



STATE OF DELAWARE
STATE COUNCIL FOR PERSONS WITH DISABILITIES

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MEMORANDUM

DATE: May 30, 2013

TO: Ms. Elizabeth Timm, DFS
Office of Child Care Licensing

FROM: Daniese McMullin-Powell, Chairperson *Dm-P/ao*
State Council for Persons with Disabilities

RE: 16 DE Reg. 1152 [DFS Proposed Criminal History Record Check Regulation]

The State Council for Persons with Disabilities (SCPD) has reviewed the Division of Family Services' (DFS) Office of Child Care Licensing (OCCL) proposal to amend its regulations covering criminal background checks for individuals involved in residential child care. The proposed regulation was published as 16 DE Reg. 1152 in the May 1, 2013 issue of the Register of Regulations. SCPD has the following observations.

First, in §1.0, SCPD recommends substituting "Basis" for "Base" in the title.

Second, in §3.0, definition of "Child Care Person", DFS ostensibly forgot to delete some internal notes. The following reference appears twice in the regulation: "(Since definitions are not numbered we would have to use the definition title)".

Third, in §3.0, delete "(see 'Direct Access' below)" and "See definitions 'Foster Parents' and 'Volunteer' below.)".

Fourth, there is an inconsistency between §3.0, definition of "direct access", and §4.1.4.1. The former standard defines "direct access" as excluding contexts in which "another child care person" is present while the latter standard "muddies the waters" by characterizing "direct access" as opportunity for contact outside the "presence of other employees or adults". The latter reference would include persons who have not undergone the screening for a "child care person". The latter reference would also include contact by "phone" or other media. SCPD recommends the following amendment to §4.1: "The opportunity to have direct access to ~~or contact with a child without the presence of other employees or adults.~~" The definition of "direct access" renders the "strike-out" language surplusage.

Fifth, in §3.0, the definition of “direct access” excludes individuals who are proximate to a child if another child care person is present. This should be reconsidered.

A. The statutory definition of “child care personnel” (Title 31 Del.C. §309), which includes a reference to “regular direct access”, is not limited to persons who would be “alone” with a child. If DFS defines “direct access” to only cover personnel who would be regularly “alone” with children, employers may justifiably exclude many child care workers from the background check process.

B. There are situations in which perpetrators act as a team to abuse/neglect children. Just because someone is not alone with a child does not mean that the child is not at risk.

Sixth, in §4.1.4, insert “persons” prior to “employed” and merge the text of §4.1.1 into the main section. Consistent with the “Fourth” observation above, this results in the following:

4.1.4. persons employed or volunteering at an agency that contracts with the Department who are in a position which involves the opportunity to have direct access to a child.

Seventh, there is some “tension” between applying the background check process only to a “child care person” meeting “direct access” criteria and the categorical mandate in §4.2.1 requiring background checks by position regardless of direct contact. For example, if a groundskeeper, administrative secretary, or administrative bookkeeper is expected to have no “regular direct contact” with children, they would not be a “child care person” subject to a background check. However, §4.2.1 would manifestly require them to submit to a background check. At a minimum, DFS should consider limiting §4.2.1 to persons expected to have “regular direct access” to children.

Eighth, §7.0 is “overbroad”. For example, §7.1.1.1 contemplates consideration of arrest records without conviction. This is inconsistent with recent EEOC guidance. See attachments. Consistent with the EEOC Q&A document, Par. 7, the Enforcement Guidance preempts inconsistent state laws and regulations. In the analogous context of adult criminal background checks, the DLTCRP recently adopted the following regulatory standard deferring to the EEOC guidance:

8.3. DHSS adopts the guidance from the Equal Opportunity Commission, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, issued 4/25/2012.

16 DE Admin Code 3105, §8.3.

Ninth, in §10.1.1, insert a comma after the word “employer”.

Tenth, §10.2 would violate the EEOC guidance if “history of prohibited offenses” includes arrests without conviction. The immediately preceding §10.1.2 refers to “arrests” which implies

that “offenses” may include arrests.

Eleventh, §10.1.2 includes a plural pronoun (“them”) with a singular antecedent (“employer”). Substitute “the employer” for “them”.

Twelfth, some sections omit punctuation. This should be corrected. See, e.g., §§8.2, 7.1.1, 4.2.1, and 6.1. The latter section has a period after §6.1.10 and no punctuation after §6.1.11.

Thank you for your consideration and please contact SCPD if you have any questions or comments regarding our observations on the proposed regulation.

cc: Ms. Vicky Kelly
Mr. Brian Hartman, Esq.
Governor’s Advisory Council for Exceptional Citizens
Developmental Disabilities Council

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Criminal background check policy updated

EEOC issues new hiring guidelines for employers

By SAM HANANEL
Associated Press

WASHINGTON — Is an arrest in a barroom brawl 20 years ago a job disqualifier?

Not necessarily, the government said Wednesday in new guidelines on how employers can avoid running afoul of laws prohibiting job discrimination.

The Equal Employment Opportunity Commission's updated policy on criminal background checks is part of an effort to rein in practices that can limit job opportunities for minorities who have higher arrest and conviction rates than whites.

"You thought prison was hard, try finding a decent job when you get out," EEOC member Chai Feldblum said.

She cited Justice Department statistics showing that 1 in 3 black men and 1 in 6 Hispanic men will be incarcerated during their lifetime. That compares with 1 in 17 white men who will serve time.

"The ability of African-Americans and Hispanics to gain employment after prison is one of the paramount civil justice issues of our time," said Stuart Ishimaru, one of three Democrats on the five-member commission.

About 73 percent of employers conduct criminal background checks on all job candidates, according to a 2010 survey by the Society for Human Resource Management. Another 19 percent of employers do so only for selected job candidates.

That data often can be

inaccurate or incomplete, according to a report this month from the National Consumer Law Center.

EEOC commissioners said the growing practice has grave implications for blacks and Hispanics, who are disproportionately represented in the criminal justice system and face high rates of unemployment.

But some employers say the new policy — approved in a 4-1 vote — could make it more cumbersome and expensive to conduct background checks. Companies see the checks as a way to keep workers and customers safe, weed out unsavory workers and prevent negligent-hiring claims.

The new standards urge employers to give applicants a chance to explain a past criminal misconduct before they are rejected outright. An applicant might say the report is inaccurate or point out that the conviction was expunged. It may be completely unrelated to the job, or a former convict may show he's been fully rehabilitated.

The EEOC also recommends that employers stop asking about past convictions on job applications. And it says an arrest without a conviction is not generally an acceptable reason to deny employment.

The guidelines are the first attempt since 1990 to update the commission's policy on criminal background checks.

While the guidance does not have the force of regulations — and may conflict with state requirements for some job applicants — it sets a higher bar in explaining how businesses can avoid violating the law.

"It's going to be much more burdensome," said Pamela Devata, a Chicago employment lawyer who has represented companies trying to comply with EEOC's requirements.



U.S. Equal Employment Opportunity Commission

Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII

On April 25, 2012, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, 42 U.S.C. § 2000e. The Guidance consolidates and supersedes the Commission's 1987 and 1990 policy statements on this issue as well as the discussion on this issue in Section VI.B.2 of the Race & Color Discrimination Compliance Manual Chapter. It is designed to be a resource for employers, employment agencies, and unions covered by Title VII; for applicants and employees; and for EEOC enforcement staff.

1. How is Title VII relevant to the use of criminal history information?

There are two ways in which an employer's use of criminal history information may violate Title VII. First, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex, or national origin ("disparate treatment discrimination").

Second, even where employers apply criminal record exclusions uniformly, the exclusions may still operate to disproportionately and unjustifiably exclude people of a particular race or national origin ("disparate impact discrimination"). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

2. Does Title VII prohibit employers from obtaining criminal background reports about job applicants or employees?

No. Title VII does not regulate the acquisition of criminal history information. However, another federal law, the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq. (FCRA), does establish several procedures for employers to follow when they obtain criminal history information from third-party consumer reporting agencies. In addition, some state laws provide protections to individuals related to criminal history inquiries by employers.

3. Is it a new idea to apply Title VII to the use of criminal history information?

No. The Commission has investigated and decided Title VII charges from individuals challenging the discriminatory use of criminal history information since at least 1969,¹ and several federal courts have analyzed Title VII as applied to criminal record exclusions over the past thirty years. Moreover, the EEOC issued three policy statements on this issue in 1987 and 1990, and also referenced it in its 2006 Race and Color Discrimination Compliance Manual Chapter. Finally, in 2008, the Commission's E-RACE (Eradicating Racism and Colorism from Employment) Initiative identified criminal record exclusions as one of the employment barriers that are linked to race and color discrimination in the workplace. Thus, applying Title VII analysis to the use of criminal history information in employment decisions is well-established.

4. Why did the EEOC decide to update its policy statements on this issue?

In the twenty years since the Commission issued its three policy statements, the Civil Rights Act of 1991 codified Title VII disparate impact analysis, and technology made criminal history information much more accessible to employers.

The Commission also began to re-evaluate its three policy statements after the Third Circuit Court of Appeals noted in its 2007 *El v. Southeastern Pennsylvania Transportation Authority*² decision that the Commission should provide in-depth legal analysis and updated research on this issue. Since then, the Commission has examined social science and criminological research, court decisions, and information about various state and federal laws, among other information, to further assess the impact of using criminal records in employment decisions.

5. Did the Commission receive input from its stakeholders on this topic?

Yes. The Commission held public meetings in November 2008 and July 2011 on the use of criminal history information in employment decisions at which witnesses representing employers, individuals with criminal records, and other federal agencies testified. The Commission received and reviewed approximately 300 public comments that responded to topics discussed during the July 2011 meeting. Prominent organizational commenters included the NAACP, the U.S. Chamber of Commerce, the Society for Human Resources Management, the Leadership Conference on Civil and Human Rights, the American Insurance Association, the Retail Industry Leaders Association, the Public Defender Service for the District of Columbia, the National Association of Professional Background Screeners, and the D.C. Prisoners' Project.

6. Is the Commission changing its fundamental positions on Title VII and criminal record exclusions with this Enforcement Guidance?

No. The Commission will continue its longstanding policy approach in this area:

- The fact of an arrest does not establish that criminal conduct has occurred. Arrest records are not probative of criminal conduct, as stated in the Commission's 1990 policy statement on Arrest Records. However, an employer may act based on evidence of conduct that disqualifies an individual for a particular position.
- Convictions are considered reliable evidence that the underlying criminal conduct occurred, as noted in the Commission's 1987 policy statement on Conviction Records.
- National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.
- A policy or practice that excludes everyone with a criminal record from employment will not be job related and consistent with business necessity and therefore will violate Title VII, unless it is required by federal law.

7. How does the Enforcement Guidance differ from the EEOC's earlier policy statements?

The Enforcement Guidance provides more in-depth analysis compared to the 1987 and 1990 policy documents in several respects.

- The Enforcement Guidance discusses disparate treatment analysis in more detail, and gives examples of situations where applicants with the same qualifications and criminal records are treated differently because of their race or national origin in violation of Title VII.
- The Enforcement Guidance explains the legal origin of disparate impact analysis, starting with the 1971 Supreme Court decision in *Griggs v. Duke Power Company*, 401 U.S. 424 (1971), continuing to subsequent Supreme Court decisions, the Civil Rights Act of 1991 (codifying disparate impact), and the Eighth and Third Circuit Court of Appeals' decisions applying disparate impact analysis to criminal record exclusions.
- The Enforcement Guidance explains how the EEOC analyzes the "job related and consistent with business necessity" standard for criminal record exclusions, and provides hypothetical examples interpreting the standard.
 - There are two circumstances in which the Commission believes employers may consistently meet the "job related and consistent with business necessity" defense:
 - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
 - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)). The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.)
- The Enforcement Guidance states that federal laws and regulations that restrict or prohibit employing individuals with certain criminal records provide a defense to a Title VII claim.
- The Enforcement Guidance says that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.
- The Enforcement Guidance provides best practices for employers to consider when making employment decisions based on criminal records.

¹ See, e.g., EEOC Decision No. 70-43 (1969) (concluding that an employee's discharge due to the falsification of his arrest record in his employment application did not violate Title VII); EEOC Decision No. 72-1497 (1972) (challenging a criminal record exclusion policy based on "serious crimes"); EEOC Decision No. 74-89 (1974) (challenging a policy where a felony conviction was considered an adverse factor that would lead to disqualification); EEOC Decision No. 78-03 (1977) (challenging an exclusion policy based on felony or misdemeanor convictions involving moral turpitude or the use of drugs); EEOC Decision No. 78-35 (1978)

(concluding that an employee's discharge was reasonable given his pattern of criminal behavior and the severity and recentness of his criminal conduct).

² 479 F.3d 232 (3d Cir. 2007).

Baker gets rid of felon job box

Written by Andrew Staub The News Journal
Dec. 10

delawareonline.com

People with felony convictions no longer have to reveal their criminal background when applying for a non-uniform job with the city of Wilmington.

At the request of City Council, Mayor James M. Baker on Monday signed an executive order that removes a question about criminal convictions from city job applications unrelated to public safety.

The decree does not apply to the private sector.

"Many people who have had problems in the past need work and are ready to work and put their problem periods behind them," Baker said.

Such measures are known popularly throughout the country as "ban the box," a reference to the square employers require applicants to check denoting a conviction record. Wilmington's application also asked the applicant to indicate the type, date and location of the offense.

"By taking this action, we can restore hope, save money and give someone a fair chance and the opportunity to present themselves as an individual and not immediately be frowned upon because of past behavior," said Councilman Justen Wright, who pushed the idea that won unanimous support in the council.

Public-safety jobs in the police and fire departments are excluded from the order because of "obvious reasons," the city said.

The city will conduct criminal background checks only on applicants who have received a conditional job offer for a non-uniformed position, Baker said.

Previously, the city conducted checks on potential employees before an offer was made, said Samuel D. Pratcher Jr., the director of human resources.

Wright said he hopes other municipalities and businesses follow suit, and would like to see the ban expanded to include vendors doing business with Wilmington.

As of November, 43 cities and counties across the country had "banned the box," and statewide measures have been instituted in Hawaii, California, Minnesota, Colorado, New Mexico, Massachusetts and Connecticut, according to the National Law Employment Project.

In April, the federal Equal Employment Opportunity Commission updated its guidelines urging employers to eliminate "policies or practices that exclude people from employment based on any criminal record."

Baltimore removed the question regarding criminal history in 2007, while identifying "positions of trust" that require background checks. Last year, Philadelphia banned the box for public and private jobs.

Though support has been strong in Wilmington, such measures have been criticized elsewhere.

Earlier this year in Minnesota, business owners opposed expanding a statewide ban-the-box provision for public employers to the private sector.

The EEOC already protects against automatic denials of employment, said Ben Gerber, manager of energy and labor management policy for the Minnesota Chamber of Commerce.

"Primarily, we feel this is already being addressed, and it's kind of unnecessary legislation," Gerber said.

Different measures from state to state also can create an administrative burden for national employers, Gerber said. Employers, not the state, should decide whether they want to ask about a person's criminal history, he said.

The National Law Employment Project estimates 1 in 4 adults in the United States has a criminal record that would appear in a background check.

There are 5,770 people incarcerated in Delaware's four prison facilities and another 1,068 in community corrections centers, said John Painter, spokesman for the state Department of Correction.

Delaware processes about 23,000 intakes and 23,000 releases a year, Painter said. About 1,300 of released prisoners annually have served a sentence of a year or more, he said.

Locally, Wright said, he often hears stories of people who need jobs, but worry about a checkered past.

Councilwoman Hanifa Shabazz tied unemployment to crime, saying some people enter survival mode after a criminal record precludes them from a chance at being hired.

"That makes it very difficult for someone to continue to do the straight and narrow," she said.

The ban-the-box measures can streamline municipalities' background check procedures, while giving people with past convictions another chance at gainful employment, said Michelle Rodriguez, a staff attorney with the National Law Employment Project.

"So many times, that's all people want," she said. "They just want the opportunity to prove themselves."

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8-4-13 MS

» DELAWARE

Background checks could expand for department

State officials are proposing to expand criminal background checks for people working for or with the Department of Services for Children, Youth and Their Families.

The changes would require background checks on all departmental employees and volunteers. Current regulations only give the cabinet secretary discretion to require background checks for employees working in certain divisions of the department.

Officials want to require criminal background checks for step-parent adoptions. They also are proposing to expand background checks for residential child care facilities to include administrative staff.

Officials are accepting public comment on the proposed changes through the end of the month.

» FORT DELAWARE