Use of Criminal History Records in the Application Process: The Employer Perspective

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Multi-Dimensional Challenges - Criminal History

Criminal History - Balancing Concerns:

- Public Policy
- Legal Restrictions
- Adverse Impact
- Liability Risks
- Protection of others
- Reduce Recidivism
- Statutory Restrictions
- OSHA Obligations
Criminal Background Checks
- Business Justification
Reasons for Background Checks

To ensure a safe work environment for employees 61%

To reduce legal liability for negligent hiring 55%

To reduce/prevent theft and embezzlement, other criminal activity 39%

To comply with applicable State law requiring a background check (e.g., day care teachers, licensed medical practitioners, etc.) for a particular position 20%

To assess the overall trustworthiness of the job candidate 12%

Other 4%

Note: n = 310. Percentages do not total to 100% as respondents were allowed multiple choices. Respondents were asked to select top two options.

*Background Checking: Conducting Criminal Background Checks, SHRM (2010)
• 73% of organizations conduct criminal background checks on all job candidates.
• 19% of organizations conduct criminal background checks on selected job candidates.

*Background Checking: Conducting Criminal Background Checks, SHRM (2010)
Criminal Background Checks: Positions Involved

Note: $n = 60$. The data in this figure represent organizations that conduct criminal background checks on select job candidates. Percentages do not total to 100% as respondents were allowed multiple choices.

*Background Checking: Conducting Criminal Background Checks, SHRM (2010)*
State Law Issues
State Laws: Criminal History

Restrictions on Pre-Employment Inquiries re Criminal History:

- Limitations on what records employers may ask about
- Limitations on when in the hiring process inquiries are permitted
- Workplace notice requirements
- Restrictions in disqualifying applicants based on criminal history
State Law Requirements

Limitations on Pre-Employment Inquiries/
Selected Jurisdictions:

California           Illinois
Connecticut          Nebraska
District of Columbia  Nevada
Georgia              New York
Hawaii
State Law Issues

Protective Legislation for Ex-Offenders:

• New York
• Hawaii
• Pennsylvania
• Wisconsin
State Law Issues

Compliance Challenges- e.g. New York:

• Correction Law (Article 23-A) - prohibits discrimination based on a criminal conviction

• Labor Law - Posting Requirements

• Human Rights Law - Prohibits inquiries regarding arrests, juvenile offenders and sealed records

• NY Fair Credit Reporting Act - Bars criminal background checks absent conviction (unless pending) and beyond 7-years, unless paid at least $25,000 annually
Restrictions in Hiring Based on Criminal Records

Restrictions in Hiring:

• Financial Institutions
• DOT Regulations
• Those Handling Firearms- Gun Control Act
• State Laws- Bars on Employment and Licensing Restrictions
Negligent Hiring Risks

Negligent hiring claims hinge on whether:

• The employer knew or should have known that the ex-offender, if placed in the specific job, posed a foreseeable risk of harm to others based on his prior crimes
• The crime against the plaintiff was reasonably foreseeable from the ex-offender's prior crimes
Negligent Hiring Risks

Selected Cases focusing on background checks:

• *Kladstrup v Westfall Health Care Center*, 701 N.Y.S. 808 (Sup. Ct. N.Y. ‘99)(Based on nurse’s job duties, obligation “to make an in-depth inquiry” to assure no history of sexual misconduct)

• *Welsh Mfg. v Pinkerton’s, Inc.*, 474 A. 2d 436 (R.I. “84)(“mere lack of negative evidence may not be sufficient...background checks ..should seek relevant information that might not otherwise be uncovered”)

• *Oakley v Flor-Shin Inc.* 964 S.W. 2d 438 (Ky. App.’98)(if employer had conducted background check, employer would have known of past criminal record)
Disparate Impact Analysis
Disparate Impact Analysis


**Facts:** H.S. education and general intelligence test adopted and imposed as hiring requirement for unskilled jobs. African Americans previously isolated in one dept. pre-Title VII and highest pay was lower than any other dept.

**Held:** Policies, practice and tests “even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.”

- “The touchstone is *business necessity*. Employment practice must “bear a *demonstrable relationship* to successful performance on the job.”
- The employer has the burden of showing that the selection procedure has “a *manifest relationship*” to the employment in question
**Disparate Impact Analysis**

*McDonnell Douglas v Green, 411 U.S. 431(1973)*

**Facts:** Plaintiff, a civil rights activist, involved in blocking entrance to plant and “lock in” that prevented occupants from leaving building. Plaintiff arrested for blocking traffic and refusing to move and pleaded guilty. Later applied for job and rejected due to “lock in” and “stall in.”

**Held:** “Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all races.”
**Disparate Impact Analysis**

**McDonnell Douglas (Cont.)**

- “*Griggs was rightly concerned that childhood deficiencies* in the education and background of minority citizens, *resulting from forces beyond their control*. Respondent… appears to be in different clothing. He had engaged in a seriously disruptive act against the one from whom he now seeks employment

- It cannot be said that petition’s refusal to employ lacked a rational and neutral business justification.”

- “Past conduct may well relate to present fitness…”
Disparate Impact Analysis

Green v Missouri Pacific Railroad, 523 F. 2d 1290, rehearing denied, 523 F. 2d 1290 (8th Cir. 1975), 549 F.2d 118 (8th Cir. 1977).

Facts:

- Broad policy of not hiring anyone with criminal conviction other than minor traffic violation. Conviction was refusing induction in military service. Applied for clerk job and performed similar job while in prison.

Held:

- Court viewed “sweeping disqualification” as improper, “which overstates what is necessary for competent performance, distinguishing McDonnell Douglas opinion (i.e. McDonnell Douglas did not seek exclusion of plaintiff which “overstates what is necessary” or “some sweeping disqualification”)

- Cited case law that not “inappropriate” to give “fair consideration” to bearing of the conviction upon applicant’s fitness for job.
Green v Missouri Pacific R.R. (Cont.)

- Cited with approval Butts v Nichols, 381 F. Supp. 573 (S.D. Ia ’74), which issued ruling regarding basic standard adopted by Appeals Court and EEOC in subsequent ’87 Guidance.

- Adopted standard used by district court judge on remand, taking into account, “the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.”

- Elected not to address any purported validation requirement, despite plaintiffs’ view that relying on conviction information could not be used unless and until validated in accordance with EEOC Guidelines, 29 CFR Sect. 1607.
Disparate Impact Analysis

EEOC adopted *Green v Missouri Pacific* Standard in ‘87 Guidance:

To establish business necessity based on failure to hire due to a criminal conviction, an employer must show it considered the three factors from *Green*:

- The nature and gravity of the offense or offenses;
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.

*Noteworthy: No reference to validation requirement!! Rather, focus is job relatedness (#1 and #3) and time (#2) and business judgment based on these considerations.*
Disparate Impact Analysis

(4-3 decision, 2 judges no sign. role in decision)

Issue: Promotion practices involving subjective decision making and issue before Court was whether disparate impact analysis could apply.

1. Key issue was meeting “business necessity” test or “job relatedness” defense, showing that employment practice had a “manifest relationship to the job in question.

2. Held: Justice O’Connor held “validation studies” not required and employers can rely on “plainly relevant criteria”.

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Watson v Fort Worth Bank (Cont.)

Cited other cases applying common sense approach:

- **New York City Transit Authority v Beazer, 440 U.S. 568 (1979)** (Court considered it “obvious” that “legitimate employment goals of safety and efficiency” permitted the exclusion of methadone users from employment with Transit Authority)

- **Washington v Davis, 426 U.S. 229 (1976)** (“Job relatedness’ requirement satisfied when employer demonstrated test was related to success at academy “‘wholly aside from possible relationship to actual performance as a police officer’”)

Disparate Impact Analysis
**Watson v Fort Worth Bank** (Cont.)

Different Approach Than O’Connor- Justice Blackman, Concurring in Part focused on the following:

- What constitutes “business necessity” is a “case specific judgment” and must take into account: (1) “nature of the particular business”; and (2) the “job in question.”

- Acknowledged that “formal validation techniques endorsed by EEOC in Uniform Guidelines may sometimes not be effective”.

- For job relatedness, courts have looked to: (1) results of studies; (2) expert testimony; and (3) prior successful experience.
Disparate Impact Analysis


- Designed to provide framework for determining proper use of tests and other selection procedures (Sec. 1607.1)

- Section 1607.6(1): “When an informal or unscored selection procedure which has an adverse impact is utilized, the user should eliminate the adverse impact, or modify the procedure....or otherwise justify continued use of the procedure in accord with Federal law.”
Disparate Impact Analysis

*El v Southeastern Pennsylvania Transportation Authority (SEPTA)*, 479 F.3d 232 (3d Cir. 2007)

**Facts:** El applies in 2000 to be a paratransit bus driver. Had been convicted of 2d degree murder in 40 years earlier when 15 yrs. Old (served 3.5 years). SEPTA policy: (1) No convictions for moral turpitude or violence; and (2) No other felonies (or certain misdemeanors) within 7 years. Hired by subcontractor, but terminated based on SEPTA policy following background check. Title VII charge and reasonable cause finding. Indiv filed lawsuit on his own behalf and as a class.[Not EEOC!]. SJ and 3rd Cir. Aff’d.

**Ruling:** Criticized EEOC Guidance for lack of clarity, distinguished *Green v Missouri Pacific* and not cite *Watson v Fort Worth Bank*. 
El v SEPTA (Cont.)

Held: Cited various S.Ct. cases and held that Court “refused to accept bare or ‘common sense’-based assertions of business necessity and instead required some level of empirical proof that the challenged hiring criteria accurately predicted job performance.”

Finding: Relied on SEPTA’s expert, Dr. Alfred Blumstein, expert on recidivism:

• “We must take him at his word that former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act.”

{Plaintiff did not produce an expert.}
Acknowledged S. Ct. “has never dealt directly with criminal record policies” but cited:

- *McDonnell Douglas* - “employer’s fear that this employee would continue to be disruptive in violation of the law was a legitimate business reason for the refusal [to hire].”

- *Beazer* – “it was permissible under Title VII to refuse to hire anyone using methadone to treat their addiction to illegal drugs for “safety sensitive” positions because the policy serves “the legitimate employment goals of safety and efficiency.”
El v SEPTA (Cont.) - Contradictory holdings:

• “(W)e have held that hiring criteria must effectively measure the “minimum qualifications for successful performance of the job in question.”

• But see:“..the issue before us is the risk that the employee will harm a passenger, and the phrase ‘minimum qualification’ simply does not fit,” thus held sui generis that policies regarding criminal convictions pertain to risk, not job performance and subjected them to a unique method of analysis.
El v SEPTA (Cont.):

Developed Own Business Necessity Standard dealing with criminal history:

- “...the policy under review [must] accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”

- “If a bright-line policy can distinguish between individual applicants that do and do not pose an unacceptable level or risk, then such a policy is consistent with business necessity.” Rejected plaintiff view that Title VII requires each applicant’s circumstances to be considered individually without reference to bright line rules.
Why is the EEOC reviewing its Guidelines:

*El v SEPTA*: The Third Circuit reviewed the 3 factors in the EEOC’s guidelines and stated:

“The EEOC’s Guidelines...do not speak to whether an employer can take these factors into account when crafting a bright-line policy, nor do they speak to whether an employer justifiably can decide that certain offense are serious enough to warrant a lifetime ban.”
Recent EEOC Policy Statements
Opinion Letter Dated June 17, 2011 to U.S. Dept. of Commerce:

**Facts:** Screening methods – May exclude from Census jobs based on convictions, including misdemeanors that have occurred since age 18.

- Recommended narrow criminal history inquiry so it “focuses on convictions that are related to the specific positions in questions and that have taken place in the past seven years,” consistent with the federal government’s updated application.
- Recommends that Census Bureau “educate and provide training to the relevant hiring officials about how to assess the suitability for the particular positions in question when evaluating criminal records.”
Opinion Letter Dated Sept 11, 2011 to Peace Corp.

Inquiry: Broad based inquiries on drug and alcohol criminal history and other broad based inquiries re criminal offenses:

• The criminal conduct should be "recent enough" and "sufficiently job-related to be predictive of performance in the position sought, given its duties and responsibilities.

• The employer should narrow its criminal history inquiries to focus on "convictions that are related to the specific positions in question, and that have taken place in the past seven years, consistent with the proposed provisions of the federal government's proposed updated employment application form."
Thank you!