Legal Outline of Authorities & Decisions Related to Criminal Records and Employment

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June 2006

*This outline of the major laws and cases regulating criminal background checks was produced with the help of several experienced advocates who specialize in the employment rights of people with criminal records, including Fran Fajana, Melanca Clark, Miriam Aukerman, Laurie Parise, Margaret Love, Roberta Meyers-Peeples, and Linda Mills.

Supported by a grant from The Open Society Institute
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Legal Outline of Authorities & Decisions
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I. Limiting Availability & Improving Accuracy of Criminal Records

  • Accuracy and Dissemination of Criminal Records

     Authorities

     (a) Criminal Justice Information Systems Regulations, 28 C.F.R. Part 20. Regulations cover central repository records and criminal court indices. Purpose is to ensure that criminal history record information “is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of such information and to protect individual privacy.” 28 C.F.R. § 20.1.

     Highlights:

     28 C.F.R. § 20.21(g): establishing right to individual access and review for correction of criminal record.

     28 C.F.R. § 20.21(a)(1): establishing 90-day period for disposition reporting.

     28 C.F.R. § 20.21(b)(2): permitting dissemination of nonconviction information only if permitted by official policy (such as statute or court rule).


     (c) A series of cases in the 1970s addressed the accuracy and dissemination of records maintained by the FBI. Although Paul v. Davis, 424 U.S. 693 (1976) (see following section), stunted the development of the constitutional due process and privacy claims raised in these cases, courts have held that 28 U.S.C. § 534 (which directs the Attorney general to collect and maintain criminal records, and exchange those records with federal, state, and local entities) imposes a duty on the FBI to maintain and disseminate criminal records “reliably and responsibly and without unnecessary harm to individuals.” Tarlton v. Saxbe, 507 F.3d 1116, 1122 (D.C. Cir. 1974); Menard v. Saxbe, 498 F.2d 1017, 1026 (D.C. Cir 1974).

     In 1976, a federal lawsuit mandated stricter compliance with the regulation that non-serious offenses not be reported on FBI rap sheets (28 C.F.R. § 20.32(b)), ruling that the FBI had failed to adequately remove non-serious offenses from the FBI rap sheets reported for non-criminal justice purposes, and directing it to do so. Tarlton v. Saxbe, 407 F. Supp. 1083, 1088-89 (D.D.C. 1976). As of this writing (December 2006), the FBI
has proposed to amend § 20.32(b) to start reporting non-serious offenses again, but the final regulation has not been issued yet.

Other Resources


Sharon M. Dietrich, Expanded Use of Criminal Records and Its Impact on Re-entry.

- Criminal Identity Theft

Authorities

State statutes governing criminal record accuracy (see above).

State constitutional provisions: deprivation of liberty and property interests without due process (Massachusetts); right to reputation (Pennsylvania).

State defamation law: but issues around immunity and remedy.

Paul v. Davis, 424 U.S. 693 (1976): the “stigma plus” case. Reputation alone is not protected by the due process clause of the U.S. Constitution; “a right or status previously recognized by state law [must be] distinctly altered or extinguished.” Id. at 711.

Litigation


Michigan and Pennsylvania legal advocates reached pre-litigation settlements with their central repositories. In both cases, the State Police agreed to “flag” records where criminal identity theft had been proved so that this information would not be given to employers. (Contacts: Miriam Aukerman in Michigan; Sharon Dietrich in Pennsylvania).
Other Resources


- Fair Credit Reporting Act Protections

Authorities

(a) Federal

The Fair Credit Reporting Act (FCRA) regulates the reporting of credit and public record information by consumer reporting agencies, as well as the way in which these reports are used to deny credit and/or employment. The statute establishes civil liability for both negligent and willful non-compliance.

Highlights:

Consumer Reporting Agencies (CRAs):

Prohibits CRAs from reporting arrests or other adverse information, other than convictions of crimes, which are more than seven years old, provided that the report is not in connection with employment of an individual who has an annual salary of $75,000 or more. §§1681c(a)(2),1681c(a)(5), 1681c(b)(3). (Note that the statute has no time limit restriction for reporting criminal convictions; however, other “adverse items” include non-criminal offenses).

Requires CRAs to maintain “reasonable procedures” to insure “maximum possible accuracy” of the information concerning the individual in the report.

Requires that when a CRA reports public record information for employment purposes which are “likely to have an adverse effect on the consumer’s ability to obtain employment,” the CRA must notify the consumer that the public record information is being reported with the name and address of the person who is requesting the information – OR – the CRA must maintain strict procedures to insure that the information it reports is complete and up to date. §§1681k(a)(1),1681k(a)(2).
Employers:

Requires that an employer, when using a consumer background report for employment purposes, provide the applicant with a copy of the report and a copy of the Federal Trade Commission Summary of Consumer Rights prior to taking any adverse action based in whole or in part on the report. §1681b(b)(3)(a)(i)(ii).

This section applies to all users of consumer reports, including employers, and requires among other things that before taking an adverse action, the user of the information must provide notice of the adverse action to the consumer. §1681m(a)(1).

(b) State:

Certain states have further protections regarding how public record information is maintained and reported and either restrict or partially restrict the reporting of arrest/non-conviction information and/or an employer’s use of such information. The states are: Alaska, California, Connecticut, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, Utah, Virginia, and Washington.¹

For example, the New York Fair Credit Reporting Act prohibits CRAs from reporting information “relative to an arrest or a criminal charge unless there has been a criminal conviction for such offense” or unless there is a pending charge. GBL §380-j(a)(a) (emphasis added). Therefore, in New York CRAs are barred from reporting non-criminal violations.

California has set a time limit on the reporting of criminal convictions at seven-years from the date of disposition. CA Civil Code §1786.1(a)(7).

Litigation

The Legal Action Center is filing a case in the Eastern District of New York against a large CRA and the employer that used the agency’s consumer background report to deny plaintiff’s employment. The complaint asserts that the CRA violated the New York Fair Credit Reporting Act for reporting the plaintiff’s three non-criminal convictions in the background check it furnished to the employer, and did not have reasonable procedures in place to insure maximum accuracy when it prepared the

¹ The list of states was compiled by the National Association of Professional Background Screeners for their membership of approximately 500 Consumer Reporting Agencies. The Brennan Center for Justice and the Legal Action Center will be conducting a research project this summer on what the statutory restrictions are for maintaining reporting and using arrest/non-criminal conviction information for a select number of states from this list.
misleading and incomplete report, in violation of both the New York and Federal Fair Credit Reporting Act. In addition, it contends that the employer violated the Federal Fair Credit Reporting Act because it used this inaccurate and incomplete consumer background check to deny the client’s employment, without first giving him a copy of the report and a reasonable period of time to respond to it.

Community Legal Services of Philadelphia has several federal FCRA cases in the pipeline. The first will be against a CRA that misreported another person’s conviction on the report for CLS’s client, even though there was no match on the date of birth or social security number.

Decisions

The majority of claims brought under the FCRA are by individuals who were denied credit due to an inaccurate credit report, and not by those denied employment based on an inaccurate criminal background check. However, below are two noteworthy cases which involve a plaintiff who was denied employment due to an inaccurate criminal background check.

Dalton v. Capital Associated Industries, 257 F.3d 409 (4th Cir. 2001)
Plaintiff was denied employment for lying on his job application based on an inaccurate background check which incorrectly listed his conviction as a felony. The CRA had mischaracterized the offense as a felony based on the representation of a court clerk. The court held that the CRA violated the federal FCRA because it produced an inaccurate report that was patently incorrect and misleading in such a way and to such an extent that could be expected to have an adverse affect on the plaintiff’s employment.

Plaintiff was denied employment because he did not reveal an expunged conviction on his employment application. The court held that the CRA’s report was incomplete; however, since the plaintiff provided the employer with a copy of the expungement order before it made its decision to deny his employment, the CRA was not the proximate cause of the plaintiff’s harm.

Other Resources


- First Amendment & Privacy Rights

Litigation

was enjoined from releasing a "preliminary" list of the school employees with criminal records to the school districts, citing the irreparable injury to those employees whose were incorrectly identified by the state as having a criminal record. The school employee's union argued that the "stigma plus" test applied to the case based on a line of federal cases which hold that the inaccurate labeling of a person as having been convicted of a crime violates the person's liberty interest.

Service Employees International Union, Local # 3 v. Municipality of Monroeville, No. 04cv1651 (W.D. Pa. filed Oct. 28, 2004): In the days before the November 2004 election, the American Civil Liberties Union of Pennsylvania brought suit on behalf of several plaintiffs involved in get-out-the-vote efforts, challenging the registration and permit ordinances of two Western Pennsylvania towns as prior restraints violating the First Amendment of the U.S. Constitution. Monroeville’s ordinance provided that persons convicted of a felony would not receive a license; however, the plaintiffs settled with Monroeville before the district court decision. The district court determined that the ordinance of the Municipality of Mt. Lebanon was not unconstitutional; an appeal is pending in the Court of Appeals for the Third Circuit. The complaint, district court’s decision, and Third Circuit briefs are available online at http://www.aclupa.org/legal/legaldocket/seiu canvassinginmtlebanon.htm.

Decisions

United States Dept. of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (FBI rap sheets are not available under the Freedom of Information Act because of the unwarranted invasion of personal privacy; employs the useful phrase “practical obscurity” with respect to a compilation of information already in the public sphere).

Watchtower Bible and Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002) (ordinance that required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit on demand violated the First Amendment).

II. Civil Rights Litigation

Authorities: Statutes


**Authorities: Caselaw**

(a) Appellate decisions

**Griggs v. Duke Power Co.**, 401 U.S. 424 (1971) (seminal case establishing disparate impact claim under Title VII. The act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation).

**Wards Cove Packing Co., Inc. v. Atonio**, 490 U.S. 642 (1989) (re-defined “burden of proof” by permitting employer unable to meet “business justification” test to proffer a business necessity defense. However, this point was legislatively overruled).

**Gregory v. Litton Systems**, 472 F.2d 631 (9th Cir. 1972) (racially-neutral questionnaire which operated to bar employment to African American applicants in far greater proportion than white applicants unlawful practice under Title VII).

**Carter v. Gallagher**, 452 F.2d 315 (8th Cir. 1972) (blanket prohibition of employment based on arrest record unlawful under the act).

**Green v. Missouri Pacific Railroad Company**, 523 F.2d 1290 (8th Cir. 1975) (examined alternative ways to use statistics to prove disparate impact).
(b) Lower court decisions


Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975) (fire department’s use of arrest and conviction data disproportionately burdened black men because “as a group [they] are arrested more than white men”).


Ekunsumi v. Cincinnati Restoration, Inc., 120 Ohio App.3d 557, 562 (1997) (appellant’s claim failed where proof of employer’s automatic disqualification of people with criminal record was not shown).

Watkins v. City of Chicago, 73 F. Supp. 2d 944, 948 (N.D. Ill. 1999) (appellant failed to make showing of racial disparity in employer’s workforce. Evidence that African-Americans are arrested at higher rates than whites in the general population deemed insufficient).


Douglas El v. SEPTA, 2005 U.S. Dist LEXIS 14133 (E.D. Pa.) (on appeal to 3rd Cir.) (trial court deemed “criminal record to operate to measure minimum qualification necessary for successful performance” as a paratransit driver regardless of the length of time lapsed since the criminal conduct).

Administrative Policies


**Law Review Articles**


**Sociologists and Other Expert Articles**


III. “Cleaning Up” Records (Expungements, Pardons, Sealing)

Authorities

Transportation Security Administration Regulations Requiring Criminal Background Checks for Hazardous Material Endorsements for Commercial Driver’s License, 49 C.F.R. § 1572.3 (“Convicted includes any plea of guilty or nolo contendere, or any finding of guilt, except when the finding of guilt is subsequently overturned on appeal, pardoned or expunged. For purposes of this part, a conviction is expunged when the conviction is removed from the individual’s criminal history record and there are no legal disabilities or restrictions associated with the expunged conviction, other than the fact that the conviction may be used for sentencing purposes for subsequent convictions.”)

Litigation

Tom Johnson’s upcoming Minnesota litigation (Separation of Powers & Sealing)

Decisions


Other Resources


Margaret Colgate Love, “Relief from the Collateral Consequences of Conviction” 4-part series in National Hire Network Newsletter, November 2005 (Nondiscrimination Statutes); December 2005 (Expungement and Sealing); February 2006 (Pardon); Spring 2006 ("Notes from the Laboratories of Democracy").


**IV. Statutory Employment Restrictions**

**Authorities**

U.S. Constitution, 14\textsuperscript{th} Amendment, Equal Protection Clause

State Constitutional Protections

**Litigation**

With a win-loss record of slightly better 50-50, the libertarian Institute for Justice has been going after state licensing restrictions for a number of years. Although they have not targeted the restrictions based on criminal records, the legal theories are nonetheless relevant. They have succeeded with substantive due process and equal protection challenges when the restrictions were particularly lacking in rationality. *Craigmiles v. Giles* successfully challenged a Tennessee law that required that casket retailers get a funeral director’s license. 110 F. Supp. 2d 658 (E.D. Tenn. 2000), 312 F.3d 220 (6th Cir. 2002). In *Brown v. (Marion) Barry*, a shoeshine entrepreneur and his homeless employees successfully challenged a D.C. Jim Crow ordinance that forbade bootblacks from shining shoes on public property. The generic city vendor permit that had been granted was pulled under the auspices of the bootblack law and he was ordered to close shop. The plaintiffs won on equal protection grounds. 710 F. Supp. 352 (D.C. Cir.1989). *Cornwall v. Hamilton* was one of the many African American hairbraiding challenges mounted by IJ. As with the other hairbraiding cases, it involved a state requirement of a cosmetology license even though cosmetology schools did not teach hair braiding, the state exam did not test on hairbraiding (except on blonde hair), and the hairbraiders did none of the cosmetology that the schools and tests covered. This requirement was stricken on both due process and equal protection grounds. 80 F. Supp. 2d 1101 (S.D. Cal. 1999). In *Santos v. Houston*, a jitney service operator successfully challenged an anti-jitney ordinance on the basis of federal antitrust laws and substantive due process. 852 F. Supp. 601 (S.D. Tex. 1994). These cases were each fact-heavy. They pointed to the absurdity of the restrictions/requirements and how the state’s justification was just not rational.
Decisions

(a) Federal court decisions

Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 (1957) (holding that individual’s arrest record could not be used to prevent his admission to the bar).

Barsky v. Board of Regents, 347 U.S. 442 (1954) (holding that a physician’s license could be suspended because of a conviction, but emphasizing the due process protections available prior to suspension).

FW/PBS, Inc. v. Dallas, 837 F.2d 1298, 1305 (5th Cir. 1988) (upholding a prohibition on the operation of sexually oriented businesses by those convicted of sex crimes).

Darks v. City of Cincinnati, 745 F.2d 1040 (6th Cir. 1984) (upholding a blanket policy of denying licenses to operate dance halls to individuals convicted of felonies).

Baer v. City of Wauwatosa, 716 F.2d 1117, 1125 (7th Cir. 1983) (holding that city had improperly denied a gunshop owner’s license to an individual who had been convicted of sexual assault).


Seasholtz v. West Virginia Bd. of Osteopathy, 526 F.2d 590 (4th Cir. 1975) (holding that osteopath’s license could be revoked for a prior conviction for fraud committed while practicing as an osteopath because that conviction was rationally connected with a determination of the fitness and capacity of the osteopath to practice his profession).

Pordum v. Board of Regents, 491 F.2d 1281 (2d Cir. 1974) (holding that exclusion of convicted persons from a profession can be justified only after a detailed and particularistic consideration of the relationship between the person involved and the purpose of exclusion).

Upshaw v. McNamara, 435 F.2d 1188, 1190 (1st Cir. 1970) (holding that a person convicted of a felony and subsequently pardoned could still be disqualified from serving as a police officer).

The following cases illustrate the application of criminal history regulations:


**Lewis v. Alabama Dep’t Pub. Safety**, 831 F. Supp. 824, 827 (M.D. Ala. 1993) (finding that a regulation excluding those convicted of a crime of force, violence, or moral turpitude from the state’s list of towing contractors was “totally irrational”).


**Furst v. New York City Transit Authority**, 631 F. Supp. 1331 (E.D.N.Y. 1986) (striking down Transit Authority policy that required the discharge of individuals convicted of felonies because it violated the equal protection clause).


(b) State court decisions


**Brandt v. Fox**, 153 Cal. Rptr. 683 (Cal. Ct. App. 1979) (reversing the denial of a real estate license because the plaintiff’s four-year-old cocaine distribution conviction was not substantially related to the business of selling real estate).

**Pieri v. Fox**, 96 Cal. App. 3d 802 (Cal. Ct. App. 1979) (holding that the denial of a real estate broker's license was impermissible in absence of evidence that the applicant's past crime of making false statements was rationally and substantially related to her present qualifications).

In Re Manville, 538 A.2d 1128, 1132 n.3 (D.C. Ct. App. 1988) (questioning whether a per se rule excluding persons with felony convictions from bar admission was unconstitutionally over-inclusive and not sufficiently related to legitimate state interests, but ultimately rejecting the rule on policy rather than constitutional grounds).


Other Resources


Gabriel Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. OF GENDER, RACE, & JUSTICE 253 (2002).


Every Door Closed: Barriers Facing Parents with Criminal Records (Amy Hirsch et al. eds., 2002).


**V. Suitability for Work (Waivers, Certificates of Rehabilitation)**

**Authorities**

49 C.F.R. §1572.7

Regulations requiring a “waiver” procedure for those commercial drivers denied a hazardous material endorsement (proposed regulations would also extend the rules to port
workers) by the Transportation Security Administration due to a disqualifying criminal offense.

Decisions

California: Peter Sheehan of the Social Justice Law Project in Oakland has focused his litigation on creating procedural protections to better implement the California waiver laws in “community care” and in removing categories of offenses that are considered “non-exempt.” See Gresher v. Anderson, 127 Cal.App.4th 88, 25 Cal.Rptr.3d 408 (Cal.App. 1st Dist. 2005). See also Glessman v. Saenz, No. CGC-02-403255 and Doe v. Saenz, No CGC-02-407530 (Cal. Sup. Ct. 12/19/03) (Department of Social Services was forced to make case-by-case determinations about class members’ eligibility for employment).

Florida: Since December 2005, three of the five Florida District Courts of Appeals found that state agencies, in the absence of legislative authority, may not impose the requirement that an individual with a felony conviction obtain the restoration of his civil rights in order to obtain a occupational license. Yeoman v. Construction Industry Licensing Board, State of Florida Department of Business and Professional Regulation, 919 So.2d 542, 31 Fla. L. Weekly D48 (Fla. 1st DCA Dec. 22, 2005); Vetter v. Department of Business and Professional Regulation, Electrical Contractors Licensing Board, 920 So.2d 44, 30 Fla. L. Weekly D2807 (Fla. 2nd DCA Dec. 14, 2005); Daniel Scherer v. Department of Business And Professional, 919 So.2d 662, 31 Fla. L. Weekly D320 (Fla. 5th DCA Jan. 27, 2006).

Louisiana: See AFSCME, Council # 17 v. State of Louisiana, 789 So.2d 1263 (La. 2001) (state law defining felony conviction during employment as mandatory cause for termination of classified civil service employees, found unconstitutional in part); Gordon v. Louisiana State Board of Nursing, 804 So.2d 34 (La. Ct. App. 2001) (the Board’s denial of a license to an individual who had been paroled and pardoned for a felony narcotics license was illegal).


VI. Other Litigation

- Labor & Employment Law Anti-Retaliation

background check was motivated by CBC’s hostility towards Teegardin’s union activity”).

Jacobs Heating & Air Conditioning and Sheet Metal Workers International Association, Local Union No. 19, 2001 NLRB 7636 (Sept. 18, 2001) (finding a violation of the National Labor Relations Act because the employer “did its best not to hire Bazeski, Kennan, and Joseph by obtaining criminal background checks . . . ”).

• Labor Law (Required Subject of Bargaining)

Health Care Workers Union Local 250 v. Sutter County In-Home Supportive Services Public Authority, 29 PERC 114 (May 11, 2005) (holding that the employer erred in failing to bargain with the union over the effects of its unilateral implementation of the a state criminal background check policy, “including details such as a worker’s appeal rights if he believes the results of a background check were erroneous.”).