

JANUARY 16, 2016

Pennsylvania Court Rules Background Screening Law Unconstitutional

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On December 30, 2015, the Commonwealth Court in Pennsylvania unanimously found the Older Adults Protective Services Act's (the Act) lifetime prohibition on the ability of individuals with convictions to hold certain jobs in nursing homes and long-term care facilities to be unconstitutional on its face, under its interpretation of the Pennsylvania state constitution.¹ Specifically, the court held that the lifetime ban provisions violate a convicted individual's due process rights because the individual is penalized for engaging in conduct that may have happened decades ago and is presumed unfit for the jobs at issue. The court also concluded that the law's lifetime ban on the ability of convicted individuals to work for these types of employers is not "substantially related" to the purpose set out in the Act, which is to protect older persons from abuse, neglect and exploitation.

Until any appeal period lapses or any appeal is decided, and while new legislation is considered, the court's decision creates substantial uncertainty for covered employers in Pennsylvania regarding disqualifying criminal record offenses.

History of the Older Adults Protective Services Act

In 1987, the Pennsylvania General Assembly enacted the Act, which was amended in 1996 to add a requirement that all applicants seeking employment in a facility covered by the Act, as well as incumbent employees with less than two years of service, submit to a criminal background check. The amendments established two categories of past criminal convictions: (1) those criminal convictions that disqualified an individual from obtaining or continuing employment regardless of the date of the conviction (category one), and (2) those criminal convictions that disqualified an individual where the conviction had occurred within the past 10 years (category two).

¹ *Peake v. Commonwealth*, No. 216 M.D. 2015 (Pa. Commw. Dec. 30, 2015).

Category one convictions included murder, rape and sexual assault. A conviction of a category one offense imposed a lifetime ban on, or immediate discharge from, employment in an Act-covered facility. Category two crimes included, among others, felony drug violations, aggravated assault, kidnapping, arson, robbery, and felony or misdemeanor theft offenses. A conviction of a category two criminal offense imposed an employment ban for a period of 10 years. The General Assembly immediately amended the amendment to remove the 10-year ban for the category two crimes, which resulted in a lifetime ban from employment with cover facilities for both category one and two crimes.

The General Assembly also immediately amended the Act to require criminal background checks on those with less than one year of service with covered facilities as of July 1, 1998 (as opposed to two years in the original bill). If the report disclosed a disqualifying conviction, the facility was required to terminate an employee who had less than one year of employment. The facility was not required to terminate someone with more than one year of employment, but that individual was banned from being hired by another facility.

Previous Challenge to the Act

The Act's employment ban prompted its first constitutional challenge in *Nixon v. Commonwealth*.² In that case, the court held that the criminal record history-based employment ban was unconstitutional as *applied* to the individuals at issue in *Nixon*. Three individuals and a private employer who had been forced to terminate qualified individuals (including two of the three plaintiffs) challenged the law's constitutionality in a declaratory action. All three individuals had been convicted of offenses (drug possession, larceny and armed robbery) between 20 to 30 years ago. They had no further criminal history and, before the bans went into effect, had performed similar jobs without incident. The court held that the facts "vividly illustrate constitutional infirmities present in [the Act] and the draconian impact of its enforcement. They further demonstrate the arbitrary and irrational nature of the challenged provisions and establish that no rational relationship exists between the classification imposed upon Petitioners and a legitimate governmental purpose." Thus, the criminal records prohibitions were unconstitutional as applied to the petitioning individuals and employer. The court ordered that the employees were entitled to seek employment at a covered facility and that the employer was entitled to hire them. The Supreme Court affirmed. *Nixon v. Dep't of Pub. Welfare*, 576 Pa. 385, 405 (Pa. 2003).³

The General Assembly did not amend the Act in response to the court's holding in *Nixon*. In response to *Nixon*, however, the Pennsylvania Department of Aging instituted an "interim policy" providing that it would not sanction any covered facility that hired or continued to employ an individual who could document a minimum of five years aggregate employment, after conviction or release from incarceration, in care-dependent services.⁴

Court Now Finds the Act Unconstitutional On Its Face

In April 2015, five individuals and a non-profit social service provider (petitioners) filed a petition for review under the Commonwealth Court's original jurisdiction challenging the constitutionality of the Act's lifetime employment ban provisions. One of the petitioners was a mental health and chemical dependency facility

² 789 A.2d 376 (Pa. Cmwlth. 2001).

³ The Supreme Court affirmed on the alternative basis that the law was irrational because it distinguished between individuals who had been employed for at least a year at a covered facility when the requirements went into effect and those that had not, but had previously been employed without incident at covered facilities. The Supreme Court did not explicitly reject the Commonwealth Court's analysis, however.

⁴ See http://www.portal.state.pa.us/portal/server.pt/community/self_study_course/18031/unit_4__criminal_background_checks/616720 ("Nixon Decision").

that, prior to enactment of the Act, had hired individuals with criminal convictions who had rehabilitated themselves. That facility found these individuals to be valuable employees. However, because of the Act, the employer had been forced to refuse to employ individuals with certain convictions. The facility argued that the “employment ban [had] negatively impacted [its] ability to provide the best possible services to its clients.”

Relying on statistical data, the petition for review argued that “the lifetime employment ban is built on a faulty premise because the risk of recidivism declines over time and eventually ‘loses any meaningful value in predicting future criminal conduct.’” The petition cited to the United States Equal Employment Opportunity Commissions’ 2012 guidance on the use of conviction and arrest records for employment purposes, which notes that criminal history employment exclusions have a disparate racial impact and “recommend[s] that prospective employers assess employment eligibility by considering the nature of the crime, the time elapsed, and the nature and requirements of the particular job.” The petition challenged the constitutionality of the Act for the reasons found in *Nixon* and also argued a number of other reasons for the court to find the Act unconstitutional.

The court agreed with the petitioners and found the unconstitutional on its face for two separate reasons.⁵ First, a lifetime employment ban for anyone convicted of an enumerated crime at any time, with a grandfather clause for employees with identical convictions employed for one year at a facility as of July 1, 1998 “does not bear a real and substantial relation to the stated goal of protecting older adults from ‘abuse, neglect, exploitation and abandonment.’” In other words, the court found no rational basis for assuming that convicted individuals with more than one year of service did not pose a threat to older adults, but then “treat all other employees and applicants [with convictions] as incapable of rehabilitation and forever a threat to older adults.”

Second, the Act’s irrebuttable presumption that any individual with a certain conviction would forever pose a risk to the elderly could not withstand constitutional scrutiny. According to the court, the lifetime ban infringed on the affected individual’s due process rights and reasonable alternatives existed to determine whether in fact an individual would pose a risk if allowed to work in a covered facility. Moreover, the court found that the statutory irrebuttable presumption was “not universally true” given that the Act allowed convicted individuals working for more than one year as of July 1, 1998, to continue working. This being the case, the court explained “it defies logic to suggest that every person who has at any time been convicted of any of the crimes listed in [the Act], including misdemeanor theft, presents a danger to those in an Act-covered facility.”

Implications for Employers

Employers covered by the Pennsylvania Older Adults Protective Services Act are presently without direct guidance on how to consider criminal background checks for their new employees. Although the Pennsylvania Department of Aging instituted an interim policy after the *Nixon* decision which allowed (but did not require) covered employers to hire certain ex-offenders despite the law’s lifetime bar, the exception provided by that interim policy was a narrow case-by-case consideration without overall guidance. Further, in annual audits the Department often rejected employers’ individualized considerations in hiring ex-offenders. Thus employers who hired offenders with any old conviction on the list risked challenge from the Department. As of the time of this writing, the Department of Aging had posted a brief notice on its

⁵ The court also found the Act unconstitutional as applied to the petitioners for the same reasons as those in *Nixon*.

website regarding Peake, noting that it is evaluating its policies in light of the decision.⁶ Covered employers should monitor the Department of Aging website for any new developments. Until an amended law is passed providing more clarification or other action takes place (such as on an appeal), the lifetime bar in the Act is stricken but no new guidelines are established in its place. Covered Pennsylvania employers will have to carefully assess situations concerning the hiring of employees based on general state law which requires that consideration of any criminal conviction be related to the job being performed.

In this regard, employers should continue to be mindful of the EEOC's criminal records guidance,⁷ Pennsylvania state law regarding criminal background check decisions,⁸ and Philadelphia's recently amended "ban the box" ordinance.⁹ In addition, employers making employment decisions based on criminal record reports obtained from third-party consumer reporting agencies must continue to abide by the requirements of the Fair Credit Reporting Act.¹⁰

6 See http://www.aging.pa.gov/organization/advocacy-and-protection/Pages/Criminal-History-Background-Checks.aspx#Vp4XS_krLIV.

7 See Jennifer Mora and Rod Fliegel, *EEOC Settles Background Check Litigation with BMW, But Also Faces Steep Attorneys' Fees in Freeman Case*, Littler Insight (Sept. 22, 2015).

8 See Jennifer Mora and William Simmons, *The Old (Law) is New Again: Plaintiffs Increasingly Using Old Pennsylvania Law to Challenge Background Check Decisions*, Littler Insight (Nov. 7, 2014).

9 See William Simmons and Thomas Benjamin Huggett, *Beyond "Ban the Box" - Philadelphia Makes Sweeping Changes to Criminal Records Screening Ordinance*, Littler Insight (Dec. 16, 2015).

10 See Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016); Rod Fliegel, Jennifer Mora, and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler ASAP (Aug. 1, 2014).