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Pennsylvania Issues Proposed Guidance On Employer Practice of Excluding Applicants from Employment Based on Criminal Convictions

By Jason E. Ruff

The Pennsylvania Human Relations Commission (PHRC) recently proposed Policy Guidance that would apply a rebuttable presumption of disparate impact discrimination when an employer rejects African American and Hispanic applicants from employment pursuant to a policy regarding prior criminal convictions.¹ Under the Policy Guidance, when investigating complaints of unlawful disparate impact discrimination by African American and Hispanic complainants, the PHRC will assume that the complainant has established a *prima facie* case under Section 5 of the Pennsylvania Human Relations Act (PHRA). This permits a claim to proceed administratively without requiring the complainant to provide statistical evidence that the employer's policy has a disparate impact on African Americans or Hispanics. The PHRC has taken this position in light of statistics that demonstrate African Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population nationally, with an even greater disparity in Pennsylvania.

The proposed Policy Guidance applies only to claims of disparate impact, not disparate treatment. *Disparate impact* occurs when a policy or practice that does not appear to be discriminatory on its face, nevertheless disproportionately and negatively affects a group of individuals based on a certain characteristic protected by equal employment laws, such as race. *Disparate treatment* occurs when an employer unlawfully considers a protected characteristic when making an employment decision, for example, when an employer rejects African American applicants who have a conviction record, but does not reject similarly situated Caucasian applicants. The PHRC will continue to use its standard policies and procedures for investigating claims of disparate treatment.

How Can an Employer Defend Itself from Such Claims?

Under the Policy Guidance, an employer can rebut the presumption of disparate impact by using conviction data from a more limited geographical boundary than the entire Commonwealth of Pennsylvania, or by using conviction data for the specific crimes

being screened. An employer may also use “applicant pool” data to show that fewer African Americans and Hispanics applied for the position in question compared to other groups. However, the Policy Guidance notes that applicant pool data may have little persuasive effect on the PHRC because such data may exclude otherwise interested applicants who choose not to apply due to the existence of the policy. Further, the Policy Guidance does not prohibit employers from denying employment based on a criminal record where the employer is required or authorized to do so based on existing state or federal laws (e.g., laws regarding child care and nursing home positions). However, an employer cannot rebut the presumption of disparate impact by relying on evidence of diversity within its workplace (known as the “bottom-line defense”).

An employer may also defend against claims of disparate impact by presenting evidence that its policy or practice is required as a matter of business necessity. To demonstrate business necessity, an employer must show that the rejected applicant claiming disparate impact has been convicted of a crime as opposed to merely being arrested, and would pose an unacceptable level of risk in the workplace. In evaluating the employer’s claim that the applicant would create an unacceptable level of risk, the PHRC will consider the following factors:

- The circumstances, number and seriousness of the applicant’s prior offenses;
- Whether the applicant’s prior conviction substantially relates to his or her suitability for the job, considering the duties and responsibilities of the job and the relationship of those duties and responsibilities to the applicant’s prior criminal offenses;
- The length of time elapsed since the conviction or release from prison, with a presumption against business necessity if there has been seven or more years (excluding time spent incarcerated) between the applicant’s last offense and rejection from the job;
- Evidence of the applicant’s rehabilitation, including satisfactory completion of parole or probation, maintenance of steady employment, subsequent education or training and letters of recommendation from employers or parole or probation officers who have worked with the applicant; and
- The manner in which the employer solicited the applicant’s criminal history during the hiring process (i.e., the Commission will look favorably upon an employer that has a hiring process that does not consider criminal history until the later stages of the hiring process, for example, after an interview or a conditional offer of employment has been made).

If the employer is able to demonstrate that it rejected the applicant due to business necessity, the applicant may still prevail on a disparate impact claim by showing that there was an alternative, less discriminatory policy or practice that the employer could have adopted that would have satisfied its demonstrated business needs.

The proposed Policy Guidance does not have the force of a statute or administrative regulation, has no binding force or effect, and may not be cited as binding legal authority for any Commission ruling or other adjudication. It is intended only to indicate the manner in which the Commission exercises its administrative discretion. However, employers should expect it to be used against them as yet another tool, even indirectly as persuasive authority, in claims of failure to hire due to race discrimination.

Pennsylvania already has a statute in force, the Pennsylvania Criminal History Record Information Act (PCHRIA), which generally prohibits employers from considering during the hiring process arrests which did not lead to a conviction.² Under the PCHRIA, employers may consider felony and misdemeanor convictions only if “they relate to the applicant’s suitability for employment in the position for which he applied.” However, because that statute is not enforced by the Commission, the Commission felt that it was underutilized.

What Should Employers Be Doing Now

The PHRC is tentatively scheduled to consider the final Policy Guidance during its monthly public meeting on February 22, 2010, after which the Policy Guidance may be implemented in its current or slightly modified form. While it might be several months before the Policy

Guidance is in force, Pennsylvania employers should consider auditing their hiring practices now to ensure that they would pass muster under the PHRC's stated policy objectives regarding the consideration of criminal convictions in the hiring process.

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¹ *Policy Guidance Concerning the Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record*, 39 Pa.B. 6845, issued Nov. 28, 2009, available at http://sites.state.pa.us/PA_Exec/PHRC/crimguid.pdf.

² 18 PA. CONS. STAT. § 9125; see also *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 32 Pa. Super. 300 (1984).