminal history record information in the commonwealth. While the scope of the problem here is multifaceted, one of the most problematic aspects impacting such individuals has to do with the public availability and bulk dissemination of such records by the AOPC. The AOPC is relied upon throughout the state by many employers and commercial agencies that provide employment background checks.

Although CHRIA has been in effect since Jan. 1, 1980, there have been few reported cases invoking the protections of the law to date. However, that trend seems to be quickly changing. For example, the Philadelphia Lawyers for Social Equity was approached by a seasoned employee in the customer service industry, who was turned away from a job at a gas station because of a five-year-old arrest that never led to a conviction. After the FEOP approached the employer about a possible CHRIA violation, the employer changed its hiring policies to ensure that individuals like this are treated appropriately throughout the hiring process. The employer independently revised its process for reviewing criminal records when hiring sales associates for its retail locations in June 2013 in order to maintain full compliance with CHRIA.

Two other recent cases where the project was not involved provide additional evidence of increased awareness of CHRIA and its civil action remedy potential. First, on Feb. 21, U.S. District Judge Felipe Restrepo of the Eastern District of Pennsylvania denied a motion to dismiss an action in which the plaintiff alleged that the employer published his expunged arrest record in violation of CHRIA. (See *Taha v. Bucks County*, No. 12-6867 (E.D. Pa. February 21, 2014).) In particular, Restrepo held that governmental entities could be liable for damages for violations of Section 9101. Second, on March 25, U.S. District Judge James Knoll Gardner denied a defendant's motion to dismiss with regard to the use of non-conviction information to deny a job applicant employment in violation of CHRIA. (See *Hoffman v. Palace Entertainment*, No. 12-cv-06165 (E.D. Pa. March 25, 2014).) In denying the motion to dismiss, Gardner held that CHRIA bars employers from considering arrests that did not also lead to convictions.

The above cases not only illustrate the kinds of collateral harm that can occur for those who have been involved with the criminal justice system but also demonstrate the importance of seeking the protection offered by CHRIA. In this regard, from the perspective of the Philadelphia Lawyers for Social Equity and the FEOP, the dramatically increased electronic availability of criminal history record information in today's society magnifies the social stigma attached to the involvement with the criminal justice system. The access to this data also exponentially extends the nature and significance of the negative collateral consequences associated with being arrested, even when not convicted. This reality, in turn, underscores the need to fully utilize the legal protections offered by the statute.

The FEOP initiative seeks to reduce these harsh consequences as they relate to employment. The law is clear. The vehicle for enforcement is clear. The next steps involve getting in that vehicle and driving it home to ensure that the legislative mandate is satisfied. Employers and others who violate the law should be held accountable.

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries. •