

RE-ENTRY TASK FORCE
FINAL RECOMMENDATION PRESENTED TO THE
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE
June 9, 2017

FY17-RE #02. Prevent adverse private employment actions on the basis of non-conviction, sealed, and expunged records.

Recommendation FY17-RE #02

Promote community safety and economic growth by preventing adverse employment action on the basis of arrests that did not result in a conviction, or criminal justice records that have been sealed or expunged.

Discussion

Obtaining employment is a lifelong challenge for those with a criminal record,¹ and the single biggest hurdle facing individuals returning from incarceration.² This is of widespread concern, as nearly one in three Americans of working age have some form of criminal record.³ In Colorado alone, over 190,000 people were arrested in 2015.⁴

The inability of large numbers of people to obtain employment adversely affects the public's safety and welfare. On an individual level, gainful employment is a key factor that enables people to avoid future arrests and incarceration.⁵ More broadly, the economy as a whole is negatively impacted by the reduction of employment rates for people with a criminal record.⁶ Numerous studies have shown that the employment related consequences of a criminal record disparately impact individuals and communities of color.⁷ It is thus necessary to ensure that Colorado's record-based restrictions on employment are both fair to individuals and productive to the safety and welfare of society.

¹ A. Christman & M.N. Rodriguez (2016, August), *Fact Sheet: Research Supports Fair-Chance Policies*, The Nat'l Emp't Law Project (at nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf); Maureen Cain, Policy Director, Colorado Criminal Defense Institute, presentation to the CCJJ Collateral Consequences Working Group (Aug. 24, 2016).

² The Piton Perspective (2007, Spring), *Study portrays struggles people face after prison* (at cdpsdocs.state.co.us/ccjj/Resources/Ref/PitonPerspective-Spr2007.pdf); Hassan Latif, Executive Director, Second Chance Center, presentation to the CCJJ Collateral Consequences Working Group (Aug. 10, 2016); Richard Morales, Deputy Executive Director, Latino Coalition for Community Leadership, presentation to the CCJJ Collateral Consequences Working Group (Aug. 10, 2016).

³ Bureau of Justice Statistics (2014, January), *Survey of State Criminal History Information Systems*, U.S. Dept. of Justice (see Table 1 on p. 14 at <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>); J.C. McGinty (2015, Aug. 7), How Many Americans Have a Police Record?, *The Wall Street Journal* (at <https://www.wsj.com/articles/how-many-americans-have-a-police-record-probably-more-than-you-think-1438939802>).

⁴ Colo. Bureau of Investigation, *Crime in Colorado 2015*, http://crimeinco.cbi.state.co.us/cic2k15/state_totals/statewide_adult_arrests.php (last visited Feb. 1, 2017).

⁵ Letter from United States Attorney General Eric Holder, Jr., to Colorado Attorney General John Suthers (April 18, 2011); see also J.H. Laub & R.J. Sampson (2001). Understanding desistance from crime, *Crime and Justice*, 28(1), 1-69 (doi: [10.1086/652208](https://doi.org/10.1086/652208)); National Research Council (2008), *Parole, Desistance from Crime, and Community Integration*, Committee on Community Supervision and Desistance from Crime (see pp. 23-24 at cdpsdocs.state.co.us/ccjj/Resources/Ref/NCR2007.pdf); and J. Radice (2012), Administering justice: Removing statutory barriers to reentry, *University of Colorado Law Review*, 83(3), 715-779 (see p. 719 at colorado.edu/law/sites/default/files/Vol.83.3.pdf).

⁶ *Fact Sheet*, supra note 1; J. Roberts (2011), Why misdemeanors matter: Defining effective advocacy in the lower criminal courts, *U.C. Davis Law Review*, 45(2), 277-372 (see pp. 300-301 at lawreview.law.ucdavis.edu/issues/45/2/Articles/45-2_Jenny_Roberts.pdf); J. Schmitt & K. Warner (2010), *Ex-Offenders and the Labor Market*, Center for Econ. & Policy Research (at cepr.net/documents/publications/ex-offenders-2010-11.pdf).

⁷ E. A. Carson (2015, September), *Prisoners in 2014*, Bureau of Justice Statistics, U.S. Dept. of Justice (reporting on p. 15 that as of December 31, 2014, black men are imprisoned in state and federal facilities at a rate of 2,724 per 100,000, Hispanic men are imprisoned at a rate of 1,091 per 100,000, and white men are imprisoned at a rate of 465 per 100,000; similar disparities exist for women) (at [http://www.bjs.gov/content/pub/pdf/p14.pdf](https://www.bjs.gov/content/pub/pdf/p14.pdf)); and U. S. Equal Opportunity Commission (2012, April 25),

RE-ENTRY TASK FORCE
FINAL RECOMMENDATION PRESENTED TO THE
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE
June 9, 2017

Because criminal record exclusions have a disparate impact based on race and national origin, they are regulated under Title VII of the Civil Rights Act of 1964.⁸ Employers face Title VII liability when their criminal record screening policy or practice disproportionately screens out members of a protected group, and the employer cannot demonstrate that it is job related for the positions in question and consistent with business necessity.⁹

Arrests alone are not proof of criminal activity.¹⁰ Employment exclusions based solely on an arrest are therefore generally not job related and consistent with business necessity, and can give rise to Title VII liability.¹¹ Policies and practices that impose exclusions based on conviction records must link the specific criminal conduct with the risks inherent in the duties of a particular position.¹²

Unlike several other states,¹³ Colorado currently places no restrictions on private employers' ability to withhold or terminate employment based on an individual's criminal record. Employers are prohibited from asking individuals to disclose criminal records that have been sealed.¹⁴ The law currently has no mechanism, however, for enforcing that prohibition.¹⁵

Proposed Statutory Language

This recommendation gives meaning to Colorado's current record sealing laws, and applies existing EEOC guidance. It would prevent private employers from taking adverse action against an individual based on arrests that did not result in conviction, sealed records, and expunged records. Under all of

Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (see "I. Summary" at https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

⁸ *Enforcement Guidance*, *supra* note 7, at 1.

⁹ *Id.* at 9.

¹⁰ *Id.* at 12.

¹¹ *Id.*

¹² *Id.* at 14-16.

¹³ In Hawaii it is "unlawful discriminatory practice" for an employer to discriminate on the basis of an individual's "arrest and court record." Haw. Rev. Stat. § 378-2(a)(1). Employers may inquire about conviction records, but are generally only permitted to consider convictions within the last ten years excluding periods of incarceration. Haw. Rev. Stat. § 378-2.5(a), -2.5(c). The State of Massachusetts prohibits private employers from inquiring about or basing employment decisions on: (1) arrests that did not result in conviction, (2) first convictions for certain misdemeanors, and (3) misdemeanors for which the associated period of incarceration ended more than five years prior unless the individual has been convicted of another offense. Mass. Gen. Laws ch. 151B, §4(9). The State of New York prohibits private employers from inquiring about, or acting adversely on the basis of: (1) any arrest not then pending where the criminal action was terminated in favor of the individual, (2) youthful offender adjudications, and (3) certain sealed records. N.Y. Exec. Law § 296(16). It is unfair discrimination to deny or act adversely on employment based on a conviction unless there is a direct relationship between the conviction and the employment. N.Y. Correct. Law § 752. The State of Pennsylvania allows private employers to consider only convictions for felonies and misdemeanors, and requires that the convictions "relate to the applicant's suitability for employment in the position for which he has applied." 18 Pa. Cons. Stat. § 9125. The State of Wisconsin generally prohibits private employers from requesting information from applicants about arrest records except as to pending charges. Wis. Stat. § 111.335(1)(a). It also restricts employers' use of conviction records. Wis. Stat. §§ 111.321, 111.335(1)(c).

¹⁴ §§ 24-72-702(1)(f), 24-72-703(4)(d)(i), C.R.S. 2016.

¹⁵ *Cf.* § 24-72-309, C.R.S. 2016 (before Colorado's record sealing statutes were moved to part 7 of chapter 72 of title 24, it was a misdemeanor to violate their provisions).

RE-ENTRY TASK FORCE
FINAL RECOMMENDATION PRESENTED TO THE
COLORADO COMMISSION ON CRIMINAL AND JUVENILE JUSTICE
June 9, 2017

those circumstances, either the individual has not been convicted of a crime, or a judge has already determined that the record in question should not be available to the public.¹⁶

The proposed provisions would be enforceable by the Colorado Department of Regulatory Agencies, Civil Rights Division.¹⁷ The civil rights commission could, after following existing notice and hearing procedures, issue a cease and desist order if it found an employer was engaging in prohibited practices.¹⁸ It could also order reinstatement or hiring, back or front pay, or other appropriate equitable relief.¹⁹ The recommendation would also allow aggrieved individuals to initiate a civil action seeking the same remedies and, under certain circumstances, compensatory and punitive damages.²⁰

Consistent with existing law, this recommendation aims to ensure record-based restrictions on employment are both fair to individuals and productive to the safety and welfare of Colorado society.

1. Amend section 24-34-402 by adding the following.

(1) It shall be a discriminatory or unfair employment practice;

(j) For an employer, employment agency, or labor organization to make any inquiry about, or to act adversely to an individual on the basis of, a record of any arrest or charge that did not result in a conviction and the criminal case is not actively pending, or any criminal justice record that has been sealed or expunged.

¹⁶ With the exception of certain controlled substance and human trafficking related offenses, the sealing of a record reflects that a judge has already determined that the harm to the individual's privacy outweighs the public's interest in the availability of the record. §§ 24-72-702(1)(b)(II)(B), -704(1)(c), -705, -706, -708(3), C.R.S. 2016.

¹⁷ § 24-34-306, C.R.S. 2016.

¹⁸ § 24-34-306(9), C.R.S. 2016.

¹⁹ § 24-34-405(2), C.R.S. 2016.

²⁰ §§ 24-34-306(11), -306(14), -306(15), 24-34-405(3), C.R.S. 2016.