



*Legal Remedies and Limitations:  
Employment of People with  
Criminal Records in Pennsylvania*



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The list of employment restrictions contained in this paper is the result of CLS's review of Pennsylvania and U.S. statutes and regulations as of May 24, 2016. However, it is possible that other restrictions exist that have not come to our attention or that have passed since this report was written. We invite readers of this report to contact Community Legal Services if they discover any other employment restrictions not reported here.

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## Introduction

Like most Americans, people with criminal records need to be employed to support themselves and their families. Moreover, participation in the labor economy is central to most of our identities; our jobs play a major role in defining who we are. In short, employment is a linchpin to the successful rehabilitation of people with records and their full and productive participation in society.

Unfortunately, the very existence of any kind of a criminal record is frequently a significant barrier to being hired for a job, or once hired, keeping the job<sup>1</sup>. Increasing numbers of Americans indisputably are passing through the criminal justice system and thus experiencing this employment barrier. The National Employment Law Project estimates that 65 million American adults, over one out of every four adults, have criminal records. High unemployment rates make finding employment even more difficult for persons with criminal records, often limiting them to low-wage jobs that offer no future.

The options for people with criminal records who are looking for work are limited. They can try to clean up their criminal records through expungements or pardons, although these procedures are limited in Pennsylvania. They can attempt

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<sup>1</sup> Some employment or licensing restrictions may also apply to individuals who have “founded” or “indicated” reports of child abuse. Although they are civil in nature, “indicated” reports of child abuse often carry some of the same employment consequences as criminal convictions, without the procedural safeguards afforded to persons charged with crimes. Because child abuse reports can affect employment opportunities, a brief discussion of these reports is warranted; please see Appendix A.



to enforce legal remedies that limit the extent to which criminal records can be considered when employment decisions are made.<sup>2</sup> They can try to convince employers to seek bonds against the risk of theft that employers fear from employing them. Most likely, they do not know of or cannot utilize any of these options, and their only alternatives are long, dogged and often repetitive job searches, work in the underground economy, or a return to committing crimes.

This report outlines the impact of criminal records on employment opportunities in Pennsylvania. In Part I, we discuss the overall legal framework applicable to the employment of people with criminal records. In Part II, we list occupations in which criminal records must be considered and which legally prohibit employment of some people with criminal records. In Part III, we discuss legal rights and remedies in the employment context, which are derived from state law, race discrimination laws, and local “Ban the Box” ordinances like those in Philadelphia and Pittsburgh.

## **I. Employer Consideration of Criminal Records Generally**

In many occupations, federal or state statutes require a criminal background check on new employment applicants. These laws usually mandate that the report be ordered from the Pennsylvania State Police (the PSP), the Federal Bureau of Investigation (the FBI), or both. These laws typically also list offenses or classes of

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<sup>2</sup> See Part III of this paper.

offenses (such as felonies) that prohibit employment of the person with the criminal record in that field. In other occupations, a similar statutory mandated screening is done in the licensing process, usually by a State licensing board. These statutes tend to exist in care-giving and security professions. These laws are discussed in the next section.

For the vast majority of jobs, however, no such laws exist to control an employer’s decision about an applicant with a criminal record. In those “unregulated” jobs, employers have a great deal of discretion whether or not to conduct a background check and hire an individual with a criminal record. However, there are limits to this discretion, created by federal antidiscrimination law and by state law that require employers to assess the suitability of the person despite the criminal record. These statutes are discussed in Part III.

## **II. Occupations with Legal Prohibitions against Employing People with Certain Criminal Records**

While all employers *may* use job-related criminal records in their hiring decisions, some employers *must* obtain criminal records and reject candidates with certain convictions. Both state and federal laws proscribe or restrict the hiring or licensing of individuals with particular types of convictions in the following professions. Note that these laws only govern convictions, not arrests that do not lead



to convictions. Moreover, juvenile adjudications do not constitute disqualifying offenses.<sup>3</sup>

The following are summaries of criminal background restrictions on Pennsylvania workers in employment or licensing that are created by federal and state law. People whose employment could be impacted should check into the precise list of crimes prohibited by statute and regulation and compare it to their criminal history records as reported by the PSP.<sup>4</sup> Employers are encouraged to learn the exact provisions of the laws applicable to their jobs, so that they do not over-exclude persons whose criminal convictions are not enumerated among the prohibitions.

**Broad Restriction: “Working with Children”**

Restrictions on working with children do not fit neatly into any particular category listed below, and therefore merit a separate explanation. In late 2014, the Pennsylvania legislature amended the Child Protective Services Law (CPSL) to expand the prohibitions on employment of individuals working with children. While previously the CPSL had required background checks and prohibited certain employment of job applicants for schools and child care, it now applies as well to anyone with a “direct contact with children.” “Direct contact” is further defined as anyone having the “care, supervision, guidance or control of children or routine

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<sup>3</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).

<sup>4</sup> A PSP record can be order on-line: <https://epatch.state.pa.us/Home.jsp> .

interaction with children.” (Emphasis added) “Routine Interaction” is further defined as “regular and repeated contact that is integral to a person’s employment...responsibilities.” The definition is arguably overbroad and vague and may be read to apply to an extremely broad range of professions.<sup>5</sup> Persons determined to be covered by this law are required to obtain both FBI and PSP records, as well as child abuse records.<sup>6</sup>

The offenses which prohibit employment under the CPSL are as follows:

**May not hire** individuals with convictions for homicide, aggravated 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**

In 2004, the CPSL’s lifetime prohibition on the employment of people with aggravated assault convictions was determined to violate the Pennsylvania Constitution. Warren County Human Services v. State Civil Service Commission, 844 A.2d 70 (Pa. Commw.), *appeal denied*, 863 A.2d 1152 (Pa. 2004). The legislature has not yet modified the statute to make it constitutional by putting time limits on the lifetime disqualifications. Consequently, the Pennsylvania Department of Public Welfare has an interim policy (reaffirmed in December of 2015) permitting employers required to comply with the CPSL to hire persons with convictions of the enumerated crimes if the following requirements are met:

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<sup>5</sup> 23 Pa. C. S. § 6303

<sup>6</sup> 23 Pa. C.S. § 6344

- The individual has a minimum five year aggregate work history in care-giving since the conviction.
- The individual's work history in care dependent services may not include any incidents of misconduct.<sup>7</sup>

### **Employment Prohibitions**

The following are professions in which employers are legally prohibited by law from hiring persons with certain offenses:

**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-related 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: arson, threats, willful destruction of property, importation or manufacture of controlled substance, burglary, robbery, theft, dishonesty/fraud, possession or distribution of stolen property, aggravated assault, bribery, or possession of controlled substance punishable by a term of imprisonment of more than **one** year, or conspiracy to commit one of those crimes, **within last 10 years**. 49 U.S.C. § 44936; 49 C.F.R. §§ 1542.209 and 1544.229. Note: Security screeners are exempt from other laws and can be refused a job for any reason. 49 U.S.C. § 44935 note.

### **Armored Car Crew Member**

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<sup>7</sup> See DPW Office of Children, Youth and Families Bulletin No. 3490-08-03 (June 27, 2008), <https://www.dhs.pa.gov/docs/Publications/Documents/FORMS%20AND%20PUBS%20OCYF/3490-08-03%20Warren%20Co.pdf>, accessed at <https://www.dhs.pa.gov/docs/For-Providers/Pages/Bulletin-Search.aspx>.

**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 **indicated or founded** child abuse reports or with convictions for homicide, aggravated 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).

For more on the CPSL, including the unconstitutionality of its lifetime bans on employment and DPW's interim policy permitting persons with enumerated convictions to be employed, *see supra* at pages 4-5.

### 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.

## Insurance Company Employee

**Must get permission of insurance regulator** in order to work in any capacity for an insurance company if convicted of felony involving dishonesty or breach of trust **ever**. 18 U.S.C. § 1033.

The Pennsylvania Department of Insurance has a 10-page application form for parties seeking permission to work in the insurance field despite a relevant felony conviction.

## Nursing Home/Home Health Care/Other Workers in Long-Term Care Facilities

The Older Adult Protective Services Act (OAPSA) previously contained a provision that prohibited **hire** of individuals who had **ever been** 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. 35 P.S. § 10225.503(a).

In a recent decision [Peake v. Commonwealth](#), the Commonwealth Court reaffirmed and strengthened prior case law finding that OAPSA's lifetime employment ban against people with certain criminal convictions is unconstitutional. The Court enjoined enforcement of the statute, meaning that

there are currently no bans on hiring people with criminal records in OAPSA-covered facilities. The Pennsylvania General Assembly is expected to pass a new criminal records provision of OAPSA shortly.

## Police

**May not employ** if convicted of felony or serious misdemeanor. 53 P.S. § 2164(7); see also pages 4-5 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**.

**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.



## Prison Private Security (Federal)

The federal rule is less clear here. Federal law requires that companies that employ private prison security guards to report to the Department of Justice anyone who has a felony conviction, a lesser conviction involving false statement or attempted use of force within the last 10 years, or a felony charge within the last 365 days with no resolution. The regulations do not explicitly state that these people may not be hired, but the existence of the rule implies as much. 28 CFR 105.23.

## 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).

## Ride-Sharing Drivers (Uber and Lyft)

The Transportation Network Company **shall disqualify an applicant, if within the last seven years**, they were convicted of driving under the influence of drugs or alcohol, a felony conviction involving theft, a felony conviction for fraud, or a felony conviction for a violation of the Controlled Substance, Drug, Device and Cosmetic Act. A seven year ban applies to such convictions. An applicant **shall be disqualified if, within the last 10 years**, they were convicted of use of a motor vehicle to commit a felony, burglary or robbery. An applicant might also be disqualified from employment for life for burglary and robbery convictions where certain aggravating circumstances exist. A 10 year ban applies to such convictions. An applicant **shall be disqualified** if convicted of a sex offense, crime

of violence, or act of terror. Such convictions carry a lifetime ban. (Senate Bill 984, 2015).

### **School Employees** (public and private schools in Philadelphia)

**Must refuse employment** for a conviction involving homicide, aggravated assault, stalking, kidnapping, unlawful restraint, luring a child into a structure or vehicle, rape, statutory sexual assault, involuntary deviate sexual intercourse, sexual assault, institutional sexual assault, indecent exposure, sexual intercourse with an animal, 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, unlawful contact with a minor, sexual exploitation of children, or a felony drug offense **at any time** preceding employment application. **Must refuse employment** for convictions for all other felonies for **ten years** after expiration of sentence. **Must refuse employment** for misdemeanors of the first degree for **five years** after expiration of sentence. **Must refuse employment** of individuals convicted of more than one misdemeanor (first degree) charge of DUI for **three years** after expiration of sentence.

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). For more on the CPSL, including the unconstitutionality of its lifetime bans on employment and DPW's interim policy permitting persons with enumerated convictions to be employed, *see supra* at pages 4-5. In Johnson v. Allegheny Intermediate Unit, 59 A.3d 10 (Pa. Commw. 2012)(en banc), the Commonwealth Court found the Public School Code's lifetime ban on homicide violated the state constitution, as applied to a worker with a 30-year-old voluntary manslaughter conviction.

## 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.

## Occupational Licenses

Some occupations and professions require a license, certificate or registration<sup>8</sup>, and are regulated by licensing boards created under state statute. All licensing boards have substantial discretion to determine the fitness of individuals applying for licenses or certificates. The specific way in which a conviction will affect the chances of getting a particular license, however, depends upon whether or not the occupation or profession is governed by one of the licensing boards that are part of the Bureau of Professional and Occupational Affairs (“BPOA”) within the Pa. Department of State. Since 2021, BPOA boards follow the rules set out in Act 53<sup>9</sup> for consideration of convictions. Non-BPOA licensing agencies have their own separate sets of rules.

After some universal rules that apply to all boards, this Guide will set out a list of some of the most common professions that fall under BPOA, and some

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<sup>8</sup> We will just refer to “licenses” in this guide, but the rules are the same.

<sup>9</sup> Act of July 1, 2020, P.L. 575, No. 53. The Act amends 18 Pa. C.S. §9124 and creates 63 Pa. C.S. §3101 *et seq.*

information about the process used by BPOA boards. After that, this Guide has information about non-BPOA boards.

### 1. Universal rules under section 9124

All licensing boards, whether under BPOA or not, are governed by a state statute that gives some guidance on the consideration of criminal records. Under 18 Pa. C.S.A. § 9124, licensing boards cannot consider:

- Records of arrest if there is no conviction of a crime based on the arrest
- Convictions which have been annulled, expunged, or sealed from public view under “Limited Access” (sealing)
- Convictions of a summary offense
- Convictions for which the individual has received a pardon from the Governor
- Convictions which do not relate to the applicant’s suitability for the license, certificate, registration or permit

### 2. Professions and Occupations Under BPOA

The most popular professions and occupations that are regulated by BPOA boards include:

- Architects
- Accountants
- Barbers<sup>10</sup> (see footnote below)
- Cosmetologists (see footnote 10 below)
- Dentists\*, \*\*\*, and Dental Hygienists\*
- Doctors\*, \*\*\*, Osteopaths\*, Physician’s Assistants\*, \*\*\*, and Midwives\*, \*\*\*
- Engineers, surveyors and geologists
- Funeral directors
- Massage therapists\*\*\*
- Nurses – RNs\*, \*\*\* and LPNs\*, \*\*\*

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<sup>10</sup> For barbering and cosmetology: Even if your record would still cause a problem getting a regular license, you may be able to work under supervision for a year or two with a “restricted license” if you were trained by a prison or the government. After that, you may be able to get a full license.

- Occupational therapists\*
- Pharmacists\*\*\*
- Physical therapists\*, \*\*\*
- Psychologists\*, \*\*\*
- Real estate, including tax assessors
- Social workers\*, \*\*\*
- Vehicle dealers and salespersons
- Veterinarians\*\*\*

\*Please note: for \* starred professions, see also pages 5-6 of this Guide, regarding restrictions on working with children.

\*\*\*For \*\*\* starred professions, there is a 10-year ban from licensing for people with a drug dealing felony, but this ban should **only** apply if the board can show that the amount of drugs involved was high enough to demonstrate significant drug dealing.

For the occupations and professions that are regulated by boards that are part of BPOA, the Act 53 rules – which are set out at 63 Pa.C.S. §§ 3112 – 3118 - must be applied whenever a board considers refusing to issue or renew, suspending, revoking or limiting a license, certificate, registration or permit on the basis of a criminal conviction. Each BPOA board will publish a best practice guide that will explain how convictions will be considered by that particular board; people with convictions who are interested in a particular profession should visit the board’s website, or contact the board directly, and get a copy of the board’s best practice guide to review.

In most cases you can only be rejected by a BPOA board for convictions if your criminal history puts your co-workers and customers at “substantial risk”. If the Board thinks you pose a risk, you have the opportunity to prove that you do not pose a “substantial risk.” There are exceptions to this rule that apply to serious

crimes of violence, and in some professions for drug dealing that involved a substantial amount of drugs; also, people with certain sex crimes are not allowed to work in various health care professions. BPOA boards will not consider any juvenile adjudications.

Each board has published a list of those criminal offenses which it considers to be “directly related” to the profession. The “directly related” offenses will be listed on the board’s website, and also in the board’s guide. If you have a conviction for one of these offenses, the board will presume that you would pose a “substantial risk,” but it will still perform an individualized assessment of you. As part of the assessment, you can overcome the presumption, and qualify for a license, by presenting evidence to show that you do not pose a substantial risk. The longer it has been since your conviction, the easier it will be to show that you no longer pose a “substantial risk.”

If you have a conviction that is not on the list of “directly related” offenses, there will not be a presumption against you. The board will still perform an individualized assessment, and during the assessment the board may still decide that you would pose a “substantial risk.” The board would have the burden to prove that you posed a substantial risk.

Whether or not your conviction is on the “directly related” list, if the board decides that you would pose a substantial risk, you will have the opportunity, during the individualized assessment, to go to a hearing and present evidence to show that



you should be given a license. The factors that boards will consider in an individualized assessment include:

- whether the criminal conduct involved an act or threat of harm;
- the facts and circumstances around the convictions;
- the applicant's total number of convictions;
- the applicant's increase in age/maturity since date of conviction;
- the applicant's criminal history, if any, after conviction;
- completion of education/training, including while incarcerated;
- references from employers or others;
- evidence of personal rehabilitation;
- whether the applicant meets the other licensing requirements;
- any criminal history while engaged in the occupation; and
- any other factor deemed relevant to fitness.

If, after you review the board's best practice guide, you are still unsure whether your record is likely to prevent you from obtaining a license, you can apply for a preliminary decision on the impact of your record. This can help give you a clear picture of your chances of getting a license, before you commit to a school or training program.

### **3. Professions and Occupations which are not under BPOA**

For licensing bodies that are not part of BPOA, the pre-2020 rules still apply. Many state agencies that grant professional or occupational licenses are required to

consider convictions when making licensing decisions or are even prohibited from licensing individuals with certain convictions. Even if the law does not require consideration of criminal records, non-BPOA licensing agencies are always permitted to consider records in the following situations:

- Where the applicant has been convicted of a felony
- Where the applicant has been convicted of a misdemeanor which relates to the trade, occupation or profession for which the license, certificate, registration or permit is sought

The individual non-BPOA licensing bodies are generally given a great deal of discretion to determine the fitness of individuals applying for licenses or certificates and are authorized to refuse or revoke licenses where the applicant has been convicted of any felony, or of a misdemeanor that relates to the relevant trade, occupation or profession.

Individuals with criminal records who are considering training for specific professions should contact the appropriate licensing body to determine whether a particular policy or restriction will make a license in that field difficult or impossible to obtain. Individuals who are provisionally denied a license because of a criminal record can appeal such a denial and seek legal representation to challenge the denial at a hearing in Harrisburg.

The following are some of the non-BPOA professions in Pennsylvania, and the criminal record consideration that are required by the law governing that specific profession:

## Bondsman

**May suspend or revoke** license if convicted of any criminal offense. 42 Pa. C.S. A. § 5746(b)(3).

## Casino employee (gaming employee)

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 employee)** (applies to bartenders, food service, clerical, parking attendants, janitorial workers, and other employees who do not handle gaming money)

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).

**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.

**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)**

**Shall** deny certification for conviction of a felony, a crime related to the practice of the EMS provider or a crime involving moral turpitude. 35 Pa. C.S. § 8121(a)(14). Certification can be reinstated five years after the effective date of revocation through an appeal process. 35 Pa. C.S. § 8121(d). *See also* pages 5-6, regarding restrictions on working with children.

### **Mortgage Broker**

**May deny** license for conviction of a crime of moral turpitude or felony, or any crime related to mortgage business. 7 Pa.C.S.A. 6139(a).

### **Pawnbroker**

**Must refuse** license for any conviction of engaging in pawnbroking business without license; **may deny** for crime showing lack of fitness or good moral character. 63 P.S. § 281-8(a).

### **Private Detective [owner or operator of security company]**

**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).

### **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.

### **Salesperson of Game of Chance**

**May not issue or renew** license for conviction of an felony **in the last five years** or any gambling (“Bingo Law”) offense **in the last ten years**. 10 P.S. § 317.

### **Taxi Driver**

**May not issue medallion** if applicant or officer/director of corporate applicant has any felony conviction **in last five years**. 66 Pa. C.S. § 2408(c).

### **Vehicle Damage Appraiser**

**May deny** license for conviction of any felony. 63 P.S. § 856.

## **III. Potential Remedies for Denials of Employment Based on Criminal Records**

Job applicants and employees in Pennsylvania who are rejected from employment solely because of their criminal records have several potential remedies. They are: (a) a Pennsylvania law limiting consideration of criminal records; (b) race discrimination claims under federal and state antidiscrimination laws; and (c) Philadelphia’s Fair Hiring Ordinance (also known as “Ban the Box”). Several other localities in Pennsylvania including Pittsburgh, Lancaster, Reading, and Allentown have “Ban the Box” ordinances as well.

### **A. Pennsylvania Law Limiting Consideration of Criminal Records**

A Pennsylvania statute provides:

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.



18 Pa. C.S.A. § 9125(b) (Section 9125). One of the few cases construing this statute has determined that it means that employers may **only** consider ***felony and misdemeanor convictions***. Cisco v. United Parcel Services, Inc., 476 A.2d 1340 (Pa. Super. 1984). Consequently, under Section 9125, employers may **not** consider ***arrest records, juvenile adjudications, and summary offense convictions***.

There has been very little guidance under state law on the meaning of “suitability” under Section 9125. However, people with criminal records may be able to argue by analogy to the factors identified in the extensive 2012 policy guidance on consideration of criminal records by the Equal Employment Opportunity Commission (see next section). For instance, a significant period of time since the crime without reoffending, a minor offense, a lack of relationship between the offense and the job applied for, and a history of successful employment in the job or the profession may all impact on “suitability” under Section 9125.

No administrative agency enforces Section 9125; it must be enforced through filing a lawsuit. A claim may be brought directly under the Criminal History Record Information Act (CHRIA),<sup>11</sup> of which Section 9125 is a part. CHRIA contains a provision providing for civil actions for actual damages, attorney’s fees and costs, and punitive damages between \$1,000 and \$10,000 for willful violations.<sup>12</sup> A claim under

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<sup>11</sup> 18 Pa. C.S.A. §§ 9101 *et seq.*

<sup>12</sup> 18 Pa. C.S.A. § 9183(b).

Section 9125 also possibly could be asserted as a “public policy violation” tort under state wrongful discharge law.<sup>13</sup>

A strong advantage to bringing a claim under Section 9125, as opposed to a lawsuit under the race discrimination theory discussed below, is that it clearly applies to all persons with criminal records without consideration of their race, and no proof of racially disparate impact is required. Moreover, no administrative exhaustion before filing suit is required. One disadvantage is that courts have interpreted Section 9125 to apply only to job applicants, and not to current employees who lose their jobs due to old convictions. Legislative efforts are underway to add language to provide a protection under Section 9125 for current employees.

### **B. Race Discrimination Claims under Title VII and Other Anti-discrimination Laws**

For African-Americans and Hispanics, an employment rejection for having a criminal record may implicate a race discrimination claim under Title VII of the Civil Rights Act of 1964 (“Title VII”).<sup>14</sup> This claim is based on a “disparate impact” theory that recognizes that even unintentional discrimination violates the law where a facially neutral policy disparately harms minority job seekers and is not required by business necessity. In the criminal record context, the claim is that because African-

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<sup>13</sup> See *Cisco*, 476 A.2d at 1340 (considering a public policy violation tort arising from Section 9125, but rejecting its applicability because plaintiff had been fired based on an arrest arising from his performance of his job).

<sup>14</sup> 42 U.S.C. §§ 2000e- 2000e-17.

Americans and Hispanics are arrested and convicted in numbers disproportionate to whites, minority job applicants are disproportionately excluded when an employer refuses to hire people with criminal records.<sup>15</sup>

### 1. Case law

Legal support for criminal record disparate impact claims dates to the early 1970s, when the courts and the Equal Employment Opportunity Commission (EEOC), which is responsible for enforcement of Title VII, started to find Title VII violations where there was either a blanket exclusion of persons with criminal records or a lack of business necessity for such a policy. In 1970, a federal district court found that a policy which automatically disqualified persons who had arrest records violated Title VII.<sup>16</sup> In 1975, a federal appeals court rendered the most important decision on convictions until recently, ruling that an across-the-board disqualification based on convictions was invalid.<sup>17</sup> Several more rulings followed which found a Title VII violation for employer use of criminal records.<sup>18</sup>

<sup>15</sup> Judge John J. Fullam notably ruled that an employer violated Title VII when it terminated a white woman because of an old criminal conviction. The judge ruled that even though she was not a member of the protected class, she had been adversely impacted by a discriminatory policy and therefore had standing under Title VII. Field v. Orkin, No. 00-5913 (E.D. Pa. filed October 30, 2001).

<sup>16</sup> Gregory v. Litton Sys., Inc., 316 F. Supp. 401 (C.D. Cal. 1970), modified on other grounds, 472 F.2d 631 (9th Cir. 1972). Gregory is still considered the leading case on an employer's use of arrest records.

<sup>17</sup> Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975).

<sup>18</sup> E.g., Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971)(brought under 42 U.S.C. Sect. 1981 and 1983); Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975); Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971), *aff'd mem.*, 468 F.2d 951 (5th Cir. 1972); EEOC Decision No. 74-89 (Feb. 12, 1974); EEOC Decision No. 71-2682 (June 28, 1971).

Claims based on Title VII and criminal history records brought between 1990 and recent years were often rejected.<sup>19</sup> The most notable decision on this issue since the 1970s involved a lawsuit challenging the criminal records policies of Philadelphia’s public transit authority for its paratransit contractors. El v. Southeastern Pennsylvania Transportation Authority, 479 F.3d 232 (3d. Cir. 2007). Although the Third Circuit ruled against the plaintiff, it did so because of the plaintiff’s failure to submit evidence to rebut the defendant’s expert on recidivism, not because people with criminal records lack entitlement to legal protections in the employment context.

In El, the Third Circuit ***mandated that criminal records policies “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”*** Id. at 245. Describing the application of its test, the court distinguished between applicants who pose “minimal level of risk” and those who do not. Id. at 245 n. 13 & 14. The court indicated that business necessity case law requires “some level of empirical proof that challenged hiring criteria accurately predicted job

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<sup>19</sup> See, e.g., Matthews v. Runyon, 860 F. Supp. 1347 (E.D. Wis. 1994) (summary judgment against plaintiff for failing to establish a prima facie case); Lewis v. Alabama Dept. of Public Safety, 831 F. Supp. 824 (M.D. Ala. 1993) (dismissal on plaintiff’s inadequate statistical showing); Williams v. Carson Pirie Scott, No. 92 C 5747, 1992 U.S. Dist. LEXIS 13643 (N.D. Ill. Sept. 9, 1992) (finding that defendant established business necessity to fire employee from “collector” position); Equal Employment Opportunity Commission v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989) (both rejecting plaintiff’s prima facie case and finding business necessity); Moses v. Browning-Feris Industries of Kansas City, No. 84-2334-S (D. Kan. Sept. 22, 1986) (finding for defendant after trial on grounds that the policy of rejecting applicants for position of garbage collector who were convicted of crimes involving moral turpitude was justified by business necessity). One notable exception is Field v. Orkin, No. 00-5913 (E.D. Pa., October 30, 2001), discussed *supra* note 12.

performance.” *Id.* at 240. Thus, pursuant to the *El* decision, for employers to avoid violating Title VII, they must carefully craft their criminal record exclusionary policies, based on empirical evidence as to whether a person with a criminal record presents more than a minimal risk. Notwithstanding EEOC’s 2012 Guidance (discussed below), future courts are still likely to be influenced by *El*’s analysis of employers’ Title VII obligations.

## 2. EEOC Policy Guidance (2012)

In April 2012, EEOC issued extensive policy guidance on employer consideration of criminal records.<sup>20</sup> This guidance superseded previous policy statements and reaffirmed the EEOC’s central position: a policy or practice of excluding persons from employment on the basis of their criminal records almost always has an disparate impact on African-Americans and Hispanics, and when it has such an disparate impact, the policy violates Title VII unless the employer demonstrates a business necessity for the policy.<sup>21</sup>

Among the most notable conclusions of the guidance are the following:

- **Blanket bans illegal:** Notably, the guidance states that an automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is illegal because it does not focus on the dangers of

<sup>20</sup> “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (Apr. 25, 2012), available at [http://www.eeoc.gov/laws/guidance/enforcement\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm).

<sup>21</sup> The Guidance cites national data and states that the data “supports a finding that criminal record exclusions have a disparate impact based on race and national origin.” For charges filed with EEOC, racially disparate impact is presumed and need not be proved. *Guidance* at V.A. In litigation, however, racially disparate impact must be proved for the plaintiffs to meet their burden of proof.

particular crimes and the risks in particular positions. Guidance at V.B(7).

- **Rejections for arrests generally illegal:** “An exclusion based on an arrest, in itself, is not job related and consistent with business necessity.” Thus, a policy which excludes people based on arrests which did not result in conviction violates the law. Employers may, however, make employment decisions based on the conduct underlying an arrest if the actual conduct makes the individual unfit for the position in question. Guidance at V.B(2).
- **Evaluating convictions:** EEOC guidance summarizes the law as requiring an employer “to link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.” Guidance at V.B(4). For employers to properly evaluate convictions, they should consider the following factors:
  - 1) The nature and gravity of the offense/conduct;
  - 2) The time that has passed since the offense and/or the sentence completion;
  - 3) The nature of the job held or sought.

Guidance at V.B(6).<sup>22</sup>

EEOC strongly recommends that if the employer is inclined to reject an applicant after assessing those factors, it conduct an individualized assessment of the person’s circumstances. Guidance at V.B(9). The guidance identifies the following factors that an employer should take into account in the individualized assessment:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;

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<sup>22</sup> These three factors were derived from Green v. Missouri Pac. R.R. Co., 523 F.2d 1290 (8th Cir. 1975), and have long been considered the framework for evaluating Title VII claims based on consideration of criminal records.



- Employment or character references and any other information regarding fitness for the particular position;
- Whether the individual is bonded under a federal, state, or local bonding program.

Guidance at V.B(9).

- **Other notable implications:** The firing of current employees who are performing well but have criminal records likely violates Title VII (see Example 8, V.B(9)). So do on-line applications that kick out people with a record (see Example 5, V.B(7)).
- **Preemption of overbroad state law exclusions:** The guidance also notes that state and local laws and regulations are preempted by federal law if they would require or permit any act which would violate Title VII. Thus, “if an employer’s exclusionary policy... is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability.”

Guidance at VII.

### 3. Enforcement

In order to enforce Title VII rights, claims must be filed with a regional office of the EEOC within 300 days of the date of the violation of rights. These charges have been given a high priority by EEOC’s strategic enforcement plan and are particularly well received in the Philadelphia office. But a very long period of investigation by EEOC is to be expected. Getting a “founded” outcome is a positive one, often leveraged in conciliation into a voluntary resolution. If EEOC does not find cause to believe that there was a violation of the law, or if conciliation fails and EEOC decides not to litigate, a right-to-sue letter is issued. Litigation under this theory of liability is not for those with limited resources or resolve, as the plaintiffs must prove both racially disparate impact and business necessity, requiring multiple experts.

Other antidiscrimination agencies in Pennsylvania also recognize that disparate impact claims for rejecting people with criminal records arise under the statutes that they enforce. In January 2010, the Pennsylvania Human Relations Commission (“PHRC”) sought public comment on proposed policy guidance on this issue. While the PHRC neither ultimately adopted nor declined to adopt this policy guidance, it has accepted and investigated race discrimination charges for people with criminal records under the Pennsylvania Human Relations Act. Similarly, the Philadelphia Commission on Human Relations accepts such charges as arising under the Philadelphia Fair Practices Ordinance.

**C. Philadelphia’s Fair Hiring Ordinance** As of March 14, 2016, the City of Philadelphia’s amended Chapter 9-3500 of the Philadelphia Code, the “Fair Criminal Record Screening Standards Ordinance,” went into effect. This ordinance is also known as the “Ban the Box” law. The ordinance now applies to private employers that employ one or more persons within the City of Philadelphia,<sup>23</sup> as well as the City of Philadelphia itself. The law does not apply to criminal justice agencies or employers hiring domestic service workers to work in their homes.

The ordinance establishes several important rights:

- Employers **cannot** ask about a criminal record on job applications or in job interviews.

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<sup>23</sup> Section 9-3502(9).

- Employers can only run background checks once they have made **offers of employment**, unless the law requires they do it earlier.
- Employers **cannot** take back their offers of employment if individuals have not been convicted or incarcerated in the past **7 years**, unless federal or state law require otherwise.<sup>24</sup>
- Employers **cannot** reject individuals based on arrest(s) that did not lead to conviction(s), regardless of when they occurred.<sup>25</sup>

**For individuals who have been convicted or incarcerated in the past 7 years,** employers in Philadelphia County:

- **Can only** take back the job offer if the conviction(s) are so related to the job that they believe hiring the individual would be an unacceptable risk.<sup>26</sup>
- **Can only** take back the job offer after conducting an individualized assessment which considers the factors recommended in the EEOC Guidance (see above).<sup>27</sup>
- **Must** notify the individual in writing, and give a copy of the criminal record if they reject the person because of a record. A person then has 10 days to explain the conviction(s), or to prove that the record is inaccurate.<sup>28</sup>

Employers that violate the ordinance are subject to a fine and they may owe monetary damages to applicants who were unfairly denied jobs. Complaints can be

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<sup>24</sup> Section 9-3504.

<sup>25</sup> Section 9-3503.

<sup>26</sup> Section 9-3504.

<sup>27</sup> Section 9-3504(2).

<sup>28</sup> Section 9-3504(a).

filed with the Philadelphia Commission on Human Relations, which is responsible for enforcement of the ordinance, within 300 days of the violation.<sup>29</sup> If the Commission does not successfully resolve the complaint, the individual has the right to sue the employer in court.

**D. Pittsburgh “Ban the Box” Ordinances**

On December 17, 2012, the Pittsburgh City Council passed two ban the box ordinances; one that applies to city employment and one that applies to city contractors.

Ordinance 2012-0013 provided that except for certain safety-sensitive positions, the City will not inquire about criminal background until it has determined that the applicant is otherwise qualified for the position. At that point, the City will make a condition job offer, pending a background check. If the City believes it has ground to rescind the offer after the background check, the applicant must be given an opportunity to provide “clarifying information.” Title One, Article XI, Chapter 181, Sect. 181.12.

Ordinance 2012-0015 provided that municipal contracts shall have a provision requiring the contractor to comply with Section 181.12(b) (see above), subject to exceptions recommended by the City Solicitor and approved in writing by the Mayor. Title One, Article VII, Chapter 161, Sect. 161.16.

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<sup>29</sup> Section 9-3506.



In addition, Allentown, Lancaster, and Reading now have their own “Ban-the-Box” ordinances. For more information on local “Ban-the-Box” ordinances, see: <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

## **APPENDIX A--CHILD ABUSE REPORTS**

Some employment or licensing restrictions may also apply to individuals who have “founded” or “indicated” reports of child abuse or neglect. Although they are civil in nature, “indicated” reports of child abuse often carry some of the same employment consequences as criminal convictions, without the procedural safeguards afforded to persons charged with crimes. Because child abuse reports can affect employment opportunities, a brief discussion of these reports is warranted.

Under the Child Protective Services Law (CPSL), 23 Pa.C.S. §6301 et. seq., local child protective service agencies throughout Pennsylvania are required to investigate reports of suspected child abuse or neglect. These reports of suspected abuse originate from a variety of sources: neighbors, teachers, doctors, hospital social workers, family members, even the children themselves. Investigative social workers are supposed to interview witnesses and review any available medical documentation in making a determination as to whether or not the report is substantiated.

If not substantiated, the social workers mark the reports as “unfounded” and the reports are eventually expunged. “Founded” reports are those in which a court has made an adjudication of child abuse. Court adjudications theoretically can be appealed to a higher court. The CPSL prohibits the employment of individuals who have “founded” child abuse reports within the five years preceding applications from

jobs in child care and schools. A 2019 amendment also prohibits people with “indicated” or “founded” reports from ever working in childcare.

Reports are “indicated” when the investigating child protective services agency determines that there is “substantial evidence” of abuse or neglect. In our experience, many “indicated” reports of child abuse involve incidents that do not rise to the level of child abuse under the law—such as purely accidental injuries, or the lawful infliction of corporal punishment that does not result in substantial pain. These reports are not subject to any judicial oversight or due process protection unless appealed in a timely manner.

Under Pennsylvania statute, reports made after July 1, 1995, had to be appealed within 45 days of notification of the indicated status of the report.<sup>30</sup> **However, because the notice that used to be sent to individuals placed on the Child Abuse and Neglect Registry was deemed by the Commonwealth Court of Pennsylvania to be defective, individuals with old child abuse reports may still be able to appeal their indicated reports even beyond the 45-day deadline. If the date of the report is prior to September 12, 2008, the deadline will be waived and individuals can still request to have their report expunged.**

Under new amendments, indicated reports dated on or after December 31, 2014, have an appeal deadline of **90 days**. Furthermore, many individuals who were placed on the Child Abuse Registry as juveniles are now eligible for automatic

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<sup>30</sup> Indicated reports made before July 1, 1995, are appealable at any time.



expungement of their child abuse records if they meet certain criteria after they reach 21 years of age or 5 years after the report is placed on the registry, whichever is later.

Many individuals do not receive the notification, do not understand it, or do not recognize its significance when they do receive it. Expungement requests made after the relevant deadline are automatically denied, and it is extremely difficult to get the deadline lifted without very good cause for missing the appeal deadline. Failing to receive notification without extenuating circumstances is not generally accepted as good cause. Consequently, a permanent barrier to certain types of employment is thus created.

These reports regularly preclude people's employment or impede their ability to get a license in many professions, such as those related to children or medical professions. As discussed on page 7 of this report, recent legislation has expanded employment restrictions contained in the CPSL for individuals seeking to work with children. We recommend that individuals ascertain that they are not the subject of any indicated or founded child abuse reports before attempting to get a license or enrolling in costly and time-consuming vocational training or education. They can do so by calling or writing the child abuse registry as follows:

Director  
Childline & Abuse Registry  
Department of Public Welfare  
Office of Children, Youth and Families  
P.O. Box 8170  
Harrisburg, PA 17105-8170  
(717) 783-6211



We further recommend that they contact the relevant licensing boards to find out whether a child abuse report might affect their ability to get a license. In the event that a report exists that may affect employment or licensing, a local legal services organization or a private attorney may be able to assist individuals in getting their records cleared.