

## Public Comment Invited

The Pennsylvania Human Relations Commission, or PHRC, proposes the adoption of policy guidance titled, *The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record*. The proposed guidance is intended to assist 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 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 Pennsylvania. Guidance is also 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.

### *Public Comments:*

Public comments, prior to final consideration of the proposed guidance, will be received by the PHRC for a period of 60 days ending on January 26, 2010. Comments may be submitted by e-mail to [phrc@state.pa.us](mailto:phrc@state.pa.us) and should include the subject line, "Comments on Proposed Policy Guidance". Comments can also be mailed to the address below. Comments submitted by fax will not be accepted.

Comments on Proposed Policy Guidance  
Pennsylvania Human Relations Commission  
Homer C. Floyd  
Executive Director  
301 Chestnut Street, Suite 300  
Harrisburg, PA 17101-1702

### *Consideration of Comments*

Commissioners will have the opportunity to review comments prior to consideration of final policy guidance, which is tentatively scheduled during their monthly public meeting on February 22, 2010 at the address listed above. The meeting begins at 1:00 and is open to the public. To determine whether consideration of comments will be on the agenda, contact the commission the week prior to the meeting at 717-787-4410.

**Policy Guidance Concerning the  
Disparate Impact Discrimination  
Implications of a Denial of Employment  
Based on a Criminal Record**

**Prepared By Pennsylvania  
Human Relations Commission**

# The Policy Guidance

## 1. Presumption of Disparate Impact

It is the position of the Pennsylvania Human Relations Commission (PHRC or 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.<sup>1</sup>

Given this position, when investigating complaints of alleged unlawful disparate impact discrimination presented by Black and Hispanic complainants that are otherwise jurisdictional, the PHRC will presume that the complainant has established the disparate impact element of a prima facie case of unlawful discrimination under Section 5 of the Pennsylvania Human Relations Act (PHRA).

The PHRC takes the position that this presumption is warranted in light not only of national data demonstrating the disparity but also in light of data showing that Pennsylvania has a more pronounced racial disparity in its conviction and incarceration rates than the nation as a whole. Consequently, Black or Hispanic complainants alleging disparate impact based on an employer’s conviction policy need not provide statistical evidence to establish the disparate impact element of a prima facie case.

## 2. Presumption of Disparate Impact is Rebuttable.

To rebut the presumption of disparate impact, respondent employers, upon an appropriate showing of relevance, may utilize conviction data from a more limited geographical boundary than the Commonwealth of Pennsylvania (e.g. the relevant city, census region, or county) or conviction data for the specific crimes being screened by the respondent. In utilizing more narrowly drawn statistics, the Commission also will consider “applicant pool” data. The Commission notes, however, that there is an inherent likelihood that such “applicant pool” data will exclude otherwise interested applicants who chose not to apply due to the existence of an employer’s conviction policy or practice and may thus have little persuasive effect. Moreover, in accordance with prior U.S. Supreme Court decisions, an employer cannot rebut a presumption of disparate impact by relying on evidence of diversity within its workplace (i.e., the so-called “bottom-line defense.”).

## 3. The Business Necessity Defense

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<sup>1</sup> As is more fully discussed in Section 2 of the Overview of the Need for and Parameters of the Policy Guidance which follows the Policy Guidance, nothing in the Policy Guidance is intended to prohibit employers from denying employment based on a criminal record where required or authorized to do so based on existing state or federal laws. Attached as Appendix “A” is an illustrative list of such current laws.

A respondent employer, in addition to being able to offer evidence intended to rebut the presumption, also may defend the existence of such a policy or practice by presenting evidence intended to prove that the policy or practice is required as a matter of business necessity.

If a respondent employer's criminal records conviction policy has a disparate impact, it will not be deemed a violation of Section 5 of the PHRA if the employer can demonstrate that the policy is justified by business necessity. To demonstrate business necessity, an employer must show with "some level of empirical proof" that the individual excluded from employment has been convicted of a crime, not merely arrested<sup>2</sup>, and poses an "unacceptable level of risk."

Among the factors the Commission will consider in deciding whether the employer has provided evidence that amounts to "some level of empirical proof" that the disqualified individual poses an "unacceptable level of risk", the Commission will consider the following:

- **The circumstances, number and seriousness of the disqualified individual's prior offense(s).**
- **Whether the disqualified individual's prior conviction substantially relates to his or her suitability for the job.** In determining whether the conviction relates to the job, the Commission will consider: (1) the duties and responsibilities of the job; and (2) the bearing, if any, of the applicant's prior criminal offense(s) on the applicant's suitability to assume these duties and responsibilities.
- **The length of time that has elapsed subsequent to the disqualified individual's conviction, or release from prison.** Modern criminological research shows that the risk of recidivism clearly decreases with time. The Commission, therefore, will consider the length of time that has elapsed subsequent to the individual's conviction or release from prison. A presumption against business necessity will be established if an individual has not re-offended seven or more years prior to his or her disqualification (excluding time spent in jail or prison).
- **Evidence of the disqualified individual's rehabilitation, including:**
  - satisfactory completion of all terms and conditions of parole and/or probation;
  - maintenance of steady employment since the conviction or release from prison;
  - educational attainment or professional training since the conviction;
  - completion of rehabilitative treatment (e.g. alcohol or drug treatment);

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<sup>2</sup> Arrests which 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. See *Cisco v. United Parcel Services*, 476 A.2d 1340 (Pa. Super. 1984).

- letters of recommendation from employers, parole, or probation officers who have been in contact with the individual subsequent to his or her conviction or release from prison.
- **The manner in which the employer solicited the disqualified individual's criminal history during the hiring process.** A hiring policy in which the employer considers the above-listed factors and does not inquire into, or consider, an individual's criminal background until later stages of the hiring process (e.g., after the interview or after a conditional offer of employment has been made) will be looked upon favorably by the Commission.

#### **4. Evidence of the Existence of alternative, less discriminatory measures.**

If the employer is able to demonstrate that the challenged employment disqualification policy or practice is justified by business necessity, a complainant may prevail on a disparate impact claim if he or she can demonstrate that there is an alternative, less discriminatory policy or practice available that would satisfy the employer's demonstrated business needs.

# **Overview of the Need for and Parameters of Policy Guidance Concerning the**

# Disparate Impact Discrimination Implications Related to a Denial of Employment Based on a Criminal Record

## 1. Introduction

The Pennsylvania Human Relations Commission (hereinafter Commission or PHRC), cognizant of the fundamental guarantee found in the Pennsylvania Human Relations Act (hereinafter PHRA) that the opportunity to obtain employment is a civil right that must be provided irrespective of race, color, religious creed, ancestry, age, sex, national origin, non-job related disability or other protected classification sets forth the following Guidance for use by those responsible for providing employment opportunities within the Commission's jurisdiction. Those responsible for providing such employment opportunities include, but are not limited to, the Commonwealth or any political subdivision or board, department, commission or school district as well as any person employing four or more persons within the Commonwealth unless otherwise excluded under the PHRA and all others involved, whether directly or indirectly, in providing employment opportunities.

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. The Commission further recognizes that to safeguard the right to obtain and hold employment without unlawful discrimination and to assure equal opportunities requires the elimination of policies or practices not only that result in disparate treatment but also that have a disparate or adverse impact on one or more protected classes under the PHRA within the parameters set forth in this Guidance.<sup>3</sup>

The Commission notes at the outset that this Guidance, as is apparent from the Guidance Heading, is limited to delineating Guidance in the area of the disparate impact theory of proving discrimination. Such Guidance does not affect complaints alleging disparate treatment on a prohibited protected class basis with respect to an employer's use of a conviction record as a disqualification from employment. A complaint brought under the disparate treatment theory of discrimination is one that includes an allegation, for example, that an employer rejects African American applicants who have a conviction record but does not reject similarly situated

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<sup>3</sup> The terms "disparate impact" and "adverse impact" as they may appear in the Guidance have the same meaning and may be used interchangeably.

Caucasian applicants. Complainants alleging disparate treatment regarding disqualification from employment based on a conviction record will continue to be processed in accordance with standard PHRC policies and procedures for investigating disparate treatment cases.

## **2. Parameters and Purpose of Policy Guidance**

In proposing this Guidance, the Commission has set forth factors that it considers to be important in determining whether, in any given case, a party has engaged in unlawful disparate impact discrimination based on race, ethnicity or other protected classification in violation of Section 5 of the PHRA. In so doing, the Commission reiterates its longstanding position that this Guidance is not intended to impose hard and fast rules that must be absolutely applied without regard to the specific facts involved. The Guidance is intended to provide both guidance and assistance to those who come under the jurisdiction of the Commission as it continues its effort to ensure that the right to equal employment opportunities as set forth in the PHRA is achieved.

Nothing in this Guidance shall affect statutory or regulatory requirements. The Guidance is neither an adjudication nor a regulation. There is no intent on the part of the PHRC to give the Guidance that type of binding force or effect. This Guidance indicates the manner in which the Commission intends to exercise its administrative discretion, unless it is convinced otherwise during the course of a specific proceeding. The Commission, as in the past, remains committed to ensuring that its adjudicative determinations are made on a case-by-case basis after consideration of all evidence of record in the given matter.

To this end, the Guidance may be deviated from whenever the PHRC believes that any statute or regulation requires it, or that it is otherwise appropriate to do so. The Guidance may not be cited as binding legal authority for any PHRC ruling, adjudication or other legally binding action. The legal rationales set forth in a policy guidance may be cited as the basis for PHRC action to the extent that the Commission believes the rationale is valid in the context of the specific proceeding.

The Commission recognizes that various state and federal laws require some employers to obtain criminal records and reject applicants with certain convictions from employment. This Guidance is limited to delineating policy guidance in the area of the disparate impact theory of proving discrimination under the PHRA and has no impact upon these laws. Because of the above, and consistent with the underlying premise that policy guidance is intended to assist employers in complying with the law, attached to this Policy Guidance as Appendix "A" is an illustrative list of various state and federal laws which require employers to reject applicants with certain convictions from employment. The Commission encourages employers who may be impacted by such laws to fully explore and understand the parameters of such laws, as well as any others that may be applicable, and to confine any employment restrictions solely to those parameters.

### 3. Summary of Need for the Issuance of the Policy Guidance

Criminal background checks have become a routine part of the hiring process throughout Pennsylvania and the United States. Whereas 51% of large employers used criminal background checks in 1996, 80% of large employers utilized them in 2003, and the percentage is likely even greater today. Due to the increased use of criminal background checks for screening prospective and current employees, a growing number of Americans are being excluded from employment opportunities on the basis of having a prior criminal record. In Pennsylvania, legal services organizations such as Community Legal Services (CLS) report that job applicants with criminal records are routinely facing “unwarranted stigmatization” by employers – in contravention to the public policy of the Commonwealth.

Employment policies or practices that disqualify individuals from employment on the basis of a prior criminal conviction may violate state and federal civil rights statutes. While such hiring policies are facially neutral they can produce a severe disparate impact on Black and Hispanic populations due to the significantly higher rates of criminal convictions experienced by these populations.

At the federal level, the Equal Employment Opportunity Commission (EEOC) has issued a Policy Statement advising that hiring policies which exclude individuals from employment on the basis of a prior conviction are “unlawful under Title VII in the absence of a justifying business necessity.” Federal courts – including the Third Circuit – have interpreted Title VII in a similar manner as the EEOC. However, the Commission has yet to issue any guidance on the acceptable considerations of a criminal background under the PHRA.

Because current data from Pennsylvania indicates that racial minorities have significantly higher rates of conviction and incarceration than Whites and that this in-state racial disparity is significantly more pronounced than the national average, the exclusion from employment of individuals with prior convictions in Pennsylvania is having a disparate impact on protected classes under the PHRA. According to CLS, the unwarranted use by employers of criminal background information remains the “most significant” issue of employment discrimination faced by their clients.

Among the data reviewed by the Commission in connection with its decision to consider adopting this Policy Guidance are the following:

- As of June 2008, Black Americans were incarcerated in state and federal prisons at a rate 6.5 times higher than Whites.
- The Department of Justice estimates that the lifetime chance of a Black male going to prison is 32.6%. The lifetime chance for an Hispanic male is 17.2%. By contrast the respective rate for White males is 5.9%.
- The rate of incarceration in state prisons and local jails is higher for Blacks than Whites in every single state.



- Blacks have a higher jail incarceration rate than Whites for every violent offense, property offense, and drug offense measured by the Department of Justice.

The disparity in incarceration and conviction rates between Black, Hispanic and White Americans is more pronounced in the Commonwealth of Pennsylvania than it is for the nation as a whole. For example:

- The Pennsylvania incarceration rate for Blacks is 9.2 times higher than the incarceration rate for Whites in state prisons and local jails.
- Only 9 other states have a more pronounced disparity in incarceration rates between Blacks and Whites than Pennsylvania.
- The Pennsylvania incarceration rate for Hispanics is 5.6 times higher than the incarceration rate for Whites in state prisons and local jails. Only one other state has a greater disparity.
- Although minorities comprise less than 14% of the Pennsylvania population, they received 32% of the convictions issued in 2007.

#### **4. PHRC Executive and Legal Staff Review of the Policy Guidance**

Commission staff, prior to development of the proposed Policy Guidance, prepared and presented to Commissioners a Proposed Policy Guidance memorandum on the issue of disqualification from employment based on criminal records history. Additionally, Commissioners had the opportunity to hear presentations from staff involved in the matter as well as an attorney from Community Legal Services who had previously presented testimony to the Equal Employment Opportunity Commission on the subject of disqualification from employment based on criminal records history.

Development of the Policy Guidance springs from and is framed by the aforementioned memorandum. Reliance on the memorandum is deemed appropriate because of its review for content and legal sufficiency by members of the Executive Staff and by the Office of Chief Counsel. Following said reviews, a joint recommendation for adoption of the Policy Guidance in a manner consistent with the information provided in the memorandum was made to the Commissioners by the Executive Director and Chief Counsel. Based upon the recommendation, and after review of the material provided, Commissioners directed the Executive Director and Office of Chief Counsel to prepare a proposed Policy Guidance consistent with the analysis and recommendations found in the memorandum for consideration by the Commissioners.

Because of the above, and consistent with the underlying premise that any Policy Guidance is intended to assist employers in complying with the law, attached to the Policy Guidance as Appendix “B” and incorporated by reference into said Guidance to the extent not otherwise set forth is a copy of the staff memorandum.

## **APPENDIX “A”**

## EMPLOYMENT PROHIBITED BY LAW<sup>4</sup>

State and federal laws that legally prohibit the employment of individuals with particular types of convictions<sup>5</sup> include but are not limited to the following:

**Aircraft/Airport Employees** (applies to those with direct access to airplanes or secure airport areas and to security screeners)

**May not hire** individuals convicted of federal hijacking or other air crimes, murder, assault with intent to murder, espionage, treason, sedition, kidnapping, rape, extortion, armed robbery, weapons convictions, distribution (or intent to distribute) a controlled substance, or felonies involving: a threat, willful destruction of property, importation or manufacture of a controlled substance, burglary, theft/fraud, possession or distribution of stolen property, aggravated assault, bribery, or illegal possession of a controlled substance punishable by a maximum term of imprisonment of more than **one year within last 10 years**. 49 U.S.C. § 44936; 14 C.F.R. §§ 107.209 and 108.229.

### **Armored Car Crew Member**

**May not hire** individuals with any conviction that disqualifies them from firearm license or permit. 15 U.S.C. § 5902.

### **Bank Employee**

**May not hire** individuals convicted of crimes of dishonesty, breach of trust, or money laundering without prior written consent of the Federal Deposit Insurance Corporation. FDIC has indicated that it considers drug offenses to be crimes of dishonesty.

FDIC may not give consent for a **minimum of 10 years** for crimes involving bribery /corruption in banking, embezzlement/theft, fraud or false statement in banking or bankruptcy transactions, obstructing the examination of a financial institution, or racketeering. 12 U.S.C. § 1829.

### **Child Care**

**May not hire** individuals with **founded** child abuse reports **within last five years** or with convictions for homicide, aggravated

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<sup>4</sup> The source document for this compilation was prepared by Community Legal Services and is entitled: "Occupations Where Certain Ex-Offenders Are Prohibited By Law from Employment."

<sup>5</sup> A juvenile adjudication is not a criminal conviction, and it does not impose any civil disability ordinarily resulting from a conviction. 42 Pa. C.S.A. § 6354(a).

assault, kidnapping, rape, various sex crimes, prostitution felonies, concealing death of child, endangering welfare of child, or pornography **ever**, or for drug felonies **within the last five years**. 23 Pa. C.S. § 6344(c); 55 Pa. Code § 6000.22 (the Child Protective Services Law, or CPSL).

### **Child Care Workers in Federal Agencies or Facilities**

**May refuse employment** for a conviction involving a sex crime, offense involving child victim, drug felony, or any other crime that bears on fitness to work with children. 42 U.S.C. § 13041.

### **Employee Benefits Employee**

**May not hire** any individual (or assign fiduciary, trustee or officer) with convictions for robbery, burglary, extortion, embezzlement, fraud, theft, bribery, arson, murder, rape, drugs, kidnapping, perjury, assault with intent to kill for **13 years after conviction**. 29 U.S.C. §1111.

### **Nursing Home/Home Health Care/Other Workers in Long-Term Care Facilities<sup>6</sup>**

**May not hire** individuals convicted of homicide, aggravated assault, kidnapping, rape, robbery, burglary, arson, theft (including two misdemeanors), various sex crimes, concealing death of child, endangering welfare of child, pornography, felony drugs **ever**. 35 P.S. § 10225.503(a) (known as the Older Adults Protective Services Act, or OAPSA).

### **Police**

**May not employ** if convicted of felony or serious misdemeanor. 53 P.S. § 2164(7); see also pages 6-7 regarding restrictions on working with children. **Port Workers** (must have a transportation security card – also known as TWIC - consistent with the following restrictions)

**May not employ** if convicted of espionage, sedition, treason or federal terrorism crime (or conspiracy to commit any of the above) **ever**.

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<sup>6</sup> In Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003), the Pennsylvania Supreme Court held that the lifetime criminal records ban of OAPSA violated the Pennsylvania Constitution as applied to petitioners because it did not provide an opportunity for them to prove their suitability for employment.

**May not employ** if convicted of a crime involving a “transportation security incident,” improper transportation of a hazardous material, unlawful possession, use, sale or manufacture of an explosive device, murder, making a threat of using an explosive or other lethal device against a government facility or transportation system, violation of RICO or conspiracy or attempt regarding any of the above **ever—but can apply for a waiver from the Transportation Security Administration (TSA).**

**May not employ** if convicted of a weapons offense, drug offense, crime of dishonesty (not including welfare fraud or writing bad checks), extortion, bribery, smuggling, immigration violations, arson, kidnapping or hostage taking, rape or aggravated sexual assault, assault with intent to kill, robbery, fraudulent entry into a seaport, RICO or conspiracy or attempt of the above **for seven years before applying for transportation credentials or for five years after release from incarceration, whichever is later—but can apply for a waiver from TSA.** 46 U.S.C. § 70105(c)(1); 49 C.F.R. § 1572.103.

**Private Detective** (including employees of organizations with private detective licenses)

**Must refuse employment** for a conviction of any felony or of the following crimes: weapons offenses, possessing burglar’s tools, receipt of stolen property, unlawful entry, aiding escape from prison, pick-pocketing, possessing or distributing narcotics, solicitation of sodomy or other lewdness, reckless endangerment, terroristic threats, simple assault. 22 P.S. § 23(a).

**School Employees**<sup>7</sup> (public and private schools in Philadelphia)

**Must refuse employment** for a conviction involving homicide, aggravated assault, harassment/stalking, kidnapping, unlawful restraint, rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, indecent exposure, incest, concealing death of a child, endangering welfare of children, dealing in infant children, felony prostitution, obscene materials, corruption of minors, sexual abuse of children, or felony drug offense for five years preceding employment application.

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<sup>7</sup> Public School Code, 24 P.S. § 1-111(e)(these rules also apply to school bus drivers and student teachers); CPSL, 23 Pa. C.S. § 6344(c).

## U.S. Government Employee

**May not hire** individuals convicted of attempting or advocating the overthrow of the U.S. government for **five years** following conviction. 18 U.S.C. § 2385.

## PENNSYLVANIA OCCUPATIONAL LICENSES

Pennsylvania licensing boards which legally prohibit the licensing and/or revocation of licenses of individuals with particular types of convictions include but are not limited to the following:

### Accountant

**May** revoke or suspend license if individual engages in dishonest conduct. 63 P.S. § 9-9.a.

### Architect

**May** refuse or revoke license for conviction of any felony or crime of moral turpitude. 63 P.S. § 34.19. A crime of moral turpitude is a crime of dishonesty and includes offenses such as fraud, tax evasion, perjury and similar offenses.

### Auctioneer

**May** revoke license for conviction for forgery, embezzlement, extortion, fraud, any crime of moral turpitude **within five years prior to issuance of license**. 63 P.S. § 734.20.

### Barber

**May** revoke or suspend license if individual engages in dishonest conduct. 63 P.S. § 559.

### Bondsman

**May suspend or revoke** license if convicted of any criminal offense. 42 Pa. C.S. A. § 4746(b)(3).

### Casino employee (gaming employees)

License or permit **will be denied** for felonies and gambling offenses **within 15-years**.

When evaluating an application after 15 years, the Gaming Control Board will consider:

- (1) the nature and duties of the applicant's position;
- (2) the nature and seriousness of the offense;
- (3) the circumstances under which the offense occurred;
- (4) the age of the applicant when the offense was committed;
- (5) whether the offense was an isolated or repeated incident;
- (6) evidence of rehabilitation.

4 Pa. C.S.A. § 1213; 58 Pa. Code § 435a.1(f) and (g).

**Casino employee (nongaming employees)** (do not handle gaming money – includes bartenders, food service, clerical, parking attendants, and janitorial workers)

Registration **may be denied** for felonies and gambling offenses **within 15-years.**

When evaluating an application for a registration, the Gaming Control Board will consider:

- (1) the nature and duties of the applicant's position;
- (2) the nature and seriousness of the offense;
- (3) the circumstances under which the offense occurred;
- (4) the age of the applicant when the offense was committed;
- (5) whether the offense was an isolated or repeated incident;
- (6) evidence of rehabilitation.

4 Pa. C.S.A. § 1213; 58 Pa. Code § 435a.1(g).

### **Chiropractor**

Applicant for license must submit evidence that he/she has not been convicted of drug felony **in last ten years.** Board **may refuse license** if convicted of any felony, or misdemeanor **in the chiropractic profession.** 63 P.S. §§ 625.501, 625.506.

### **Dental Hygienist**

**May** refuse or revoke license for any felony or crime of moral turpitude. 63 P.S. § 124.1. *See also* pages 5-7, regarding new restrictions on working with children.

### **Dentist**

**Must** refuse or revoke license if convicted of any drug felony less than **10 years old.** **May** refuse or revoke license if convicted of any other felony or any crime of moral turpitude. 63 P.S. §§ 123.1,

124.1. *See also* pages 5-7, regarding new restrictions on working with children.

**Employment Agent** (applies to license holder only)

**May** refuse license to anyone with conviction for any crime other than traffic violation. 43 P.S. §§ 539(8), 541; 34 Pa. Code § 9.13.

**Engineer, Land Surveyor, Geologist**

License **must be revoked** (with opportunity to be heard) for any drug felony or crime relating to professional field. 63 P.S. §§ 151(g), 157.1(b).

**Funeral Director**

**May** refuse license for any crime of moral turpitude, violation of health law, or relating to profession. 63 P.S. § 479.11.

**Horse Racing** (applies to anyone employed at horse gambling or race meetings, including vendors and stable workers)

**Must refuse** license for conviction of race fixing. **May refuse** license for conviction of any crime of moral turpitude, illegal gambling. 58 Pa. Code § 165.35.

**Hunting/Trip Permit Salesperson**

**May** deny license for conviction of any crime. 67 Pa. Code § 65.3.

**Insurance Adjuster**

**May** revoke license for conviction of any felony. 63 P.S. § 1606.

**Medical Technician, Emergency (EMT)**

**May** suspend, revoke or refuse certification for conviction of a felony or crime involving moral turpitude. 35 P.S. § 693(j.1)(1)(xiv). *See also* pages 5-7, regarding new restrictions on working with children.

**Midwives**

**May refuse** license for crime of moral turpitude. 63 P.S. § 172. *See also* pages 5-7, regarding new restrictions on working with children.



## **Mortgage Broker**

**May deny** license for conviction of any felony or misdemeanor. 63 P.S. § 456.06(d).

## **Motor Vehicle Dealer**

**May refuse or revoke** license for any crime of moral turpitude, dishonesty/theft **committed as a dealer within 5 years of application.** 63 P.S. § 818.19.

## **Nurse (Registered Nurse and Licensed Practical Nurse)**

**Must refuse** license for any drug felony conviction **in the last ten years.** **May refuse** license for any other felony or crime of moral turpitude. 63 P.S. §§ 216(c), 224(a)(5)(RNs); 63 P.S. §§ 655, 666(a)(5)(LPNs). *See also* pages 5-7, regarding new restrictions on working with children.

## **Occupational Therapist**

**Must refuse or may revoke** license for any crime found by Board to have a direct bearing on fitness to be an OT. 63 P.S. § 1516. *See also* pages 5-7, regarding new restrictions on working with children.

## **Optometrist**

**Must suspend** license for a drug felony. **May revoke** license for any felony or crime of moral turpitude. 63 P.S. § 244.7. *See also* pages 5-7, regarding new restrictions on working with children.

## **Osteopath**

**May refuse** license for any felony, drug felony, crime of moral turpitude or any crime related to the practice of osteopathic medicine. 63 P.S. §§ 271.14, 271.15. *See also* pages 5-7, regarding new restrictions on working with children.

## **Pawnbroker**

**Must refuse** license for any conviction of engaging in pawnbroking business without license. 63 P.S. § 281-8(a).

## Pharmacist

**Must refuse** license for conviction of any drug felony **in the last 10 years**. **May refuse** license for any felony related to the practice of pharmaceuticals, or any crime of moral turpitude. 63 P.S. §§ 390-3, 390-5.

## Physical Therapist/Athletic Trainer

**Must refuse** license to individuals convicted of any drug felony **in the last ten years**. 63 P.S. § 1306.

## Physician

**Must refuse** license for any drug felony conviction **in the last ten years**. **May refuse** license for any other felony or any misdemeanor **relating to a health profession**. 63 P.S. §§ 422.22, 422.41. *See also* pages 5-7, regarding new restrictions on working with children.

## Physician's Assistant

**May refuse** license for any felony conviction. 63 P.S. § 271.15(b). *See also* pages 5-7, regarding new restrictions on working with children.

## Podiatrist

**May refuse, suspend or revoke** license for conviction in connection with the practice of podiatric medicine or involving moral turpitude. 63 P.S. § 42.16. *See also* pages 5-7, regarding new restrictions on working with children.

## Private Detective

**May not issue** license if convicted of any felony or of the following crimes: weapons offenses, possessing burglar's tools, receipt of stolen property, unlawful entry, aiding escape from prison, pick-pocketing, possessing or distributing narcotics, solicitation of sodomy or lewdness, reckless endangerment, terroristic threats, simple assault. 22 P.S. § 16(b).

## Psychologist

**Must refuse** license for any drug felony conviction **in last ten years.**

**May refuse** license for any other felony or misdemeanor **in the practice of psychology.** 63 P.S. §§ 1206, 1208. *See also* pages 5-7, regarding new restrictions on working with children.

## Radioactive Waste Disposal (applies to facility operators)

**Must deny** license for conviction of a first degree misdemeanor or felony **involving an environmental crime within the last 10 years.** **May deny** license if applicant or applicant's partner, officer, associate, or agent has engaged in unlawful conduct. 35 P.S. § 7131.502.

## **APPENDIX “B”**



Pennsylvania Human Relations Commission  
Memorandum

DATE: August 17, 2009

TO: Homer C. Floyd, Executive Director

THRU: Michael Hardiman, Chief Counsel

FROM: Ryan Allen Hancock, Assistant Chief Counsel  
Michael Connett, Law Clerk

RE: Proposed Policy Guidance Concerning Job Applicants with Criminal Records

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“People who have committed a crime should be entitled to a second chance after paying their debt to society.”  
-- *American Bar Association, 2007* --

**I. SUMMARY:**

Criminal background checks have become a routine part of the hiring process throughout Pennsylvania and the United States. Whereas 51% of large employers used criminal background checks in 1996, 80% of large employers utilized them in 2003, and the percentage is likely even greater today.<sup>i</sup> Due to the increased use of criminal background checks for screening prospective employees, a growing number of Americans are being excluded from employment opportunities on the basis of having a prior criminal record.<sup>ii</sup> In Pennsylvania, legal services organizations such as Community Legal Services (CLS)<sup>iii</sup> report that job applicants with criminal records are routinely facing “unwarranted stigmatization” by employers – in contravention to the public policy of the state.<sup>iv</sup>

Hiring policies that disqualify job applicants on the basis of a prior criminal conviction may violate state and federal civil rights statutes<sup>8</sup>. While such hiring policies are facially neutral, they can produce a severe disparate impact on Black and Hispanic populations due to the significantly higher rates of criminal convictions experienced by these populations.<sup>v</sup>

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<sup>8</sup> Arrests which have not led to conviction should virtually never be considered for hiring purposes within the Commonwealth.

At the federal level, the Equal Employment Opportunity Commission (EEOC) has issued a Policy Statement advising that hiring policies which exclude applicants on the basis of a prior conviction are “unlawful under Title VII in the absence of a justifying business necessity.”<sup>vi</sup> Federal courts – including the Third Circuit – have interpreted Title VII in a similar manner as the EEOC.<sup>vii</sup> However, the Pennsylvania Human Relations Commission has yet to issue any guidance on the acceptable considerations of a job applicant’s criminal background under the PHRA.

Because current data from Pennsylvania indicates that racial minorities have significantly higher rates of conviction<sup>viii</sup> and incarceration<sup>ix</sup> than Whites and that this in-state racial disparity is significantly more pronounced than the national average,<sup>x</sup> the exclusion of job applicants with prior convictions in Pennsylvania is having a disparate impact on protected classes under the PHRA. According to CLS, the unwarranted use by employers of criminal background information remains the “most significant” issue of employment discrimination faced by their clients.<sup>xi</sup>

It is our recommendation, therefore, that the Commission issue Policy Guidance on when an employer’s consideration of a job applicant’s<sup>9</sup> criminal background is consistent with Section 5(a) of the PHRA.<sup>10</sup>

## **II. FACTUAL BACKGROUND**

### **1) Hiring Policies that Exclude on the Basis of a Prior Criminal Conviction Have a Disparate Impact on Blacks and Hispanics – Both Nationally *and* in Pennsylvania:**

Hiring policies that exclude job applicants on the basis of a prior conviction record are almost certain to have a disparate impact on Black and Hispanic Americans, due to the stark disparity in conviction rates that exist between Whites, Blacks, and Hispanics. The national data supporting this proposition is overwhelming. For example:

- As of June 2008, Black Americans were incarcerated in state and federal prisons at a rate 6.5 times higher than Whites.<sup>xii</sup>
- The Department of Justice estimates that the lifetime chance of a Black male going to prison is 32.6%.<sup>xiii</sup> The lifetime chance for an Hispanic male is 17.2%.<sup>xiv</sup> By contrast the respective rate for White males is 5.9%.<sup>xv</sup>
- The rate of incarceration in state prisons and local jails is higher for Blacks than Whites in every single state.<sup>xvi</sup>
- Blacks have a higher jail incarceration rate than Whites for every violent offense, property offense, and drug offense measured by the Department of Justice.<sup>xvii</sup>

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<sup>9</sup> Although the focus of this memo is on prospective employees, we believe the recommended policy applies equally to current employees as well. A preliminary review of the case law indicates that such an approach is warranted. *See, e.g. Wright v. Home Depot U.S.A. Inc.*, 142 P.3d 265 (Hi.2006) (state statute limiting employer’s consideration of a prospective employee’s criminal background applies with equal force to current employees.)

<sup>10</sup> Our recommended guidance concerning claims of disparate impact arising from conviction-based hiring policies, does not affect the Commission’s analysis of disparate treatment-based claims.

The disparity in incarceration and conviction rates between Black, Hispanic and White Americans is more pronounced in the Commonwealth of Pennsylvania than it is for the nation as a whole. For example:

- The Pennsylvania incarceration rate for Blacks is 9.2 times higher than the incarceration rate for Whites in state prisons and local jails.<sup>xviii</sup>
- Only 9 other states have a more pronounced disparity in incarceration rates between Blacks and Whites than Pennsylvania.<sup>xix</sup>
- The Pennsylvania incarceration rate for Hispanics is 5.6 times higher than the incarceration rate for Whites in state prisons and local jails.<sup>xx</sup> Only one other state has a greater disparity.<sup>xxi</sup>
- Although minorities comprise less than 14% of the Pennsylvania population, they received 32% of the convictions issued in 2007.<sup>xxii</sup>

## **2) The Adverse Economic Impacts of a Prior Criminal Conviction are More Severe for Black than White Applicants**

Criminologists have repeatedly found a “strong and consistent negative effect” of a prior conviction on an individual’s employment prospects.<sup>xxiii</sup> However, a prior conviction appears to affect Black applicants more severely than White applicants. In a 2009 study from New York, a criminal background reduced a Black job applicant’s chances of receiving a callback from prospective employers by 60%.<sup>xxiv</sup> By contrast, the respective reduction in the callback rate for similarly situated White applicants with identical professional qualifications and criminal backgrounds was only 29%.<sup>xxv</sup> Similar findings were reported in an earlier study from Wisconsin as well.<sup>xxvi</sup>

In addition, both the New York and Wisconsin studies reported that Black applicants *without* a criminal background had roughly the same chance of receiving a callback as similarly situated white applicants *with* a criminal background. This finding has again been confirmed in a forthcoming study which reports that “black and Latino applicants with clean backgrounds fared no better than a white applicant just released from prison.”<sup>xxvii</sup>

Such studies indicate that a prior criminal conviction produces a significantly greater impairment in securing employment for Black applicants than similarly situated White applicants.

## **3) Unemployment is linked to higher rates of recidivism**

The difficulties ex-offenders face in securing steady employment is particularly problematic in light of research linking unemployment with recidivism. As noted by the American Bar Association, “The ability to get and maintain employment has been identified as a reliable predictor of a criminal offender’s ability to successfully reenter society after a term in prison, and remain law-abiding.”<sup>xxviii</sup> According to a recent study from Chicago, ex-offenders are three times more likely to recidivate if they fail to secure steady employment.<sup>xxix</sup>

While social scientists continue to study the relationship between unemployment and recidivism<sup>xxx</sup>, it appears likely – based on present knowledge – that unemployment may

exacerbate the rate of recidivism among ex-offenders.<sup>xxx</sup> Increasing employment opportunities for ex-offenders, therefore, may not only reduce unintentional employment discrimination against Blacks and Hispanics, but may promote positive public safety outcomes as well.

#### **4) New research indicates little risk of recidivism when an ex-offender has remained crime-free for an extended period of time.**

New research indicates that ex-offenders who have remained crime-free for an extended period of time are no more likely to commit a new crime than non-offenders.

According to a study published in the May 2009 issue of the journal *Criminology*, young adults who committed burglary at the age of 18 were no more likely to commit a crime than non-offenders if they had remained crime-free for 3.8 years.<sup>xxxii</sup> Similarly, young adults who had committed aggravated assault or robbery were no more likely than non-offenders to commit a new crime if they remained crime-free for 4.3 or 7.7 years respectively.<sup>xxxiii</sup>

Consistent with these findings, a recent study of a population cohort in Philadelphia, found that “a person who offended 6 or 7 years in the past looks very similar in regard to the risk of new offending to a person who never offended at all.”<sup>xxxiv</sup> Based on the findings of the Philadelphia study, the authors suggest “that after a given period of remaining crime free it may be prudent to wash away the brand of ‘offender’ and open up more legitimate business opportunities to this population.”<sup>xxxv</sup>

### **III. STATE of the LAW:**

#### **Federal law:**

“Pennsylvania courts generally interpret the PHRA in accordance with its federal counterparts.”<sup>xxxvi</sup> Federal courts interpreting Title VII of the Civil Rights Act of 1964 have held that employers cannot have a “blanket policy of denying employment to any person having a criminal conviction.”<sup>xxxvii</sup>

According to the Eighth Circuit, hiring policies that exclude applicants on the basis of a prior conviction that is “remote in time” and which “does not significantly bear upon the particular job requirements” is an “unnecessarily harsh and unjust burden” which will have a disparate impact on Black Americans.<sup>xxxviii</sup>

The Eighth Circuit later provided guidance to employers for determining the relevance of an applicant’s prior criminal conviction.<sup>xxxix</sup> According to *Green*, employers may consider an applicant’s prior criminal conviction “so long as [the employer] takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.”<sup>xl</sup>

Similarly, the Third Circuit has recently held that a conviction-based hiring policy must be able to “distinguish between individual applicants that do and do not pose an unacceptable level of risk.”<sup>xli</sup> Whether or not a policy distinguishes “with sufficient accuracy between those who pose



[a] minimal level of risk and those that do not” is generally a question of fact.<sup>xlii</sup> The employer’s burden is to demonstrate with “some level of empirical proof”<sup>xliii</sup> that its policy “accurately – but not perfectly” meets this standard.<sup>xliv</sup>

### The Position of the EEOC:

According to a 1987 Policy Statement<sup>11</sup> issued by the Equal Employment Opportunity Commission (EEOC), it is a presumptive violation of Title VII for employers to bar applicants with prior criminal convictions.<sup>xlv</sup> For, although the policy is facially neutral, it is presumed – based on the racial disparity in national conviction rates – to have a discriminatory effect on Blacks and Hispanics. To rebut this presumption, employers can either 1) cite statistics which challenge the assumption that the hiring policy has a disparate impact or 2) defend the hiring policy by demonstrating that it is “justified by business necessity.”<sup>xlvi</sup>

To rebut the prima facie case that a conviction policy has an adverse effect on Blacks or Hispanics, the EEOC allows employers to cite more “narrowly drawn statistics” which demonstrate that the hiring policy does not have a disparate impact.<sup>xlvii</sup> Such statistics may include: 1) regional or local data showing the lack of racial disparity in conviction rates, 2) data showing the lack of racial disparity in conviction rates for the specific crimes being screened by the employer, or 3) data demonstrating the absence of a disparate impact on the employer’s actual “applicant pool.”<sup>xlviii</sup>

While the EEOC allows employers to present “applicant pool” data, it notes with caution that such data may be inherently distorted by its possible exclusion of individuals with criminal convictions who chose not to apply because of the employer’s policy.<sup>xlix</sup> As noted by the EEOC, “if many Blacks with conviction records did not apply for a particular job because they knew of the employer’s policy and they therefore expected to be rejected, then applicant flow data would not be an accurate reflection of the conviction policy’s actual effect.”<sup>1</sup>

If an employer fails to rebut the presumption of disparate impact, it may nevertheless defend the hiring policy by demonstrating that the policy is “justified by business necessity.”<sup>li</sup> To demonstrate “business necessity”, an employer must show – in accordance with the standard set forth by the Eighth Circuit<sup>lii</sup> – that it considered:

1. the nature and gravity of the offense or offenses,
2. the time that has passed since the conviction and/or completion of sentence, and
3. the nature of the job for which the applicant has applied.

### Pennsylvania State Law:

Pennsylvania state law currently provides that public and private employers may only consider felony and misdemeanor convictions if “they relate to the applicant’s suitability for employment in the position for which he has applied.” 18 Pa. C.S. 9125(b). However, because this statute is not enforced by any administrative agency, it remains largely unutilized. Pennsylvania courts have therefore had little occasion to interpret the meaning of the statute’s “suitability for

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<sup>11</sup> The EEOC Policy Statement is currently under review.

employment” standard,<sup>liii</sup> and remedies for a violation remain unclear. In one of the few cases to interpret Section 9125(b), the Pennsylvania Superior Court held that – based on its legislative history – the statute precludes employers from considering arrests not leading to conviction.<sup>liv</sup>

Section 9125(b) is consistent with what the Pennsylvania Supreme Court has described as the “deeply ingrained public policy of this state to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders.”<sup>lv</sup> As noted by the Court, “to forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation.”<sup>lvi</sup>

#### Other States:

In addition to Pennsylvania, a significant minority of states have enacted statutes limiting employers’ consideration of criminal background information when making hiring decisions. Although most of these state statutes pertain only to public employers, some states – including Hawaii, Kansas, New York, and Wisconsin – have statutes that restrict private employers as well.

Common elements of state laws restricting an employer’s consideration of a job applicant’s criminal background include:

- a prohibition on the consideration of arrests not leading to convictions;
- a requirement that the conviction be directly, reasonably, rationally, or substantially related to the job being applied for;
- a requirement that the employer consider the length of time that has elapsed since the applicant’s conviction or release from prison;
- a requirement that the employer consider evidence of the applicant’s rehabilitation;
- a prohibition on the employer inquiring into, or considering, an applicant’s criminal background until later stages in the hiring process (aka “ban the box”); and
- a requirement that the employer notify the applicant in writing that the decision not to hire was based in part, or in whole, on the applicant’s criminal history;
- defined exceptions to the rule for certain occupations (e.g. law enforcement) and certain crimes (e.g. sex-related crimes).

#### *Arrests not leading to conviction:*

At least 13 states have laws prohibiting employers from inquiring about, or considering, arrests that did not lead to conviction.<sup>lvii</sup>

#### *Relationship of applicant’s conviction to job:*

At least 15 states have requirements that employers can only exclude applicants on the basis of a prior criminal conviction if the conviction is “directly”,<sup>lviii</sup> “reasonably”,<sup>lix</sup> “rationally”,<sup>lx</sup> or “substantially”<sup>lxi</sup> related to the job. For example:

- In New York, a conviction may be “directly related” to a job if it has a bearing on the applicant’s “fitness or ability to perform one or more [of the job’s] duties or responsibilities.”<sup>lxii</sup>
- In Wisconsin, a conviction “substantially relates” to a job if the “circumstances” of the offense “substantially relate to the circumstances of the particular job or licensed activity.”<sup>lxiii</sup>
- In Kansas, an applicant’s criminal history may be considered if it “reasonably bear[s] on the applicant’s trustworthiness or the safety or well-being of the employer’s employees or customers.”<sup>lxiv</sup>

*Length of time since conviction/release:*

Some states require employers to consider the length of time that has elapsed since the applicant’s conviction or release from prison. In Connecticut<sup>lxv</sup> and New York,<sup>lxvi</sup> the length of time that has elapsed since the conviction is one of several factors that employers must consider. Neither state, however, indicates when the length of time is significant. By contrast, Hawaii<sup>lxvii</sup> and Washington State<sup>lxviii</sup> have provided specific guidance on when the length of time since an applicant’s conviction or release precludes the consideration of the conviction. In Hawaii, public and private employers may not consider a conviction if it occurred more than ten years prior to the application.<sup>lxix</sup> Washington State also uses a ten year standard, although it only applies to public employers.<sup>lxx</sup>

*Evidence of rehabilitation:*

Some states require an employer to consider evidence of an applicant’s rehabilitation.<sup>lxxi</sup> In New York, a presumption of rehabilitation is established if the applicant has received a “Certificate of Good Conduct”<sup>lxxii</sup> from the New York State Division of Parole.<sup>lxxiii</sup> In Minnesota, a presumption of rehabilitation is established for the purpose of public employment if more than one year has elapsed since the applicant’s release from prison and the applicant has obeyed all terms of his or her parole or probation.<sup>lxxiv</sup>

*“Ban the Box”: Prohibition on inquiring into an applicant’s criminal background until later stages in the hiring process:*

Several states have enacted “ban the box” legislation which prohibits employers from asking about an applicant’s criminal background on the employment application. Hawaii prohibits both public and private employers from inquiring into an applicant’s criminal history until the employer has made a conditional offer of employment.<sup>lxxv</sup> In May 2009, Minnesota’s Governor approved a bill which prohibits public employers from inquiring into an applicant’s criminal background until the applicant has been selected for an interview.<sup>lxxvi</sup> Massachusetts enacted similar legislation in 2008.<sup>lxxvii</sup>

In addition to state-wide legislation, several cities and counties – including Boston (July 2006), Chicago (January 2006), Minneapolis (December 2006); San Francisco (June 2006), St. Paul (December 2006) and Alameda County, California (October 2006) – have enacted ban the box legislation.<sup>lxxviii</sup>

### *Notification requirement:*

Several states, including Pennsylvania,<sup>lxxxix</sup> require that an employer notify the applicant in writing if the decision not to hire was based in whole, or in part, on the applicant's criminal records.<sup>lxxx</sup>

### *Exceptions based on occupation and crime:*

Many states with restrictions on how employers may consider a job applicant's criminal background provide exceptions to the rule. Two common exceptions are that law enforcement agencies may consider all aspects of an applicant's criminal background,<sup>lxxxix</sup> and that employers in certain types of occupations may automatically bar applicants with certain types of convictions.<sup>lxxxii</sup>

### Involvement of State Civil Rights Agencies:

In many states, criminal record statutes, such as Pennsylvania's 9125(b), which restrict an employers' consideration of an applicant's criminal background are not within the jurisdiction of the state civil rights agency. However, in at least five states – Hawaii,<sup>lxxxiii</sup> Massachusetts,<sup>lxxxiv</sup> New York,<sup>lxxxv</sup> and Wisconsin<sup>lxxxvi</sup> – an unjustified exclusion of job applicants on the basis of a prior criminal record is considered a form of unlawful employment discrimination and, hence, under the explicit jurisdiction of the state civil rights agency.

## **IV. OUR RECOMMENDATIONS:**

For the foregoing reasons, we recommend that the Commission promulgate the following policy:

- **Presumption of disparate impact.** Any hiring policy used by a public or private employer that excludes applicants on the basis of a prior conviction is presumptively discriminatory (e.g. Complainant has established a prima facie case of unlawful discrimination) under Section 5(a) of the PHRA due to its presumed disparate impact on Black and Hispanic populations.<sup>lxxxvii</sup> This presumption is warranted in light of data showing that Pennsylvania has a more pronounced racial disparity in its conviction and incarceration rates than the nation as a whole.<sup>lxxxviii</sup> Consequently, Black or Hispanic Complainants alleging disparate impact based on an employer's conviction policy need not provide statistical evidence to establish a prima facie case.
  - **Presumption is rebuttable.** To rebut the presumption of disparate impact, Respondents may utilize conviction data from a more limited geographical boundary than the Commonwealth of Pennsylvania (e.g. the relevant city, census region, or county) or conviction data for the specific crimes being screened by the Respondent.<sup>lxxxix</sup> In utilizing more narrowly drawn statistics, the Commission will consider "applicant pool" data. The Commission notes, however, that there is an inherent likelihood that such data will exclude otherwise interested applicants who chose not to apply due to Respondent's conviction policy and may thus have little persuasive effect.<sup>xc</sup> Moreover, in accordance with the U.S.

Supreme Court, an employer cannot rebut a presumption of disparate impact by pointing to evidence of diversity within its workplace (e.g. the “bottom-line defense.”)<sup>xcvi</sup>

- **Business Necessity as a Justification:** If Respondent’s conviction policy has a disparate impact, it will not be deemed a violation of Section 5(a) if the employer can demonstrate that the policy is justified by business necessity.<sup>xcvii</sup> To demonstrate business necessity, an employer must show with “some level of empirical proof” that the individual applicant has been convicted of a crime, not merely arrested, and poses an “unacceptable level of risk.”<sup>xcviii</sup> The Commission will consider:
  - **Whether the applicant’s prior conviction substantially relates to his or her suitability for the job.**<sup>xcix</sup> In determining whether the conviction relates to the job, the Commission will consider 1) the duties and responsibilities of the job and 2) the bearing, if any, of the applicant’s prior criminal offense(s) on the applicant’s suitability to assume these duties and responsibilities.
  - **The length of time that has elapsed since the applicant’s conviction, or release from prison.** Modern criminological research shows that the risk of recidivism clearly decreases with time.<sup>xcv</sup> The Commission will, therefore, consider the length of time that has elapsed since the applicant’s conviction or release from prison. A presumption against business necessity will be established if an applicant has not re-offended seven or more years prior to his or her application.
  - **Evidence of the applicant’s rehabilitation, including:**
    - satisfactory completion of all terms and conditions of parole and/or probation;
    - maintenance of steady employment since the conviction or release from prison;
    - educational attainment or professional training since the conviction;
    - completion of rehabilitative treatment (e.g. alcohol or drug treatment);
    - 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.
  - **The circumstances, number and seriousness of the applicant’s prior offense(s).**
  - **The manner in which the employer solicited the applicant’s criminal history during the hiring process.** A hiring policy in which the employer considers the above-listed factors and does not inquire into, or consider, an applicant’s criminal background until later stages of the hiring process (e.g. after the interview or after a conditional offer of employment has been made) will be looked upon favorably by the Commission.
- **Alternative, less discriminatory measures:** If the employer is able to demonstrate that the challenged hiring policy is justified by business necessity, complainant may still prevail on a disparate impact claim if he or she can demonstrate that there is an alternative, less discriminatory policy available that would satisfy the employer’s articulated business needs.

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<sup>i</sup> Laura Moskowitz, Address at the U.S. Equal Employment Opportunity Commission (Nov. 20, 2008), available at <http://www.eeoc.gov/abouteeoc/meetings/11-20-08/moskowitz.html>.

<sup>ii</sup> COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, AM. BAR ASS’N, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES, 27 (2007), available at: <http://www.abanet.org/cecs/secondchances.pdf>.

<sup>iii</sup> Janet Ginzberg, Address at the U.S. Equal Employment Opportunity Commission (Nov. 20, 2008), available at <http://www.eeoc.gov/abouteeoc/meetings/11-20-08/ginzberg.html>

<sup>iv</sup> Secretary of Revenue v. John’s Vending Corporation, 453 Pa. 488, 494 (Pa. 1973) (stating that it’s the “deeply ingrained public policy of this state to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders.”)

<sup>v</sup> THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf>

<sup>vi</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON THE ISSUE OF CRIMINAL RECORDS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Feb. 4, 1987), available at <http://www.eeoc.gov/policy/docs/convict1.html>

<sup>vii</sup> See, e.g. El v. Septa, 479 F.3d 232, 242 (3rd Cir. 2007); Green v. Missouri Pacific Railroad Co., 549 F.2d 1158 (8th Cir. 1977); Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975); Field v. Orkin, 2001 WL 34368768 (E.D. Pa. Oct 30, 2001).

<sup>viii</sup> SENTENCING IN PENNSYLVANIA, PENNSYLVANIA COMM’N ON SENTENCING, SENTENCED OFFENDER CHARACTERISTICS AND TYPE OF CONVICTION: PENNSYLVANIA (2009), available at [http://www.portal.state.pa.us/portal/server.pt/document/398868/paofndrcnvctn\\_exclddui07\(1\)\\_pdf](http://www.portal.state.pa.us/portal/server.pt/document/398868/paofndrcnvctn_exclddui07(1)_pdf)

<sup>ix</sup> PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MIDYEAR 2005, at 11 (2006), available at <http://www.ojp.gov/bjs/abstract/pjim05.htm>

<sup>x</sup> *Id.*

<sup>xi</sup> Ginzberg, *supra* note 3.

<sup>xii</sup> HEATHER C. WEST & WILLIAM J. SOBEL, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PRISON INMATES AT MIDYEAR 2008 – STATISTICAL TABLES 18 (2009) available at <http://www.ojp.usdoj.gov/bjs/abstract/pim08st.htm>.

<sup>xiii</sup> BONCZAR, *supra* note 5, at 8.

<sup>xiv</sup> *Id.*

<sup>xv</sup> *Id.*

<sup>xvi</sup> HARRISON, *supra* note 9, at 11.

<sup>xvii</sup> DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, PROFILE OF JAIL INMATES, 2002, at 4 (2004), available at [www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf](http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf).

<sup>xviii</sup> HARRISON, *supra* note 9, at 11.

<sup>xix</sup> *Id.*

<sup>xx</sup> *Id.*

<sup>xxi</sup> *Id.*

<sup>xxii</sup> PENNSYLVANIA DEP’T OF CORRECTIONS, NUMBER OF INCARCERATED OFFENDERS IN THE PA DEPARTMENT OF CORRECTIONS BY RACE (2009), available at [http://www.portal.state.pa.us/portal/server.pt/document/480137/painrcrtdoffndrrce\\_pdf](http://www.portal.state.pa.us/portal/server.pt/document/480137/painrcrtdoffndrrce_pdf).

<sup>xxiii</sup> Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 622 (2005).

<sup>xxiv</sup> Devah Pager, Bruce Western, Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCES 199-200 (2009), available at [http://www.princeton.edu/~pager/annals\\_sequencingdisadvantage.pdf](http://www.princeton.edu/~pager/annals_sequencingdisadvantage.pdf)

<sup>xxv</sup> *Id.* at 200.

<sup>xxvi</sup> Pager, *supra* note 23, at 645.

<sup>xxvii</sup> Devah Pager, Bruce Western, Bart Bonikowski, *Race at Work: A Field Experiment of Discrimination in a Low-Wage Labor Market*, AMERICAN SOCIOLOGICAL REVIEW (forthcoming October 2009).

<sup>xxviii</sup> COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, *supra* note 2, at 28.

<sup>xxix</sup> *Id.* at 27.

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<sup>xxx</sup> See, e.g., MDRC, Transitional Jobs Reentry Demonstration, [http://www.mdrc.org/project\\_33\\_83.html](http://www.mdrc.org/project_33_83.html) (last visited Aug. 5, 2009).

<sup>xxxi</sup> See, e.g. Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, 5 CORRECTIONS MANAGEMENT QUARTERLY 1, 14 (2001) (stating “we find enough sound experimental evidence of program effectiveness to conclude that employment remains a viable avenue for reducing crime and recidivism.”)

<sup>xxxii</sup> Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009).

<sup>xxxiii</sup> *Id.*

<sup>xxxiv</sup> Megan C. Kurlychek, Robert Brame, & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?* 5 CRIMINOLOGY & PUBLIC POLICY 483 (2006).

<sup>xxxv</sup> *Id.*

<sup>xxxvi</sup> *Kelly v. Drexel Univ.*, 94 F.3d 102, 105 (3d Cir. 1996). However, although Pennsylvania courts often interpret the PHRA in accordance with its federal counterparts, it is well-settled that “Pennsylvania courts are not bound in their interpretations of Pennsylvania law by federal interpretations of parallel provisions in Title VII.” See *Jones v. School District of Phila.*, 19 F. Supp. 2d 414, 417 (E.D. Pa. 1998). See also *Anderson v. Upper Bucks County Area Vocation Tech. School*, 30 Pa. Commw. 103, 108 (1977) (“This Court is not compelled by the [Supreme Court’s] construction of Title VII ... to construe the Pennsylvania Human Relations Act in the same fashion.”); *Harrisburg School District v. Commw. of PA*, 77 Pa. Comm. 594 (1983)(citing *Anderson*).

<sup>xxxvii</sup> *Field v. Orkin*, 2001 WL 34368768 (E.D. Pa. Oct 30, 2001).

<sup>xxxviii</sup> *Green v. Missouri Pacific Railroad Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975).

<sup>xxxix</sup> *Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158 (8th Cir. 1977).

<sup>xl</sup> *Id.* at 1160.

<sup>xli</sup> *El v. Septa*, 479 F.3d 232, 245 (3rd Cir. 2007).

<sup>xlii</sup> *Id.*

<sup>xliii</sup> *Id.* at 240.

<sup>xliv</sup> *Id.* at 242.

<sup>xlv</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra note 6*.

<sup>xlvi</sup> *Id.*

<sup>xlvii</sup> EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT (July 29, 1987), available at <http://www.eeoc.gov/policy/docs/convict2.html>.

<sup>xlviii</sup> *Id.*

<sup>xlix</sup> *Id.* (citing *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977)).

<sup>l</sup> *Id.*

<sup>li</sup> *Id.*

<sup>lii</sup> *Green*, 549 F.2d at 1160.

<sup>liii</sup> See *Cisco v. United Parcel Services*, 476 A.2d 1340 (Pa. Super. 1984); *Hunter v. Port Authority of Allegheny Co.*, 419 A.2d 631 (Pa. Super. 1980).

<sup>liv</sup> *Cisco*, 476 A.2d at 1343

<sup>lv</sup> *Secretary of Revenue v. John’s Vending Corporation*, 453 Pa. 488, 494-495 (Pa. 1973).

<sup>lvi</sup> *Id.* As further evidence of the “public policy” articulated by the Pennsylvania Supreme Court, the Pennsylvania Superior Court has interpreted Article 1, Section 1 of the State Constitution as precluding public employers from denying employment to applicants with prior convictions, unless denying such applicants advances a “legitimate governmental objective.” *Hunter*, 419 A.2d at 638.

<sup>lvii</sup> Arkansas [Ark. Code §§ 17-1-103(b)(2) (only applies to public employers)]; California [Cal.Labor Code § 432.7]; Connecticut [Conn. Gen. Stat. § 46a-80(d) (only applies to public employers)]; Hawaii [Haw. Rev. Stat. § 378-2.5(c)]; Illinois [775 Ill. Comp. Stat. 5/2-103]; Maine [16 M.R.S.A. §§ 611, 613 (employers may only consider arrests where there remains an “active prosecution”)]; Massachusetts [M.G.L.A. 151B § 4(9)]; Michigan [Mich. Comp. Laws § 37.2205a(1) (employers cannot inquire into misdemeanor arrests not leading to conviction but may inquire into felony arrests)]; Montana [Mont.Admin.R. 24.9.1406 (inquiries into arrests not leading to convictions “raise a suspicion that the employer intends to use the information to unlawfully discriminate and, therefore, should not be asked at any time during the hiring process”)]; New Jersey [N.J.S.A. 2C:51-2 (only applies to public employers)]; New Mexico [N. M. S. A. 1978, § 28-2-3 (only applies to public employers)]; New York [N.Y. Exec. Law § 296(16)]; Pennsylvania

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[18 Pa.C.S.A. § 9125 (interpreted by Pennsylvania Superior Court in *Cisco*, 476 A.2d at 1343 as precluding the consideration of arrests not leading to convictions)]; Wisconsin [Wis. Stat. § 111:335(1)(a)].

<sup>lviii</sup> Florida [Fla. Stat. Ann. § 112.011(1)(a) (only applies to public employers)]; Kentucky [Ky. Rev. Stat. Ann. § 335B.020(1) (public employers)]; Louisiana [La. Rev. Stat. Ann. Â§ 37:2950(A) (public employers)]; Minnesota [Minn. Stat. § 364.03 (public employers)]; New Mexico [N.M. Stat. Ann. § 28-2-4 (public employers)]; New York [N.Y. Correct. Law § 752 and N.Y. Exec. Law § 296(15) (public and private employers)]; Washington [Wash. Rev. Code §§ 9.96A.020 (public employers)].

<sup>lix</sup> Arizona [Ariz. Rev. Stat. § 13-904(E) (only applies to public employers)]; Kansas [Kan. Stat. Ann. § 22-4710(f) (private and public employers)].

<sup>lx</sup> Hawaii [Haw. Rev. Stat. § 378-2.5(a) (applies to both private and public employers)].

<sup>lxi</sup> Wisconsin [Wis. Stat. § 111.335(b) (applies both private and public employers)].

<sup>lxii</sup> N.Y. Correct. Law § 752-753.

<sup>lxiii</sup> Wis. Stat. § 111.335(b). The Wisconsin Supreme Court has interpreted this statute to mean that a conviction “substantially relates” to the job “if the tendencies and inclinations to behave in a certain way in a particular context are likely to reappear later in a related context, based on the traits revealed . . . It is the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.” *County of Milwaukee v. LIRC*, 139 Wis. 2d 805, 824 (Wis. 1987).

<sup>lxiv</sup> Kan. Stat. Ann. § 22-4710(f).

<sup>lxv</sup> Conn. Gen. Stat. § 46a-80(b).

<sup>lxvi</sup> N.Y. Correct. Law § 753(d).

<sup>lxvii</sup> Haw. Rev. Stat. § 378-2.5(d).

<sup>lxviii</sup> Wash. Rev. Code § 9.96A.020(2).

<sup>lxix</sup> Haw. Rev. Stat. § 378-2.5(d).

<sup>lxx</sup> Wash. Rev. Code § 9.96A.020(2).

<sup>lxxi</sup> Connecticut [Conn. Gen. Stat. § 46a-80(b) (only applies to public employers)]; Minnesota [Minn. Stat. § 364.03(3) (public employers)]; New Mexico [N.M. Stat. Ann. § 28-2-4(B) (public employers)]; New York [N.Y. Correct. Law § 753(g) (private and public employers)];

<sup>lxxii</sup> Ex-offenders can apply for a Certificate of Good Service after a certain defined period of time (3 to 5 years) after their conviction or release from prison. For “A” and “B” felonies, ex-offenders must wait 5 years. For “C,” “D,” and “E” felonies, ex-offenders must wait 3 years. If, after the application and subsequent investigation, the parole officer finds that the applicant has been rehabilitated, a Certificate will be issued. For more information, see:

[http://www.legal-aid.org/selfhelp/employment/offender\\_certificates.html](http://www.legal-aid.org/selfhelp/employment/offender_certificates.html)

<sup>lxxiii</sup> N.Y. Correct. Law § 753(2) (“the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”)

<sup>lxxiv</sup> Minn. Stat. § 364.03(3) (“Sufficient evidence of rehabilitation may be established by the production of... (2) evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole.”)

<sup>lxxv</sup> Haw. Rev. Stat. § 378-2.5(b) (“Inquiry into and consideration of conviction records for prospective employees shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.”)

<sup>lxxvi</sup> Minn. Stat. 364.021 (“A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.”) Text of statute online at: <http://www.crimeandjustice.org/pdfFiles/BanTheBoxHR-Guide.pdf>

<sup>lxxvii</sup> Massachusetts Executive Order No. 745, January 11, 2008 (“It shall be the policy of the Executive Department with respect to employment decisions that a criminal background check will only occur, and its results will only be considered, in those instances where a current or prospective employee shall have been deemed otherwise qualified and the content of a criminal record is relevant to the duties and qualifications of the position in question.”)

Available online at: [http://www.mass.gov/Agov3/docs/Executive%20Orders/executive\\_order\\_495.pdf](http://www.mass.gov/Agov3/docs/Executive%20Orders/executive_order_495.pdf)

<sup>lxxviii</sup> Examples of Municipal Hiring Policies Addressing Criminal Records,

[http://www.secondchancenj.org/files/Ban%20the%20Box%20Overview\\_January%202008.doc](http://www.secondchancenj.org/files/Ban%20the%20Box%20Overview_January%202008.doc) (last visited Aug. 5, 2009). See also Jessica S. Henry, *Criminal History on a “Need to Know” Basis: Employment Policies that Eliminate*



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*the Criminal History Box on Employment Applications*, 5 JUSTICE POLICY JOURNAL (2008), available at [http://www.cjcj.org/files/criminal\\_history.pdf](http://www.cjcj.org/files/criminal_history.pdf).

<sup>lxxxix</sup> 18 Pa.C.S.A. § 9125(c).

<sup>lxxx</sup> See, e.g. *Connecticut* [Conn. Gen. Stat. § 46a-80(c)]; *New Mexico* [N. M. S. A. 1978, § 28-2-4(B)]; *New York* [N.Y. Correct. Law § 754].

<sup>lxxxxi</sup> See, e.g. Fla. Stat. Ann. § 112.011(2); La. Rev. Stat. Ann. § 37:2950(D); Wash. Rev. Code § 9.96A.030.

<sup>lxxxii</sup> See, e.g. Wash. Rev. Code § 9.96A.020(3)-(5)

<sup>lxxxiii</sup> Haw. Rev. Stat. § 378 (“It shall be an *unlawful discriminatory practice*: (1) Because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or *arrest and court record*: (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment...”) (*emphasis added*)

<sup>lxxxiv</sup> M.G.L.A. 151B § 4(9).

<sup>lxxxv</sup> NY Exec. Law 296(15) (“It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of ‘good moral character’ which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law.”)

<sup>lxxxvi</sup> Wis. Stat. § 111.335(1)(c) (“it is not employment discrimination because of conviction record to refuse to employ or license, or to bar or terminate from employment or licensing, any individual who: 1. Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.”)

<sup>lxxxvii</sup> In establishing this presumption, the Commission is interpreting Section 5(a) of the PHRA in accord with the Equal Employment Opportunity Commission’s interpretation of Title VII.

<sup>lxxxviii</sup> HARRISON, *supra* note 9, at 11.

<sup>lxxxix</sup> This is consistent with EEOC’s policy guidance on the use of statistics to rebut the presumption of disparate impact in a case involving a conviction policy. According to the EEOC “when the employer can present more narrowly drawn statistics showing either that Blacks and Hispanics are not convicted at a disproportionately greater rate or that there is no adverse impact in its own hiring process resulting from the convictions policy, then a no cause determination would be appropriate.” See <http://www.eeoc.gov/policy/docs/convict2.html>

<sup>xc</sup> See, e.g. *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977) (stating that “the application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.”); *Donnell v. General Motors Corp.*, 576 F.2d 1292, 1298-1299 (8th Cir. 1978) (finding that “the District Court gave undue weight to potentially misleading applicant data since the educational requirements will not only cause completed applications to be rejected, but it will also deter the completion of applications.”) See also Equal Employment Opportunity Commission, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, July 29, 1987.

<sup>xc</sup> *Connecticut v. Teal*, 457 U. S. 440 (1982).

<sup>xcii</sup> This is consistent with EEOC’s position that a conviction policy is “unlawful under Title VII in the absence of a justifying business necessity.” EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 6.

<sup>xciii</sup> This definition of business necessity was set forth by the Third Circuit in *El v. Septa*, 479 F.3d 232 (3rd Cir. 2007).

<sup>xciv</sup> The “suitability” for the job standard is in accord with 18 Pa. C.S. 9125(b) which provides that “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” (*emphasis added*).

<sup>xcv</sup> Blumstein & Nakamura, *supra* note 32. See also Kurlychek, Brame, & Bushway, *supra* note at 34.