

**COMMENTS ON PROPOSED POLICY GUIDANCE CONCERNING THE DISPARATE
IMPACT DISCRIMINATION IMPLICATIONS OF A DENIAL OF EMPLOYMENT
BASED ON A CRIMINAL RECORD**

**SUBMITTED BY THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
January 26, 2010**

The Public Interest Law Center of Philadelphia (the Law Center) commends the Pennsylvania Human Relations Commission (PHRC) for drawing attention to the significant barriers to employment created by criminal record checks and the disproportionate impact of those barriers on minorities, particularly those in Pennsylvania. We further applaud the PHRC for its thoughtful, carefully-balanced proposed guidance which will have the effect, with the modifications suggested below, of encouraging employers to tailor more carefully any use of such record checks.

We appreciate the opportunity to comment on the PHRC's proposal. As one of the original Lawyers Committees for Civil Rights Under Law, the Law Center's mission is to ensure that people have access to the material benefits of society—and when race, ethnicity, national origin, disability, gender or poverty deprive people of those benefits, we use our skills as lawyers to remove those barriers.

There can be no more powerful benefit from participating in modern American society than the opportunity to work which, in turn, allows a person to contribute to his livelihood and community. Unfortunately, that benefit has been increasingly denied to African American and Hispanic citizens because of the combined effects of their disproportionate incarceration and the increasing use of criminal records checks. Although Blacks and Hispanics account for 12.8 and 15.4 percent, respectively, of the nation's population, they account for 39.5 and 19.9 percent of the nation's state, federal and local prison populationsⁱ. As PHRC demonstrated in its request for

comments, these racial disparities are even greater within the Commonwealth of Pennsylvaniaⁱⁱ. At the end of 2008, Blacks and Hispanics accounted for 49.4 percent and 11.1 percent of all inmates held by the Pennsylvania Department of Correctionsⁱⁱⁱ but only 10.8 and 4.8 percent of Pennsylvania's total population^{iv}.

At the same time, the employment rate for Blacks and Hispanics is significantly below that of Caucasian citizens. At the end of December 2009, the national unemployment rate was 10 percent^v; but for Blacks and Hispanics, the reported rate was 16.2 and 12.9 percent^{vi}. Even before the "Great Recession", Blacks and Hispanics in Pennsylvania had higher rates of unemployment. In 2008, 5.8 percent of Pennsylvanians were unemployed; however, the unemployment rate was 10.1 percent for Blacks and 7.6 percent for Hispanics^{vii}.

Comments

As described by the PHRC, one of the purposes for its Guidance is to encourage employers to adopt policies and practices that, while protecting legitimate employment-related interests, do not, at the same time, discriminate against racial minorities and other protected classes:

The Commission, in proposing this Guidance, begins with the recognition that it is the expressed public policy of the Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, age, sex, national origin, non-job related disability or other protected classification found in the PHRA.^{viii}

Each of the suggestions below is intended to achieve this goal by strengthening the incentives for employers to adopt non-discriminatory policies.

1: Apply a presumption of disparate impact when an employer inquires into an applicant's criminal record early in the hiring process.

We suggest that the PHRC should apply the presumption of a disparate impact beyond the situation when there is a “policy or practice” of excluding individuals from employment of the basis of a prior criminal conviction. PHRC should assume that whenever an employer inquires into an applicant’s criminal history before making either a conditional offer of employment or granting an interview, there is such a “policy or practice.” This proposal has a greater likelihood of encouraging employers to adopt clear, bright line policies prohibiting early inquiries; thereby increasing the chance that an employment decision will not be based on a criminal conviction.

Under the current proposal, the time at which an employer solicits a prospective employee’s criminal record history is only one of a large number of factors which may or may not be sufficient to establish a business justification. The fact that this factor is one among many and carries an uncertain weight does not, in our view, create a sufficient incentive for an employer to wait to make the inquiry; Moreover, it is relatively more difficult for a prospective employee to prove a “policy or practice” of excluding people based on prior criminal convictions. A presumption that is based on a clear, bright line test is much more likely to lead to clear, bright line hiring practices.

Although not as powerful an incentive, we suggest, alternatively, that the PHRC modify the rules for proving a business justification; namely, PHRC will presume there is not a business necessity if an employer inquires about an applicant’s criminal history before making a conditional offer or granting an interview. The employer would then have the burden to prove that it is necessary to inquire early in the hiring process. This alternative would operate in a

manner similar to the allocation of the burden of proof for purposes of establishing a business necessity when a person's prior conviction is seven years or more in the past.

The principles that we suggest here are the same as those that animate the laws adopted in Minnesota and Hawaii. In May of 2009, Minnesota passed a statewide "Ban the Box" ban^{ix}. The bill – which was supported unanimously by both Republicans and Democrats - prevents public employers from inquiring about an individual's criminal record until after an interview has been offered^x. As explained by the Council on Crime and Justice's President, and former Hennepin County, Minnesota Judge, Pamela Alexander: "Over the last several decades, increase in criminalization combined with easier access to criminal records and heightened fear and scrutiny have created an entire class of people who are subject to permanent punishment ..."^{xi}. Mark Haase, the Council's Director of Public Policy and Advocacy explained that the Minnesota law reduces discrimination and confusion based only upon the initial application^{xii}. In Hawaii, the legislation includes private employers and requires a conditional offer to be made before an employer may inquire about an applicant's criminal history^{xiii}.

2: Define and clarify when a past crime is substantially related to a job. Using this standard, PHRC should favorably view employers who narrowly tailor their inquiries to specific crimes or categories of crimes that they have determined are substantially related.

Among the factors that PHRC will consider when deciding whether the employer has a business necessity defense that allows the employer to use an applicant's criminal history to deny employment, is whether the prior conviction "substantially relates" to the job offered. We believe that the currently described standard that is too vague and recommend that the PHRC adopt the standard contained in the New York statute cited in PHRC's memorandum.^{xiv} whether the conviction is directly related to the applicant's ability to perform one or more of the job's

duties or responsibilities. This standard sharpens and clarifies the focus on the particular activities required in the position.

We further recommend PHRC state that it will look favorably upon an employer which limits the request for conviction information to a narrow subset of crimes or categories of crimes that the employer has previously determined are directly related to the applicant's ability to perform. This position achieves two goals: it incentivizes employers to establish policies that may decrease discrimination against ex-offenders; and it will encourage applicants who may have been discouraged to apply under a policy that seeks information about all convictions, however irrelevant to the position.

3. The Commission should not consider “applicant pool” data.

The current proposal allows an employer to rebut a presumption of disparate impact with information about the “applicant pool.” However, as PHRC acknowledges, “there is an inherent likelihood that such ‘applicant pool’ data will exclude otherwise interested applicants...”^{xv} The Equal Employment Opportunity Commission (EEOC) has also acknowledged that this data may be inherently distorted.^{xvi} We, too, believe that information about the applicant pool is seriously flawed because the power rests substantially with the employer to shape the applicant pool. Moreover, if applicants are aware of an employer's policies, they may be otherwise discouraged from applying for a position. Because of the inherent flaws of this data, and the abilities that employers have to manipulate their applicant pools, PHRC should not allow employers to use applicant pool data to rebut a presumption of disparate impact.

ⁱ U.S. Census Bureau, *State & County QuickFacts PA*. (2009), <http://quickfacts.census.gov/qfd/states/42000.html>; U.S Department of Justice Bureau of Justice Statistics, *Prison Inmates at Midyear 2008-Statistical Tables* (2009) <http://74.125.93.132/search?q=cache:WygmePNblhoJ:www.ojp.gov/bjs/pub/pdf/pim08st.pdf+prison+inmates+at+midyear+2008&cd=1&hl=en&ct=clnk&gl=us>.

ⁱⁱ The Pennsylvania Human Relations Commission, *Memorandum RE: Proposed Policy Guidance Concerning Job Applicants with Criminal Records* 7(2009).

ⁱⁱⁱ Pennsylvania Department of Corrections, *Annual Statistical Report*. (2008) www.education.state.pa.us/portal/server.pt/document/722258/anrpt08_pdf.

^{iv} U.S. Census Bureau: *State & County QuickFact, PA*.

^v U.S. Department of Labor Bureau of Labor Statistics, *Table A-1. Employment status of the civilian population by sex and age*. (2009) <http://www.bls.gov/news.release/empsit.t01.htm>

^{vi} *Id*

^{vii} See U.S. Department of Labor Bureau of Labor Statistics, *Table A-2. Employment status of the civilian population by race, sex, and age*. (2009) <http://www.bls.gov/news.release/empsit.t02.htm>; and U.S. Department of Labor Bureau of Labor Statistics *Table A-2. Employment status Hispanic or Latino population by sex and age*. (2009) <http://www.bls.gov/news.release/empsit.t03.htm>.

^{viii} Pennsylvania Human Relations Commission, *Policy Guidance Concerning the Disparate Impact Discrimination Implication of a Denial of Employment Based on a Criminal Record*.

^{ix} Minn. Stat. 364.021 Public Employment; Consideration of Criminal Records.

^x KFAI 90.3, *Minnesota is First State to Pass Statewide "Ban the Box" Law*. (2009) <http://www.kfai.org/node/19909>.

^{xi} The Real Cost of Prisons, *Minnesota Becomes First State to "Ban the Box", Narrows Employer Liability for Criminal Records*. (2009) http://realcostofprisons.org/blog/archives/2009/05/minnesota_becom.html.

^{xii} *Id*

^{xiii} Haw. Rev. Stat. § 378-2.5(f). Employer inquiries into conviction record.

^{xiv} Pennsylvania Human Relations Commission, *Policy Guidance Concerning the Disparate Impact Discrimination Implication of a Denial of Employment Based on a Criminal Record*.

^{xv} Pennsylvania Human Relations Commission, *Policy Guidance Concerning the Disparate Impact Discrimination Implication of a Denial of Employment Based on a Criminal Record*.

^{xvi} Pennsylvania Human Relations Commission, *Policy Guidance Concerning the Disparate Impact Discrimination Implication of a Denial of Employment Based on a Criminal Record*.