



For Immediate Release

Felony and Misdemeanor Convictions –Does (or Should) the Label Make Any Difference in the Hiring Process?

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Philadelphia, PA (July 7, 2008) -- Many employers make hiring decisions regarding applicants with criminal convictions depending upon whether the offense was labeled by the state statute as a felony or misdemeanor. Some employers have policies, written and unwritten, that a person convicted of a misdemeanor is always eligible for employment while someone convicted of a felony is either automatically disqualified or requires further scrutiny before being considered. So how should an employer consider conviction records? *(Note: Some states have specific laws that regulate this topic; these laws are not addressed in this paper).*

What are the Differences Between a Felony and Misdemeanor?

The distinction between a felony and misdemeanor has sometimes been thought of as a function of the potential periods of incarceration to which a court may sentence a convicted individual. Some people think of misdemeanors as crimes where the sentencing statute provides a maximum incarceration period of one year or less and felonies as crimes with incarceration periods of more than one year. But that difference is not always the case. Every state has the right to define the terms misdemeanor and felony as it sees fit, as is the situation in Pennsylvania, discussed below, and the employer should check the governing state statutes before acting. And to further complicate the matter, many states like Pennsylvania have several degrees of felonies, misdemeanors or both, all of which provide different sentencing alternatives.

Pennsylvania has three degrees of both felonies and misdemeanors. 18 Pa. C. S. A. § 106. Persons convicted of felonies of the first degree may be sentenced to imprisonment, the maximum term of which is more than ten years. Second degree felonies have a maximum of ten years and third degree felonies have a maximum of seven years. First degree misdemeanors have a maximum of five years. Second degree misdemeanors have a maximum of two years and third degree misdemeanors have a maximum of one year. Therefore in Pennsylvania, a person convicted of a first degree misdemeanor may be sentenced to a longer period of incarceration than a person convicted of a third degree felony. Accordingly to make a hiring decision solely on the statutory characterization of the offense is not a good business judgment.

New Jersey does not even use the terms felonies and misdemeanors, but rather has adopted a system that utilizes four degrees of criminal offenses, with first degree offenses carrying the most severe sentencing possibilities and fourth degree the least. See N.J.S.A. 2C:43-1 and N.J.S.A. 2C:43-6.

Furthermore, since states may define crimes differently, one state may define a crime as a misdemeanor, while another (perhaps the state of potential employment) regards it as a felony (or vice versa). Simply relying on the label attached by one state, then, may prove problematic.

There are numerous sentencing considerations that could result in the scenario where the person convicted of a misdemeanor (or lower degree of crime) receives a harsher sentence than the felony (or higher degree of crime) defendant. A sentencing judge after considering the gravity of the offense, which is normally reflected by the type and degree of the offense, must normally next consider aggravating and mitigating factors. In New Jersey and many other states, these factors include but are not limited to the nature and circumstance of the offense and the role of the defendant; the gravity and seriousness of the harm inflicted on the victim; the risk that the defendant will commit another crime (what is the defendant's record), prior criminal record, provocation and the victim's conduct and more. See N.J.S.A. 2C-44-1, et. seq.

After the judge considers all of the appropriate factors, the sentence must be formulated. In deciding upon an appropriate sentence for a defendant, in the absence of a statutory requirement (e.g. a crime committed with a gun requires jail in some states) a judge has several sentencing alternatives including incarceration, probation, fines, and restitution from which to choose; in many instances the options may be combined (e.g.: sentence of six months imprisonment followed by community service, and a requirement of restitution before the sentence is deemed complete). A sentence, including a period of incarceration, for a particular offense under consideration might result in a sentence that is normally appropriate for a lower degree offense. So the applicant who has committed a more serious offense can be treated as someone who committed a less grievous offense. And the reverse is also true.

Just as a judge must consider all of the relevant facts in making a sentencing decision, so must a HR professional consider many of the same facts as did the judge, as well as the sentence of the judge, in making a hiring decision. Accordingly however a statute characterizes an offense is only be the starting point for considering the relevance of the offense to the applicant's suitability for a position.

What is the Legal Relevance of a Felony or Misdemeanor Criminal Conviction to the Hiring Process?

Many states mandate that convictions be related to the job in order to be relevant. The Pennsylvania statute, 18 PA C.S. § 9125 provides:

(a) General rule: Whenever an employer is in receipt of information that is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section.

(b) Use of information: Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.

The U.S. Equal Employment Opportunity Commission (EEOC) in its Notice N-915 (2/4/87) now contained in the EEOC Compliance Manual § 605 APP. (signed by then Chairman and now Justice Clarence Thomas) articulated a three point analysis to be utilized in determining the relevance of an applicant's conviction to an open position in Title VII cases. This analysis articulates the EEOC's position on the "business necessity" defense enunciated by the U.S. Supreme Court in its first Title VII case dealing with employment discrimination, *Griggs v. Duke Power*, 401 US 424 (1971). The EEOC's analysis requires consideration of:

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

However last year the U.S. Third Circuit Court of Appeals minimized the importance of the EEOC analysis in the case of *El v. Septa*, 479 F.3d 232, (3d. Cir. 2007) and stated “In addition, it does not appear that the EEOC’s Guidelines are entitled to great deference”, *Septa* at p.244. *Septa* was the second circuit court opinion to deal with the issue of criminal record policies and Title VII; the first was *Green v. Missouri Pac. R.R.*, 523 F. 2d 1290 (8th Cir. 1975) and involved a very different set of facts. In the *Septa* case, the Third Circuit affirmed the District Court’s grant of Summary Judgment in favor of Septa and upheld Septa’s bright line employment screening policy prohibiting the hiring of someone with a conviction for a violent crime. The facts are straight forward. Septa provides mass public transportation in southeast Pennsylvania. The plaintiff was a 56 year old black male with a 40 year old “murder-2” conviction. The conviction involved a gang killing where the defendant was present but not the triggerman. The plaintiff was seeking a job as a driver for one of Septa’s affiliates. The court found Septa’s policy was defensible under Title VII claims based on the expert report and testimony of Septa’s three experts, including Dr. Alfred Blumstein, a recidivism expert from Carnegie-Mellon University in Pittsburgh, PA. Surprisingly the plaintiff presented no evidence to the contrary which might have prevented summary judgment. Dr. Blumstein opined that an individual with a 40-year-old criminal record would be more likely to recidivate than a person without that record. The court held that “discriminatory hiring policies (must) accurately but not perfectly distinguish between applicants’ ability to perform successfully the job in question...” *Septa* at p.244. The court went on to hold that the policy must “accurately distinguish between applicants that pose an unacceptable level of risk and those that do not.”, *Septa* at p.245. Accepting Septa’s expert testimony the court established a new approach to analyzing the business necessity defense that focuses on the statistical probability of a person to recidivate and whether that likelihood is any greater for a person with a prior criminal conviction than for a person with no similar criminal record.

While the *Septa* case could be read to suggest that employers should consider engaging criminologists to assist them in the preparation of their employment screening policies, at the very least it is now the law in the Third Circuit that specific hiring decisions made pursuant to an employer’s criminal record screening policy must be defensible in terms of whether the applicant posed an unacceptable level of risk to justify the denial of employment. And statistical evidence of recidivism will be highly relevant to that determination.

A Proposed Process for Reviewing Felony and Misdemeanor Criminal Convictions

Every employer should have a written policy that establishes its process for reviewing conviction records. Such a policy should require the consideration of the following:

1. Consider the EEOC’s analysis of business necessity considerations in ALL cases – they all make good common sense and help predict unacceptable risk in a particular situation
 - a. **Nature and gravity of the offense –**
 - i. What was the nature of the offense(s)? Was the offense about dishonesty, violence, or a sexual type offense?
 - ii. What was the gravity or seriousness of the offense? Was the offense a felony or misdemeanor? And if the information is available, what was the degree of the felony or misdemeanor?

Here, also, the employer must be sensitive to the workings of the criminal justice system. Determining the “nature and gravity” of the offense may be much more complex than first appears, for several reasons. First, even if a defendant was **convicted** of a misdemeanor, s/he may well have been charged with a felony, and had the felony downgraded as a result of a plea bargain. Second, there maybe scant records of what the “actual facts” of the offense were. Third,

simply relying on a statutory label may be extremely difficult. Recently, for example, in a slightly different context, courts have grappled with whether (a) reckless driving, (b) possession of a gun by an ex felon, (c) commercial burglary, (d) drug possession, (e) statutory rape, and others are or are not “crimes of violence”. Again, the employer should seek to obtain as much information as possible about the precise facts of the crime **charged**, as well as the crime of conviction.

b. The time that has passed since the offense

- i. How long ago was the offense?
- ii. What has the applicant been doing since that time?

c. The nature of the job sought

- i. Are there safety considerations? Will the applicant be working with the public, including in particular the aged, infirm or the young?
 - ii. Is the applicant seeking a position of trust, including handling money, managing payables or receivables? A conviction for fraud may be relevant if the job contains opportunities for deceit but not if it is a job that does not pose such a possibility.
2. Consider the sentence imposed by the judge for each of the applicant’s offense(s)? Was the applicant incarcerated or released on probation? If on probation, was it ever violated?
 3. Ask the applicant about the facts of the particular matter.
 4. If there is more than one conviction, is there a pattern of conduct that is likely to repeat?
 5. Based on the foregoing, assess the risk and the likelihood that the applicant will recidivate and as a result harm the legitimate business interests of the employer.

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About Arthur J. Cohen, Esq. VP of Operations and General Counsel

Arthur Cohen is a licensed attorney in Pennsylvania and New Jersey with over 30 years of experience in employment law. In 2007, Mr. Cohen was elected as the Chairman of the Board of Directors for the National Association of Professional Background Screeners (NAPBS). As Concorde's General Counsel, Mr. Cohen reviews drug and alcohol policies for the Company's clients, drafts testing policies for some of Concorde's largest clients, provides litigation services, and offers general legal guidance.

About Concorde Inc

Since 1983, Concorde has established itself as an industry leader in all facets of Employment Screening and Health Services including: [Drug and Alcohol Testing](#), [Background Screening](#) and [Occupational Health Services](#).

As a single source provider of Employee Screening and Health Services, Concorde not only facilitates the selection of candidates through pre-employment Drug and Alcohol Testing or Background Checks, but also offers additional services that are designed to retain your employees.