



Ban-the-Ban: The Commonwealth Court in Pennsylvania Finds Unconstitutional the Lifetime Hiring Ban for Convicted Criminals Under The Older Adults Protective Services Act (“OAPSA”)

Insights

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There is a growing trend across the country to provide rehabilitated criminals with greater access to better employment opportunities. First, we saw many states enact “Ban-the-Box” measures which forced employers to remove from their employment applications the question (usually in the form of a box to be checked) that asks if applicants have a criminal record¹. Now, under the Pennsylvania Older Adults Protective Services Act (“OAPSA”), the Commonwealth Court has taken Pennsylvania in the same direction. OAPSA previously prohibited employers from hiring certain convicted criminals to work in facilities such as nursing homes and other long-term health care facilities. See 35 P.S. § 10225.503(a). This, however, was recently held unconstitutional by *Peake, et al. v. The Commonwealth of Pennsylvania, et al.*, Case No. 216 M.D. 2015 (Pa. Commw. Ct. Dec. 30, 2015) (J. Leavitt) (“[OAPSA]’s current blanket prohibition lacks fine-tuning because it treats all enumerated crimes, regardless of their vintage or severity, as the same even though they present very different risks of employment.”).

Employers subject to the provisions of OAPSA still must require applicants to submit criminal records reports, however, those employers are now free to decide for themselves, on a case-by-case basis, whether to hire an applicant with a criminal record.

What is OAPSA?

In 1987, the Pennsylvania General Assembly enacted the Older Adults Protective Services Act (“OAPSA”), 35 P.S. §§ 10225.101-10225.5102. The Pennsylvania General Assembly codified the legislative policy underlying OAPSA, providing that:

It is declared the policy of the Commonwealth of Pennsylvania that older adults who lack the capacity to protect themselves and are at imminent risk of abuse, neglect, exploitation or abandonment shall have access to and be provided with services necessary to protect their health, safety and welfare. It is not the purpose of this act to place restrictions upon the personal liberty of incapacitated older adults, but this act should be liberally construed to assure the availability of protective services to all older adults in need of them. Such services shall safeguard the rights of

incapacitated older adults while protecting them from abuse, neglect, exploitation and abandonment. It is the intent of the General Assembly to provide for the detection and reduction, correction or elimination of abuse, neglect, exploitation and abandonment, and to establish a program of protective services for older adults in need of them.

35 P.S. § 10225.102. The purpose of enacting OAPSA was to protect older adults from abuse, neglect, exploitation, and abandonment. *Id.*

In 1996, the Pennsylvania General Assembly amended OAPSA by adding a chapter regarding criminal records. See 35 P.S. §§ 10225.501-10225.508. This chapter provided that facilities covered by OAPSA shall require all applicants seeking employment in their facility to submit a criminal records report to the facility. 35 P.S. § 10225.502. It also provided that facilities covered by OAPSA are prohibited from hiring applicants who have been convicted of certain criminal offenses from murder to theft to forgery. 35 P.S. § 10225.503(a).

The Peake Decision

In *Peake*, the Commonwealth Court of Pennsylvania, in a unanimous decision, ultimately concluded that:

The lifetime employment ban contained in Section 503(a) of the Act, 35 P.S. § 10225.503(a), violates due process guaranteed by Article I Section I of the Pennsylvania Constitution because it goes beyond the necessities of the case and is not substantially related to the Act's stated objective of protecting older adults. The statutory ban does not have a plainly legitimate sweep because a substantial number of its applications are invalid, making it unconstitutional on its face.

Peake, 216 M.D. 2015 at p. 29.

The Petitioners in *Peake* included: (1) Resources for Human Development, Inc., a facility covered by OAPSA; (2) Tyrone Peake, a 52-year-old male who was convicted of attempted theft of an automobile at age 18 and served three years of probation; (3) Joan Grey, a 60-year-old female with over 20 years of caregiving experience who was convicted in 1998 of possession of drugs with intent to deliver; (4) Charles Ford, a 55-year-old male with over 30 years of experience as a cook who was convicted of robbery, attempted theft, aggravated assault, and simple assault at the age of 20; (5) Desmond Lowe, a 48-year-old male who, in 1999, borrowed a car from a friend which he later found out was stolen, and pled guilty to theft by receiving stolen property and served two years of probation; and (6) Rudolph Jainlett, a 39-year-old male who wrote a bad check in 1996 and unknowingly borrowed a stolen car from his cousin in 1997, and served a total of five years of probation for those offenses. See *Peake*, 216 M.D. 2015 at pp. 12-13.

The Commonwealth Court specifically noted that “it defies logic to suggest that every person who has at any time been convicted of any of the crimes listed in Section 503 of the Act, including misdemeanor theft, presents a danger to those in an Act-covered facility.” *Id.* at pp. 26-27.

Important Takeaways from the Peake Decision

There are three (3) important takeaways from the Peake decision that effect facilities covered by OAPSA that should be highlighted:

1. all applicants seeking employment in facilities covered by OAPSA still must submit a criminal records report to the facility. 35 P.S. § 10225.502;
2. facilities covered by OAPSA are no longer blanketly prohibited from hiring applicants who have been convicted of certain enumerated criminal offenses. See 35 P.S. § 10225.503(a) (held unconstitutional by Peake, 216 M.D. 2015 at p. 26);
3. employers are, however, still free to decline hiring an individual with a criminal record. See Peake, 216 M.D. at p. 27 (“Act-covered facilities should not be required to employ a person with a criminal record, but they should have the opportunity to assess the situation and exercise their discretion to employ an applicant found to be sufficiently rehabilitated and a good fit for the job.”).

What Does Peake Mean in the Big Picture?

Legislative bodies, courts, and administrative agencies have focused on the issue of reincorporating convicted criminals into meaningful positions in the American workforce. Employers subject to Ban-the-Box laws, OAPSA, or other similar state-mandated or federally mandated laws regarding the hiring of convicted criminals should revisit their hiring policies, applications, online forms, and handbooks to ensure compliance with the changing laws.

[1] According to the National Employment Law Project, as of December 1, 2015, a total of 19 states have adopted Ban-the-Box policies, including: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Vermont, and Virginia. See <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>.