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Keeping Criminal Background Checks in Check

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Jeffrey Campolongo

It is no secret that many employers commonly ask about criminal background information during employment application processes, and doing so is not in itself illegal. The effect of screening out those with criminal or even arrest records, however, has been shown to be disproportionately discriminatory toward African-Americans and Latinos. Under Title VII of the Civil Rights Act of 1964, it is unlawful to exclude individuals from employment because of their race or national origin. By requesting criminal background information, employers are at risk of unlawfully discriminating against minorities, even if that is not their intention.

Two recent settlements highlight the widespread use of these practices and the number of job applicants affected by them. According to an Equal Employment Opportunity Commission press release, Pepsi Co. recently entered into a settlement after an EEOC investigation into Pepsi's criminal background check policy preventing more than 300 African-Americans from receiving employment. Pepsi was alleged to have had a policy against hiring anyone who had merely been arrested pending prosecution but not convicted, as well as those who were arrested for or convicted of minor offenses. According to the EEOC press release,

the settlement requires Pepsi to pay \$3.13 million, provide employment opportunities to victims of the policy, conduct Title VII training and provide the EEOC with regular reports.

According to a press release from the Public Interest Law Center of Philadelphia (PILCOP), Integrity Staffing Solutions, which is located in Allentown and handles hiring for Amazon.com, also settled a suit with an African-American job applicant. The case, *Dunn v. Integrity Staffing Solutions and Amazon.com Inc.*, was filed with the Pennsylvania Human Relations Commission and the EEOC by PILCOP and Berger & Montague. According to the PILCOP press release, "Integrity Staffing Solutions acted quickly, reinforcing that people with criminal convictions should not automatically be denied work." The settlement with ISS requires ISS to change its employment advertisements and job applications. ISS will also provide training to its hiring personnel and supervisors regarding the appropriate use of information regarding criminal backgrounds.

According to the PHRC complaint, Albert Dunn was convicted of involuntary manslaughter three decades ago for shooting a man who was threatening his family. The complaint detailed that, after serving his sentence, Dunn led a life of maintained steady employment, obtained two government security clearances and counseled young people about the repercussions of crime, until being laid off from his job. Despite having decades of work experience and community involvement, the complaint alleged that his criminal record remained a barrier to employment.

Granted, it will not sound shocking that someone who served a sentence for killing someone is not every company's

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ideal image of an employee, and not every individual with a criminal record will become a "model citizen," as the plaintiff in the ISS case has been described. Even those who have merely been arrested or found not guilty of a crime, however, have similar difficulty finding employment. The EEOC and case law has taken heed of various studies and statistical information that shows individuals of minority backgrounds are disproportionately represented among those who have been imprisoned or accused of crimes.

It has been found nondiscriminatory to exclude from employment those with criminal convictions that directly relate to a particular job. A bank, for instance, has reasonable grounds for not hiring someone who was convicted of embezzlement or robbery. However, as stated by Jennifer Clarke, executive director of PILCOP, "Employment policies that impose a blanket exclusion on people with past convictions, without any consideration of the relationship of the conviction to the job in question, can constitute unlawful discrimination under federal and state law." Proving that one has been discriminated against because of a criminal background question on a job application or a criminal background check is not an easy task. The individual must be qualified for the position and, as in any employment dispute, there may be any number of reasons an employer may proffer for why an employment decision was made.

The Pennsylvania Criminal History Record Information Act permits employers to consider an applicant's felony and misdemeanor convictions in connection with hiring decisions only to the extent they directly relate to an applicant's suitability for the specific job in question. Employees and applicants must be informed in writing if refusal to hire is based on criminal record information. Arrests that have not led to conviction should virtually never be considered for hiring purposes within the commonwealth of Pennsylvania. The Pennsylvania Superior Court held that 18 Pa.C.S.A. §9125, based on its legislative history, precludes employers from considering arrests not leading to conviction, as in its 1984 ruling in *Cisco v. United Parcel Services*.

In January 2010, the PHRC proposed the adoption of a policy guidance titled "The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record." The proposed guidance was intended to provide assistance to public and private employers, employment agencies and labor unions in their efforts to comply with the employment provisions found in the Pennsylvania Human Relations Act.

The proposed guidance, unlike the PHRC regulations, does not have the full force and effect of law, but is meant to serve as a tool to help ensure equal opportunity for all who seek employment in this commonwealth. According to the PHRC's proposed guidance, the policy is intended as a preventative measure to reduce employment discrimination by helping jobseekers, employees and employers understand the implications of adopting hiring and job retention policies that may disparately impact racial minority job applicants and employees.

Community Legal Services of Philadelphia has been at the forefront of advocating for ex-offenders and people with criminal records in the employment context. To that end, CLS analyzed and summarized the PHRC proposed guidance on criminal records. According to the CLS summary, the PHRC policy would:

- Presume that an employer's policy or practice of excluding people from employment on the basis of a prior criminal record has a disparate impact upon black and Hispanic applicants. This would make it much easier for a person who filed a complaint with the PHRC about a company that turned him or her down on the basis of his or her criminal record to establish a claim of discrimination.
- Require the employer to prove that its hiring practice is justified by business necessity by demonstrating that the individual poses an "unacceptable level of risk." This requirement adopts the business necessity standard articulated by the 3rd U.S. Circuit Court of Appeals in *El v. SEPTA*. Employers would be required to balance factors such as seriousness and nature of the conviction(s), job relatedness, length of time since the conviction(s) and rehabilitation.
- Require the employer be able to provide proof that the person excluded from employment was actually convicted, not merely arrested on charges that did not result in conviction.
- Favor hiring practices that do not inquire into criminal backgrounds until after a conditional offer of employment has been made.

One of the resources available to employees and applicants is the Criminal Record Expungement Project (C-REP) in Philadelphia, which is a nonprofit organization dedicated to working with the community to reduce the impact of criminal records on individuals in society through pro bono direct representation, advocacy and public education. According to C-REP's co-founder and chair of the board, Ryan Hancock, in just over a year, C-REP has successfully expunged more than 400 criminal charges, presented dozens of public education sessions and conducted a CLE. For more information about C-REP, check out its website at www.paexpungementproject.org.

On the federal side, existing EEOC guidelines regarding employers' use of criminal records date back more than 20 years. In 1987, the EEOC made clear that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." In July 2011, the EEOC held a full commission forum to evaluate the impact of criminal records screening on workers of color.

Unfortunately, according to Maurice Emsellem, policy co-director with the National Employment Law Project, "many employers, large and small, refuse to hire qualified people if they have a criminal record, no matter how old or minor

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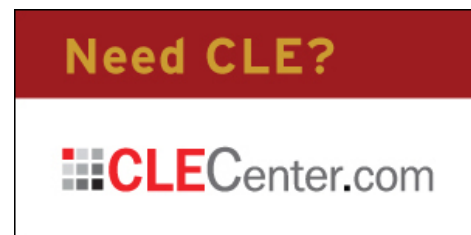
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the offense, and the trend is only picking up with the rise in background checks," as stated in a National Employment Law Project press release. Emsellem noted, "The good news is that the EEOC and advocates across the country are fighting back by more aggressively enforcing the nation's anti-discrimination laws, which balance the legitimate concerns of employers to keep the workplace safe with the civil rights of qualified workers struggling to find work in today's economy." •

Jeffrey Campolongo concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.

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