

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

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*\*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-Peebles, and Linda Mills.*

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

### 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).

(b) Implementing the federal regulations, state statutes in every state govern accuracy and dissemination of criminal records. See citations and summary of state statutes in Paul L. Woodard and Eric C. Johnson, Compendium of State Privacy and Security Legislation: 2002 Overview, NCJ 187669 (U.S. Dept. of Justice, Bureau of Justice Statistics, Nov. 2003), available at <http://www.ojp.usdoj.gov/bjs/abstract/cspsl02.htm>.

(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

SEARCH, the National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information (2005) (available from SEARCH's website: <http://www.search.org/services/publications/default.asp> ).

Owen M. Greenspan and Eric C. Johnson, Survey of State Criminal History Information Systems, 2003, NCJ 210297 (U.S. Dept. of Justice, Bureau of Justice Statistics, Feb. 2006).

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

Bland v. Flynn, Secretary of the Executive Office of Public Safety, Mass. Super. Ct. SUCV2004-01751-F (filed April 22, 2004) (raising claims under state statute governing criminal record accuracy, claim under state statute establishing privacy rights, and due process claims under state and federal constitutions) (Contacts: Fran Fajana).

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

Report of the BJS/SEARCH National Focus Group on Identity Theft Victimization and Criminal Record Repository Operations (Dec. 2005) (available from SEARCH's website: <http://www.search.org/services/publications/default.asp?category=9> ).

- **Fair Credit Reporting Act Protections**

### Authorities

#### (a) Federal

Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

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):

15 U.S.C. §1681c – Requirements relating to information contained in consumer reports.

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).

15 U.S.C. §1681e(b) – Compliance procedures – accuracy of report.

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

15 U.S.C. §1681k – Public record information for employment purposes.

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:

15 U.S.C. §1681b(b) – Conditions for furnishing and using consumer reports for employment purposes.

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).

15 U.S.C. § 1681m – Requirements on users of consumer reports.

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.<sup>1</sup>

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

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<sup>1</sup> 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 (4<sup>th</sup> 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.

Obabueki v. IBM and Choicepoint, 236 F.Supp.2d 278 (S.D.N.Y. 2002)

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

National Consumer Law Center, Fair Credit Reporting (2002) and Supplement (2005).

- **First Amendment & Privacy Rights**

### Litigation

AFT Michigan (Jane Doe 1 and Jane Doe 2) v. State of Michigan (E.D. Mich. Feb. 22, 2006)(Gadola, J.)(order granting permanent injunction). The State of Michigan

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/seiucanvassinginmtlebanon.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

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

Cal. Lab. Code § 432.7 (West 1989 & Supp. 2002).

Conn. Gen. Stat. § 46a-79 (2001).

Colo. Rev. Stat. § 24.5-101 (2001).



Haw. Rev. Stat. § 378-2 (1993 & Supp. 2000).

775 Ill. Comp. Stat. Ann. §5/2-103 (West 2001).

Mass. Gen. Laws Ann. Ch. 151B, §4(9) (West 1990 & Supp. 2002).

Mich. Comp. Laws §37.2205a (2001).

Minn. Stat. §364.03 (1998).

N.J. Stat. Ann. §2A:168A-1 (West 1985 & Supp. 2001).

N.Y. Correct. Law §§ 752-54 (McKinney 1987 & Supp. 2001-2002); N.Y. Crim. Proc. Law § 160.60 (McKinney 1992 & Supp. 2001-2002); N.Y. Exec. Law §§ 296 (15)-(16) (McKinney 2001).

R.I. Gen. Laws § 28-5-7(7) (2000).

Wis. Stat. Ann. §111.321 (West 1997 & Supp 2001).

#### 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 (9<sup>th</sup> 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 (8<sup>th</sup> Cir. 1972) (blanket prohibition of employment based on arrest record unlawful under the act).

Green v. Missouri Pacific Railroad Company, 523 F.2d 1290 (8<sup>th</sup> Cir. 1975) (examined alternative ways to use statistics to prove disparate impact).

(b) Lower court decisions

Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971) (“security sensitive” position as a bellman served as justification to fire former offender convicted of theft).

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”).

United States v. City of Chicago, 411 F. Supp. 218 (N.D. Ill. 1976) (“standardless inquiry about bad character, immoral conduct and dissolute habits” including arrest and background investigations enjoined under the act).

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).

Field v. Orkin Extermination Co., Inc., 2002 WL 32345739 (E.D. Pa. 2002) (stating that blanket policy of denying employment to any person having a criminal conviction is violative of the act).

Douglas El v. SEPTA, 2005 U.S. Dist LEXIS 14133 (E.D. Pa.)(on appeal to 3<sup>rd</sup> 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

U.S. Equal Employment Opportunity Commission, Compliance Manual, § 15 “*Race and Color Discrimination*” (April 19, 2006) available at <http://www.eeoc.gov/policy/docs/race-color.html> (last visited 4-24-06).

U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended*, [42 U.S.C. § 2000e \(1982\) II](#), EEOC Compliance Manual § 604 (Feb. 4, 1987).

U.S. Equal Employment Opportunity Commission, *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, [42 U.S.C. § 2000e et seq.](#), EEOC Compliance Manual (Sept. 7, 1990).

U.S. Equal Employment Opportunity Commission, *Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment*, EEOC Compliance Manual § 604-B (July 29, 1987).

*EEOC Guide to Pre-Employment Inquiries*, 8A Fair Empl. Prac. Man. (BNA) 443:65 (1992).

#### Law Review Articles

*Walking a Tightrope: Balancing Competing Public Interest in the Employment of Criminal Offenders*, 34 Conn. L. Rev. 1281 (2002).

#### Sociologists and Other Expert Articles

Robert D. Crutchfield & Susan R. Pitchford, *Work and Crime: The Effects of Labor Stratification*, 76 Social Forces 93 (1997).

Michael Ezell & Lawrence Cohen, *Desisting From Crime* (2005).

Miles D. Harer, *Recidivism among Federal Prisoners released in 1987*, 46 Journal of Correctional Education 98 (1995).

Megan C. Kurlycheck, Robert Brame, Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement* (March 2006).

John Laub & Robert Sampson, *Shared Beginnings, Divergent Lives* (2003).

Jeffrey K. Liker, *Wage and Status Effects for Employment on Affective Well-being among Exfelons*, 47 American Sociological Review 264 (1982).

Thomas Meisenhelder, *An Exploratory Study of Exiting From Criminal Careers*, 15 Criminology 319 (1977).

Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937 (2003).

Devah Pager, Bruce Western, *Discrimination in Low-Wage Labor Markets: Evidence from an Experimental Audit Study in New York City*, available (2005) available at <http://paa2005.princeton.edu/download.aspx?submissionId=50874> .

Christopher Uggen, *Work as a Turning Point in the Life Course of criminals: A Duration Model of Age, Employment, and Recidivism*, 65 American Sociological Review 529 (2000).

Ann Dryden Witte & Helen Tauchen, *Work and Crime: An Exploration Using Panel Data* (Nat'l Bureau of Econ. Research, Working Paper No. 4794, 1994).

### 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

The Pennsylvania courts recognize a constitutional right to seek expungement of an arrest record. See, e.g., Commonwealth v. Armstrong, 434 A.2d 1205, 1206 (Pa. 1981); Commonwealth v. Wexler, 431 A.2d 877, 879 (Pa. 1981); Commonwealth v. Malone, 366 A.2d 584, 487-88 (Pa. Super.1976)(noting serious losses that can be caused by an arrest record, including reputational and economic injury). In recent years, the Pennsylvania Supreme Court concluded that despite a lack of statutory authority to expunge Protection from Abuse (“PFA”) records, Art. I, § 1 provides a right to expunge PFA records where the petitioner seeks to protect his reputation. Carlacci v. Mazaleski, 798 A.2d 186, 188 (Pa. 2002).

#### Other Resources

Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide* (forthcoming 2006), previewed at <http://www.sentencingproject.org/rights-restoration.cfm>.

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”).

Margaret Colgate Love, *Reviving the Benign Prerogative of Pardoning*, Litigation Magazine (forthcoming Winter 2006).

Margaret Colgate Love, *The American Way of Punishment: The ABA Justice Kennedy Commission Report*, XXVII The Champion 36 (December 2004).

Margaret Colgate Love, *Old Wine in a New Skin: The ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons*, 16 FEDERAL SENTENCING REPORTER 232 (2004)(with Gabriel J. Chin).

Margaret Colgate Love, *Starting Over With a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URBAN LAW JOURNAL 1705 (2003).

Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN LAW JOURNAL 1483 (2000).

Boston Foundation, CORI: Balancing Individual Rights and Public Access, <http://www.tbf.org/uploadedFiles/CORI%20Report.pdf>.

#### **IV. Statutory Employment Restrictions**

##### Authorities

U.S. Constitution, 14<sup>th</sup> 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. Craig Miles 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

Schwartz 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 (6<sup>th</sup> 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 (7<sup>th</sup> Cir. 1983) (holding that city had improperly denied a gunshop owner's license to an individual who had been convicted of sexual assault).

Schanuel v. Anderson, 708 F.2d 315, 319 (7<sup>th</sup> Cir. 1983) (upholding a statute prohibiting employment of persons convicted of felonies as security guards for a ten-year period).

Miller v. Carter, 547 F.2d 1314 (7<sup>th</sup> Cir. 1977), *affirmed*, 434 U.S. 356 (1978) (equally divided court) (striking down ordinance that permanently barred persons convicted of certain offenses from obtaining a public chauffeur's license).

Seasholtz v. West Virginia Bd. of Osteopathy, 526 F.2d 590 (4<sup>th</sup> 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 (1<sup>st</sup> Cir. 1970) (holding that a person convicted of a felony and subsequently pardoned could still be disqualified from serving as a police officer).

M&Z Cab Corp. v. City of Chicago, 8 F.Supp.2d 941, 947 (D. Ill. 1998) (upholding revocation of taxicab medallions based on the holder's felony conviction).

Hill v. City of Chester, 1994 U.S. Dist. LEXIS 11951 \*19 (E.D. Pa. Aug. 26, 1994) (upholding decision of city council to eliminate position of an employee based on his criminal record).

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").

Weissinger v. Ward, 704 F. Supp. 349 (E.D.N.Y. 1989) (upholding the discharge of a police officer convicted of criminal facilitation for completing false accident reports).

Hill v. Gill, 703 F. Supp. 1034, 1037 (D.R.I. 1989) (upholding regulations prohibiting persons convicted of felonies from being licensed as school bus drivers).

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).

Dixon v. McMullen, 527 F. Supp. 711 (N.D. Tex. 1981) (upholding refusal to certify pardoned felon as police officer because his conviction for robbery would directly reflect on his qualifications for the job of investigating robberies).

Kindem v. City of Alameda, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980) (invalidating city's blanket ban on hiring persons with felony convictions).

Smith v. Fussenich, 440 F. Supp. 1077 (D. Conn. 1977) (striking down record-based bar to private detective and security guard work).

Butts v. Nichols, 381 F. Supp. 573 (S.D. Iowa 1974) (holding that prohibiting convicted felons from occupying state civil service positions violated the equal protection clause).

(b) State court decisions

Lopez v. McMahon, 205 Cal. App. 3d 1510 (1988) (upholding refusal to issue daycare license to an applicant residing with an individual convicted of a violent felony)

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).

Brewer v. Department of Motor Vehicles, 93 Cal. App. 3d 358 (Cal. Ct. App. 1979) (reversing the denial of a license to sell vehicles based on a criminal record).

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).

Cronin v. O’Leary, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001) (striking down ban on employment with state department of human services as a violation of procedural due process).

Warren County Human Services v. State Civil Service Commission, 844 A.2d 70 (Pa. Commw.), pet. for allowance of appeal denied, 863 A.2d 1152 (Pa. 2004) (lifetime ban of persons with aggravated assault convictions from employment in child care violated the Pennsylvania Constitution).

Nixon v. Commonwealth of Pennsylvania, 839 A.2d 277, 288 (Pa. 2003) (statute that prohibited employment in elder care facilities for those convicted of certain criminal offenses did not have a real and substantial relationship to Commonwealth’s interest in protecting elderly individuals, violating Pennsylvania Constitution).

#### Other Resources

American Bar Association, *Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons 1* (2004).

Miriam Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 WAYNE J.L. IN SOCIETY 18 (2005).

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## **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.4<sup>th</sup> 88, 25 Cal.Rptr.3d 408 (Cal.App. 1<sup>st</sup> 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. 1<sup>st</sup> 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. 2<sup>nd</sup> DCA Dec. 14, 2005); Daniel Scherer v. Department of Business And Professional, 919 So.2d 662, 31 Fla. L. Weekly D320 (Fla. 5<sup>th</sup> 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).

Pennsylvania: Nixon v. Commonwealth, 839 A.2d 277, 288 (Pa. 2003) (statute that prohibited employment in elder care facilities for those convicted of certain criminal offenses did not have a real and substantial relationship to Commonwealth’s interest in protecting elderly individuals, violating Pennsylvania Constitution).

## **VI. Other Litigation**

- **Labor & Employment Law Anti-Retaliation**

Consolidated Biscuit Company and Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, AFL-CIO, CLS, 2004 NLRB LEXIS 9 (NLRB Div. of Judges Jan. 14, 2004) (“Given the absence of any credible explanation, I find that this

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.").