

Criminal Convictions as a Barrier to Employment

How Attorneys Can Help People with Records Get a Second Chance

By Miriam Aukerman

Fast Facts:

The civil consequences of criminal convictions can be more severe than the criminal consequences.

Many of the statutory barriers to the employment of former offenders make no sense, particularly since former offenders, after seven years of law-abiding conduct, have a similar risk of offending as persons without criminal records.

Although employers frequently adopt policies refusing to hire felons, such policies can be illegal under Title VII.

Karen, a live-in aid at an adult foster care home, decided she needed more privacy for her family and got a job at a nursing home.¹ But days before she was to move out of her apartment at the live-in facility and start her new job, the nursing home told her that because of her criminal record, the facility was legally barred from hiring her, even though she had worked there before and had an excellent work history. Karen and her children became homeless. After two months, Karen finally found factory work. But when her employer adopted a no-felon policy, Karen lost her job again. On her record were a 1997 conviction for welfare fraud, a 1995 conviction for inappropriately issuing a refund to a customer while working as a store clerk, and a 1994 conviction for driving without insurance.

For Karen, as for many individuals with criminal records, the employment consequences of her convictions were more severe than the criminal consequences. People with criminal records face high unemployment rates and low wages.² Some studies suggest that two-thirds of employers refuse to hire former offenders.³ Additionally, the negative impact of a criminal record is more severe than it was a few years ago because more employers are performing background checks. According to the Society for Human Resource Management, 51 percent of surveyed employers were conducting checks in 1996, while 96 percent were doing so by 2004.⁴

Because employment at a living wage is closely linked to distance from crime, high unemployment among former offenders presents a serious public safety risk.⁵ One study found that former prisoners who are unemployed are three times more likely to return to prison than those with steady jobs.⁶ The public thus has a strong interest in ensuring that people with records get a second chance. This article highlights strategies lawyers can use to prevent or mitigate the employment consequences of having a criminal record.

Statutory Barriers to Employment

Many jobs are off-limits to people with records as a matter of law. No one wants pedophiles working in daycare centers or embezzlers working in banks. However, many of these restrictions are overbroad, such as rules that prohibit a person convicted of drinking alcohol in an unlicensed establishment from providing state-subsidized daycare.⁷ Record-based restrictions are also often inconsistent when compared across occupations. For example, a person with a felony record can become an attorney, but is barred for life from becoming a security guard at a mall.⁸ Moreover, many record-based restrictions make no allowance for rehabilitation. A person convicted of any felony related to drug manufacture or distribution cannot work in nursing homes, regardless of how much time has passed or what the person has accomplished afterward.⁹ Yet research shows that after seven years of law-abiding conduct, a former offender has a similar risk of offending as a person without a criminal record.¹⁰

No one knows exactly how many jobs in Michigan are off-limits to people with records. A study in Florida—the only state to have researched the question—showed that record-based restrictions affect over 40 percent of jobs.¹¹ Numbers in Michigan are likely to be comparable. Frustratingly, occupational restrictions are scattered throughout federal and state codes and policies, creating a bewildering patchwork of regulation that makes it difficult for practitioners to advise clients about their eligibility for employment.

To address this problem, the Criminal Issues Initiative has developed a number of tools to aid practitioners in determining how particular convictions affect their clients' employability. Defense attorneys can use the Collateral Consequences Client Questionnaire to identify clients who work in fields that are restricted. In addition, the Michigan Reentry Law wiki, an online "wikipedia" for reentry issues, contains detailed outlines and sample pleadings on record-based occupational restrictions, as well as other reentry issues. See sidebar for details and website addresses for these resources.

So what can attorneys do about statutory barriers to employment? First, defense counsel and prosecutors should try to secure an outcome in a criminal case that will not unnecessarily restrict a defendant's employment opportunities. Second, attorneys repre-

Fast Resources:

Michigan Reentry Law Wiki—reentry.mplp.org

The Michigan Reentry Law wiki provides legal outlines, sample pleadings, statutory cites, and other materials to help attorneys identify and mitigate the collateral consequences of criminal convictions.

Collateral Consequences Client Questionnaire—www.michbar.org/programs/criminalissues.cfm

The Collateral Consequences Client Questionnaire, developed by attorneys for attorneys, enables defense attorneys to flag potential collateral consequences affecting their clients.

sending clients who already have convictions should not assume that they are barred from employment. Laws imposing occupational barriers are complex and sometimes include grandfathering provisions or appeals mechanisms, which would allow an otherwise disqualified client to work in a particular field.

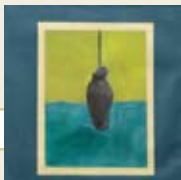
Employer Responsibilities Under Title VII

Although it is widely believed by both employers and job applicants that employers may reject applicants solely on the basis of their criminal records, blanket "no-felon" policies can violate federal laws against race discrimination. The Equal Employment Opportunity Commission (EEOC) has determined that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population."¹² The EEOC has become increasingly interested in this issue, and this September filed *EEOC v Peplemark, Inc.*, alleging that Peplemark unlawfully maintained a policy of denying employment to people with criminal records.¹³

To avoid Title VII liability for criminal-record-based employment decisions, the EEOC requires employers to demonstrate business necessity by establishing that the employer considered three factors: (1) the nature and gravity of the offense, (2) the time elapsed since the conviction or completion of sentence, and (3) the nature of the job sought.¹⁴ The only recent court decision on this issue, *El v Southeastern Pennsylvania Transportation Authority*, adopted a slightly different standard, holding that under Title VII, criminal record policies must "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."¹⁵ Under either standard, blanket no-felon policies will often be illegal. Thus, management-side attorneys should make sure that their clients adopt hiring policies that comport with Title VII standards, while labor-side attorneys can use those standards to challenge employers who fail to consider applicants with records.

The Fair Credit Reporting Act

When using criminal record information for employment purposes, both consumer reporting agencies and employers have responsibilities under the Fair Credit Reporting Act (FCRA).¹⁶ If a



Right of Center by Matt Whyte

credit reporting agency¹⁷ provides public record information that is likely to have an adverse effect on an individual's ability to obtain employment, such as arrest or conviction data, the agency must either (1) notify the individual whose record is being reported, or (2) maintain strict procedures designed to ensure that the public record information is complete and up to date.¹⁸ Errors on criminal records are common, and the FCRA provides a valuable tool to protect clients harmed by inaccurate records.

The FCRA also applies to employers. When using criminal record information contained in credit reports, employers must provide to the job applicant a copy of the report and the Federal Trade Commission's Summary of Consumer Rights *before* making an adverse employment decision.¹⁹ Again, management-side attorneys should make sure their clients comply with these requirements, while labor-side attorneys can use employer violations of the FCRA, which are very common, as leverage to ensure fair consideration of their clients during the hiring process.

Expungement and Cleaning Up Records

The best criminal record is no criminal record. Expunging a person's criminal record can transform that person's life. Unfortunately, few clients are eligible for expungement. Individuals can have only one conviction (meaning one count of either a misdemeanor or felony).²⁰ In addition, at least five years must have passed since the conviction or release from imprisonment, whichever is later.²¹ Prosecutors and defense attorneys should, when possible, structure convictions for first-time offenders to include only one count, so that these individuals are eligible for expungement. After all, individuals who reoffend will become ineligible for expungement, while those who do not reoffend deserve the fresh start that expungement can provide.

Individuals seeking employment can be haunted not just by criminal convictions, but also by arrests. When a client is arrested but not charged, or is charged but not convicted, attorneys should file a motion for return of fingerprints to clear the arrest/charge information from the client's criminal record.²²

Conclusion

Most attorneys involved in the criminal justice system have paid little attention to the collateral consequences of convictions, while attorneys on the civil side have tended to think of record-related problems as a criminal matter. Meanwhile, people with criminal records are becoming second-class citizens, not just losing opportunities for employment but also facing problems with housing, immigration, drivers' licenses, public benefits, student loans, and other issues.

For defense attorneys to represent their clients adequately, they need to be aware of and mitigate these noncriminal sanctions. For prosecutors to protect the public, they need to make sure that criminal sanctions do not result in collateral consequences (such as unemployment) that increase the risk of recidivism. For civil practitioners to meet the needs of employers and employees, they must understand the rights of people with rec-

ords. Finally, for judges to do justice, they need to be aware, when meting out punishment, that noncriminal consequences of a conviction can be even more punitive than the criminal sentence itself. The first step is to understand what collateral consequences are and when they apply. The resources developed by the Criminal Issues Initiative will help attorneys do just that. ■

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FOOTNOTES

1. Karen is a former client of Legal Aid of Western Michigan. Her name has been changed to protect her identity.
2. See Solomon et al., *From Prison to Work: The Employment Dimensions of Prisoner Reentry* (Urban Institute, 2004), at 14, available at <http://www.urban.org/UploadedPDF/411097_From_Prison_to_Work.pdf>. All websites cited in this article were accessed October 12, 2008.
3. Travis, et al., *From Prison to Home: The Dimensions and Consequences of Prisoner Reentry* (Urban Institute, 2001), at 31, available at <http://www.urban.org/UploadedPDF/from_prison_to_home.pdf>.
4. Terhune, *The Trouble with Background Checks*, Business Week, May 29, 2008, available at <http://www.businessweek.com/magazine/content/08_23/b4087054129334.htm?campaign_id=rss_smlbz>.
5. Travis, *supra* at 31 (2001) (citing research showing that a 10 percent decrease in an individual's wages is associated with a 10–20 percent increase in criminal activity and likelihood of incarceration).
6. *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*. Final Report of the Mayoral Policy Caucus on Prisoner Reentry (2006), at 15, available at <<http://www.chicagometropolis2020.org/documents/MPCFinalReport.pdf>>.
7. Department of Human Services, Program Eligibility Manual, § 705, and Crime Code Exhibit, available at <<http://www.mfia.state.mi.us/olmweb/ex/pem/705.pdf>>; MCL 436.1913(2) (prohibiting consumption of alcohol in unlicensed commercial establishment).
8. MCL 338.1056; MCL 338.1067.
9. MCL 333.20173a(1)(a); 42 USC 1320a-7(a)(4).
10. Kurlychek, Brame & Bushway, *Scarlet letters and recidivism: Does an old criminal record predict future offending?*, 5 Criminology & Pub Pol'y 1101, 1117 (2006).
11. Mills, *Inventoring and Reforming State-Created Employment Restrictions Based on Criminal Records: A Policy Brief and Guide* (September 2008), at 2, available at <<http://www.aecf.org/~media/PublicationFiles/Employment%20Restrictions%20Policy%20Guide%20Sept%202008.pdf>>.
12. U.S. Equal Employment Opportunity Commission, Notice No. N-915, *EEOC Policy Statement on Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq. (1982), at 1 (February 4, 1987), available at <<http://www.eeoc.gov/policy/docs/convict1.html>>.
13. *EEOC v Peoplemark, Inc.*, No. 1:08-CV-00907 (complaint filed September 29, 2008).
14. *EEOC Policy Statement on Issue of Conviction Records*, n 12 *supra*.
15. *El v Southeastern Pennsylvania Transportation Authority*, 479 F3d 232, 245 (CA 3, 2007).
16. See 15 USC 1681 et seq.
17. See 15 USC 1681a(f) (defining "consumer reporting agency").
18. See 15 USC 1681k(a).
19. See 15 USC 1681b(b)(3).
20. See *People v Blachura*, 176 Mich App 717; 440 NW2d 1 (1989) (holding that multiple counts arising out of same incident made defendant ineligible for expungement).
21. MCL 780.621.
22. MCL 28.243; State Court Administrative Office Form MC 235.

