

Proposed Criminal Background Check Guidelines¹

By: Robert J. Baker, Esquire



Robert J. Baker, Esquire is an associate with The Chartwell Law Offices, LLP. His practice concentrates in the defense of Pennsylvania employment law matters and human resources consultation on behalf of employers. Mr. Baker previously worked as a human resources generalist, where he gained extensive experience in human resources and employee relations. Additionally, Mr. Baker maintains his PHR certification and membership in the Society for Human Resources Management and Human Resources Professionals of Central Pennsylvania.

Mr. Baker can be contacted, by telephone at (717) 909-5170, or by email at rbaker@chartwelllaw.com.

The Pennsylvania Human Relations Commission (PHRC) has recently proposed new guidelines, which may affect employer criminal background checks, which are open for public comment until January 26, 2010. More specifically, the PHRC proposes the adoption of policy guidance titled, The Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record, which is intended to provide assistance to public and private employers, employment agencies and labor unions in their efforts to comply with the employment provisions found in the Pennsylvania Human Relations Act (PHRA).

Although the proposed policy does not have the same effect as the PHRC regulations, the Commission notes the policy is meant to serve as a tool to help ensure equal opportunity for all who seek employment in this Commonwealth. The PHRC notes that guidance is also intended in an effort to implement preventative measures to reduce employment discrimination in all facets of employment, including jobseekers, employees and employers to "understand the implications of adopting hiring and job retention policies that may disparately impact racial minority job applicants and employees."

Continuing, the proposed guidelines detail several basic principles. First and foremost, the policy outlines a presumption of disparate impact. The PHRC has taken the position 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 African Americans and Hispanics based upon statistical information that demonstrate a disproportionately greater rate of conviction than their representation in the population. Therefore, the PHRC will presume that the Complainant has established the disparate impact element of a *prima facie* case of unlawful discrimination. In other words, the PHRC will presume that a Complainant has met his or her initial burden of proof with respect to an allegation of discrimination as a result of the criminal background checks performed by the prospective employer or employer.

Secondly, it is important to note that this presumption can be rebutted through the use of conviction data "from a more limited geographical boundary than the Commonwealth of Pennsylvania," which may include the relevant city, census region or county, or conviction data for the specific crimes being screened by the respondent. In other words, rebuttal of the presumption is an opportunity for the prospective employer or employer to overcome the presumption of disability assumed by the PHRC.

Continuing, the PHRC has noted that an employer can rebut the presumption of disparate impact through demonstration that such a policy or practice is required as a matter of business necessity. In such a case, the employer will be determined to have not violated the PHRA. Factors the PHRC may consider include:

¹ Information from the Pennsylvania Bulletin was used for this article. The Pennsylvania Bulletin, No. 09-2209, may be found in its entirety at <http://www.pabulletin.com/secure/data/vol39/39-48/2209.html>.

- The circumstances, number and seriousness of the disqualified individual's prior offense(s) [criminal convictions].
- Whether the disqualified individual's prior conviction(s) substantially relates to his or her suitability for the job. The PHRC 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. The PHRC 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 the completion of parole and/or probation, additional education or training since the conviction, maintenance of employment since the conviction or release from prison, completion of rehabilitative treatment and letters of recommendation.
- 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 (for example, after the interview or after a conditional offer of employment has been made) will be looked upon favorably by the Commission.

Lastly, 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.

The proposed guidelines are indeed troublesome as they would place an onerous upon the prospective employer or employer to demonstrate or justify the business necessity of the criminal background checks. Further, it is conceivable that the proposed guidelines will interfere or conflict with the statutory obligations of certain industries to obtain criminal background checks as part of the pre-employment process.

Employers are strongly urged to submit comments to the PHRC. The comments may be submitted by email: phrc@state.pa.us or by mail: Comments on Proposed Policy Guidelines, Pennsylvania Human Relations Commission, Homer C. Floyd, Director, 301 Chestnut Street, Suite 300, Harrisburg, PA 17101-1702.

Employers or individuals with questions or concerns may contact Robert Baker by telephone: (717) 909-5170 or by email: rbaker@chartwelllaw.com.