DISCRIMINATION BASED ON CRIMINAL RECORDS

Lisa J. Bernt, Esq.
Fair Employment Project, Cambridge

I. LIMITS ON WHAT AND WHEN EMPLOYERS MAY ASK ABOUT CRIMINAL HISTORY UNDER MASSACHUSETTS DISCRIMINATION LAW

The Massachusetts Fair Employment Practices Act, Mass. General Law Chapter 151B prohibits employment discrimination based on race, color, religious creed, national origin, ancestry, sex, pregnancy, gender identity/expression, sexual orientation, age, disability, genetic information, military service/veteran status, and criminal record.

More specifically, Chapter 151B, §§ 4(9) and (9 ½) limit what and when covered employers may ask job applicants and employees about their criminal histories.[1]

There are very few decisions interpreting these provisions.

Chapter 151B is enforced by the Massachusetts Commission Against Discrimination (MCAD), which has issued a Fact Sheet on Criminal Offender Record Information Administrative Procedure Reforms (MCAD Fact Sheet).[2]

There is no federal equivalent to Chapter 151B, §§ 4(9) and (9 ½) .[3]

---

[1] The text of these provisions is included in these materials.

Chapter 151B covers most private-sector employers with at least six employees, as well as government employers, and those who employ domestic workers. §1(1).

[2] Included in these materials, and available on the MCAD's website. While the MCAD Fact Sheet and other MCAD guidance do not have the force of law, the SJC has said that the MCAD's interpretation of its governing statute is entitled to substantial deference. Rock v. Massachusetts Comm'n Against Discrimination, 384 Mass. 198, 204 (1981). Note that this Fact Sheet predates a 2018 amendment to the statute, which changed the five-year limitation on asking about misdemeanors to three years.

[3] The use of criminal history in some situations may form the basis of a discrimination claim under federal and state law based on race or national origin, or other protected class, as discussed below.

A. Requesting criminal record information under Chapter 151B

The law limits questions that a covered employer or its agent[4] may ask (in writing, orally, or otherwise) an applicant or employee about the individual's criminal history.

The employer or its agent may not ask an applicant or employee for information concerning:

> Any matter that did not result in a conviction. c. 151B, §4(9)(i).
>
> A first conviction for certain misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, disturbance of the peace. c. 151B, §4(9)(ii).
>
> Any conviction of a misdemeanor where the date of the conviction or the completion of any resulting incarceration (whichever is later), occurred more than three years earlier, unless the individual has been convicted of any other offense in the prior three years. 151B, §4(9)(iii).[5]
>
> A criminal record, or anything related to a criminal record, that has been sealed or expunged. c. 151B, §4(9)(iv).
>
> Juvenile offenses.[6]

---

[4] Meuse v. National P.I. Servs. LLC, No. 21-cv-11533-ADB, 2022 WL 2532831 (D. Mass. July 7, 2022) (granting plaintiff's motion to amend complaint to add claim under c. 151B, § 4(9) where the employer's agent, a consumer reporting agency, allegedly asked him to provide information about a charge and arrest for which no conviction resulted).

Baldwin v. Pilgrim Nuclear Power Station, 529 F.Supp.2d 204 (D. Mass. 2008) (allowing employer's motion for summary judgment on c. 151B, § 4(9) claim where plaintiff failed to show a "pervasive control of the employment relationship" by the defendant, in that the statute "limits the criminal history information an *employer or its agent can* elicit from a prospective *employee* in an *application for employment*.")

If an employer and a temporary employment agency are found to be "joint employers," the agency as well as the employer are subject to these provisions. MCAD Fact Sheet.

[5] As of October 2018, the five-year limitation on asking about misdemeanors was changed to three years. The MCAD Fact Sheet predates this amendment.

[6] MCAD Fact Sheet, citing MCAD and Hanson v. Mass. Dep't of Social Services, No. 01-BEM-2202, 28 MDLR 42 (2006) (Decision of Full Commission) (affirming Hearing Officer's decision that juvenile offenses fall within the scope of c. 151B, § 4(9).).

And with exceptions, most employers are prohibited from including criminal history questions in an "initial written application." c. 151B, §4(9½).[7]

> *The exceptions*: "[A]n employer may inquire about any criminal convictions on an applicant's application form if: (i) the applicant is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses; or (ii) the employer or an affiliate of such employer is subject to an obligation imposed by any federal or state law or regulation not to employ persons, in either 1 or more positions, who have been convicted of 1 or more types of criminal offenses." c. 151B, §4(9 ½).
>
> Examples: "[I]f a properly promulgated regulation specifically prohibits an employer from hiring an employee convicted of a felony, the employer falls into the first exception, and may make a pre-interview inquiry in writing about a felony conviction. . . . The second exception would apply, for example, to banks, their parents and subsidiaries, which are required by federal law to make inquiries about whether a job applicant has been convicted of a crime that involves dishonesty, breach of trust or money laundering." MCAD Fact Sheet.

During an interview or thereafter, an employer may ask about convictions, as long as they do not ask about any offenses listed in Chapter 151B, **§** 4(9). MCAD Fact Sheet.

The law prohibits the employer from discriminating against the applicant or employee for refusing to answer prohibited criminal history questions. c. 151B § 4(9).[8]

---

[7] "Consistent with the legislative intent behind CORI Reform, the MCAD will presume that a written application or form requesting criminal background information prior to an interview is part of the 'initial written application.'" MCAD Fact sheet.

And "[w]here an applicant self-identifies as disabled and seeks a modification to the application process such that the application will be completed orally rather than in writing, employers should refrain from seeking criminal background information until the time of the interview. Unless the employer falls into one of the two statutory exceptions, the MCAD will consider any inquiry (including an oral one) prior to the interview that seeks prohibited criminal record information in the modified or adjusted application process to be in violation of G.L. c. 151B, § 4(9½) and/or G.L. c. 151B, § 4(16) [prohibiting disability discrimination]." MCAD Fact Sheet.

[8] In Heagney v. Wong, 915 F.3d 805 (1st Cir. 2019), the plaintiff was asked on an application whether there were "any issues that we should be aware of that would arise" during a background investigation. He answered "no" and was not hired when the employer learned from other sources of a prior criminal case. The First Circuit affirmed a jury verdict for plaintiff, noting evidence that he was denied the job not because of the criminal case itself, but because he "was not forthcoming" about the case. (Notably, the jury awarded no compensatory damages. It did award punitive damages, but the First Circuit reversed that award.)

See Kraft v. Police Comm'r, 410 Mass. 155 (1991) (holding that an employer may not discharge an employee for answering falsely in response to an unlawful inquiry, in a case brought under Chapter 151B, § 4(9A), which prohibits certain inquiries regarding mental healthcare).

The employer violates the statute merely by making a request that is impermissible under these provisions.[9]

B. Use of criminal history information

Chapter 151B, § 4(9) "prohibits an employer from taking an adverse employment action against an applicant or employee because of criminal history information the employer obtained unlawfully." MCAD Fact Sheet.

However, employers are not prohibited under Chapter 151B from obtaining criminal history information from other sources, and the Supreme Judicial Court has held that these protections are narrow in scope, rejecting a blanket prohibition against an employer's use of information it obtained elsewhere.[10]

"A job applicant whose criminal record is sealed or expunged does not have to provide an employer with any information about the sealed or expunged case. In response to any questions about prior convictions, a job applicant with no convictions other than a sealed or expunged case may answer that he or she has 'No Record.'" Mass.gov Guide to Criminal Records in Employment and Housing, in these materials and available at https://www.mass.gov/guides/guide-to-criminal-records-in-employment-and-housing

[9] In Clemens v. Legg Mason Wood Walker, Inc., No. 946022G, 16 Mass.L.Rptr. 433, 1995 WL 17015554 (Super. Ct. Suffolk Cty, Oct. 31, 1995), the court denied summary judgment where the employer allegedly violated § 4(9) when it (two days after hire) asked plaintiff whether he had "ever been convicted of a crime or received a verdict of anything other than 'not guilty' in any criminal investigation or proceedings." It then sought details of any such conviction. Plaintiff answered the question, stating that he had been judged a disorderly person. Plaintiff alleged that he was discharged based on such criminal record. Defendant denied that it used such information in its decision to terminate him. The court found that the employer "violated the statute by merely inquiring about the plaintiff's past criminal record. The inquiry was broad enough to seek information prohibited by the statute, and it did, in fact, elicit information from Clemens covered by the statute." Whether the plaintiff is entitled to damages however, is a separate inquiry and requires the plaintiff to prove that the response to the question "play[ed] some role in action injurious to the employee which the employer thereafter took."

[10] In Bynes v. School Committee of Boston, 411 Mass. 264, 268-69 (1991), the SJC rejected the plaintiffs' contention that Chapter 151B, § 4(9) bans all requests by an employer from any source for prohibited information. "The Legislature's intent was merely to protect employees from such requests from their employers and not to proscribe employers from seeking such information elsewhere. . . . The plaintiffs' interpretation of Section 4 (9) would turn that limited prohibition against an employer's request to an employee or prospective employee into a general prohibition against an employer's use of such information. . . ." The court added, citing MCAD cases, that the MCAD has "construed the protection afforded by § 4 (9) to be 'quite narrow in scope' and 'directed primarily at the preemployment inquiry, particularly the application form.'"

Meuse v. National P.I. Servs. LLC, Meuse v. National P.I. Servs. LLC, No. 21-cv-11533-ADB, 2022 WL 2532831 (D. Mass. July 7, 2022) ("The statute does not . . . prohibit employers from obtaining information about criminal charges from another source.") (citing Bynes)

Harris v. City of Lowell Police Dept., 95-BEM-2414, 24 MDLR, 2002 WL 356501 (Decision of Full Commission Jan 16, 2002) (remanding matter for additional factual findings: "[T]he Hearing Officer incorrectly concluded that M.G.L. c. 151B, § 4(9) prohibits an employer from considering certain past criminal conduct in the employment decision. In fact, the statute only prohibits an employer from discriminating against an applicant for his "failure to furnish such information through a written application or oral inquiry.")

Courts have held that criminal history does not encompass civil protective orders[11] or a "limited threshold inquiry in a traffic stop."[12]

[11] Ryan v. Chief Admin. Justice of the Trial Court, 56 Mass. App. Ct. 1115, 779 N.E.2d 1005, 2002 Mass. App. LEXIS 1611 (affirming judgment for employer, holding that employer did not violate c. 151B, § 4(9) when it based a decision not to promote plaintiff on a protective order that had been entered against him under G.L. c. 209A, as such orders are civil, not criminal, in nature; further noting that the legislative intent "was merely to protect employees from such requests from their employers and not to proscribe employers from seeking such information elsewhere," and as the employer did not request the information from the plaintiff, the statute was not violated.) (internal citations omitted).

[12] In Giblin v. Essex County Sheriff's Dept., No. 13-P-1083, 85 Mass. App. Ct. 1123, 2014 WL 2473015 (2014) the plaintiff police officer had been subjected to a disciplinary hearing after his car was stopped in a "brief detention," after a motor vehicle incident. He volunteered information to the employer about the incident. The court affirmed the trial court decision for the employer, concluding that Chapter 151B, § 4(9) was not implicated, "The stop of Giblin's car was not an arrest, but a brief threshold inquiry. While a threshold inquiry ius often referred to as a 'brief detention' in the criminal law setting, we are unconvinced that a limited threshold inquiry in a traffic stop was what was contemplated by the drafters of 151B, sec 4(9). Even if the statute were implicated, and we do not hold that it does, it was the plaintiff who, without solicitation, volunteered information about his accident. The [employer] was not obligated by statute to ignore the disclosure of this information or ignore the information it learned, without solicitation" from the police department that stopped him. (Internal citations omitted.)

II. RACE, NATIONAL ORIGIN DISCRIMINATION

Employers (with exceptions, discussed below) who refuse to hire someone with a criminal record might violate other discrimination laws, such as federal and states laws prohibiting discrimination based on race or national origin: Title VII of the Civil Rights Act of 1964 (Title VII), enforced by the Equal Employment Opportunity Commision (EEOC),[13] and Chapter 151B §4(1), enforced by the MCAD.

The focus here is on race and national origin because "[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin." EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act (EEOC Guidance).[14]

Such claims might be brought under a theory of disparate treatment and/or disparate impact.

A. Disparate treatment

An employer might violate the discrimination laws when it treats criminal history information differently for different applicants or employees, based on their race or national origin:

---

[13] Title VII applies to private-sector employers with 15 or more employees, to state and local government employers with 15 or more employees, to the federal government as an employer, to employment agencies, and to labor unions. EEOC website: https://www.eeoc.gov/coverage

[14] Available on EEOC's website: https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions

"The EEOC enforces Title VII, which prohibits employment discrimination based on race, color, religion, sex, or national origin. Having a criminal record is not listed as a protected basis in Title VII. Therefore, whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin." EEOC Guidance, § II. Introduction.

As a best practice, the EEOC "recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity." EEOC Guidance, §V.B.3

EEOC notes that while courts might give it deference, such guidance does not have the force of law.

> "For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record." EEOC Guidance, §IV.

The EEOC Guidance, §IV, discusses various types of evidence that might be used to establish that race, national origin, or other protected characteristics motivated an employer's use of criminal records in a selection decision:

- Biased statements. Comments by the employer or decisionmaker that are derogatory with respect to the charging party's protected group, or that express group-related stereotypes about criminality, might be evidence that such biases affected the evaluation of the applicant's or employee's criminal record.
- Inconsistencies in the hiring process. Evidence that the employer requested criminal history information more often for individuals with certain racial or ethnic backgrounds, or gave Whites but not racial minorities the opportunity to explain their criminal history, would support a showing of disparate treatment.
- Similarly situated comparators (individuals who are similar to the charging party in relevant respects, except for membership in the protected group). Comparators may include people in similar positions, former employees, and people chosen for a position over the charging party. The fact that a charging party was treated differently than individuals who are not in the charging party's protected group by, for example, being subjected to more or different criminal background checks or to different standards for evaluating criminal history, would be evidence of disparate treatment.
- Employment testing. Matched-pair testing may reveal that candidates are being treated differently because of a protected status.58
- Statistical evidence. Statistical analysis derived from an examination of the employer's applicant data, workforce data, and/or third party criminal background history data may help to determine if the employer counts criminal history information more heavily against members of a protected group.

B. Disparate impact

Under a disparate impact theory, the plaintiffs challenge an employer's neutral policy that has a disproportionate impact based on race or national origin and is not job related and consistent with business necessity.

This theory might apply, for example, where an employer has a uniform policy that collects and uses the same type of criminal history information for all of its applicants. Such a policy is neutral on its face, but it might have a discriminatory impact.

Where there is evidence showing that a criminal record screening policy or practice disproportionately screens out a protected group, the employer must demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity. EEOC Guidance (§V.B.1)

> The EEOC Guidance (§V.B.4) discusses two ways that employers can demonstrate job relatedness and business necessity:
>
> > (1) by validating the criminal conduct exclusion using the Uniform Guidelines on Employee Selection Procedures, which provide a framework for determining the proper use of tests and other selection procedures.[15] or
> >
> > (2) by developing "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job. . . . The employer's policy then provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity." EEOC Guidance, §V.B.4[16]

[15] https://www.eeoc.gov/laws/guidance/employment-tests-and-selection-procedures
"These guidelines incorporate a single set of principles which are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices which discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures. These guidelines do not require a user to conduct validity studies of selection procedures where no adverse impact results. However, all users are encouraged to use selection procedures which are valid, especially users operating under merit principles." 20 CFR § 1607.1.B

[16] The EEOC notes that "[a]lthough Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII." EEOC Guidance, §1.

Individualized Assessment

Individualized assessment generally means that an employer informs the individual that he may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

The individual's showing may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate. Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information.

EEOC Guidance, §V.B.1

The EEOC emphasizes that arrests and convictions are treated differently when determining if an exclusionary policy or practice is job related and consistent with business necessity:

> "The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty. An arrest

> . . . may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action. Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity. Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity." EEOC Guidance, EEOC Guidance, §V.B.2.

If an employer demonstrates that its policy or practice is job related and consistent with business necessity, the plaintiff may still prevail by demonstrating that there is a less discriminatory alternative "that serves the employer's legitimate goals as effectively as the challenged practice but that the employer refused to adopt." EEOC Guidance, §V.C.

Some notable cases:

Green v. Missouri Pacific Railroad Co., 523 F.2d 1290 (8th Cir. 1975) and 549 F.2d 1158, 1160 (8th Cir. 1977): Court held that it violated Title VII to follow a policy of disqualifying any applicant with a conviction of any crime other than a minor traffic offense. The court identified three factors to consider in assessing whether such a policy is job related and consistent with business necessity: (1) The nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought. Discussed more fully in the EEOC Guidance, §V.B.1

Field v. Orkin Extermination Co., No. Civ. A. 00-5913, 2002 U.S. Dist. LEXIS 11828 (E.D. Pa. Feb. 21, 2002): An employee of 10 years was fired after a new company that acquired her former employer discovered her six-year-old felony conviction. The new company had a blanket policy of firing anyone with a felony conviction less than 10 years old. The court granted summary judgment for the employee on this claim: "[A] blanket policy of denying employment to any person having a criminal conviction is a violation of Title VII." The same judge, however, in an earlier opinion in the same matter, had qualified that statement: "A blanket policy to refuse employment to persons with recent criminal records would not violate Title VII if the criminal conviction involved conduct which demonstrates a person's lack of qualification for the job - e.g., a bank would not be required to hire, or retain in employment, a teller previously convicted of embezzlement." 2001 U.S. Dist. LEXIS 24068 (E.D. Pa. Oct. 31, 2001)

El v. Southeastern Pennsylvania Transp. Auth. 479 F.3d 232 (3d Cir. 2007): The plaintiff, a 55-year-old African-American driver-trainee challenged the employer's policy of excluding everyone ever convicted of a violent crime from the job of paratransit driver. The plaintiff was terminated when the employer learned of his conviction for second-degree murder 40 years earlier, when he was 15 years old. The court expressed

concern about the employer's policy, but ultimately affirmed summary judgment for the employer because the plaintiff presented no evidence to rebut the employer's expert's testimony. Discussed more fully in the EEOC Guidance, §V.B.1

Cases brought under a disparate impact theory can be especially challenging for plaintiffs. It can be difficult to get the necessary data, involve protracted and expensive discovery, and require an expert to handle the statistical complexities.[17]

C. Defenses permitted by some employers

Some employers have additional defenses.

Title VII, for example, includes a national security exception that allows employers to exclude an individual from employment if the job requires a security clearance and the individual fails to qualify for one. 42. U.S.C. § 2000e-2(g)

And "[i]n some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. Compliance with federal laws and/or regulations is a defense to a charge of discrimination." EEOC Guidance, §VII.

"Title VII also does not preempt federal statutes and regulations that govern eligibility for occupational licenses and registrations. These restrictions cover diverse sectors of the economy including the transportation industry, the financial industry,and import/export activities, among others." EEOC Guidance, §VII.A

[17] *See* El v. Southeastern Penn. Transp. Auth., discussed above (affirming summary judgment for the employer because the plaintiff presented no evidence to rebut the employer's expert's testimony); Walden v. Raimondo, No. 5:21-CV-304, 2024 U.S. Dist. LEXIS 137796 (M.D. Ga. Aug. 2, 2024) (granting summary judgment for employer where plaintiff with a criminal history brought a disparate impact race discrimination claim, in part because he provided no statistical evidence); Lyons v. Washington State Dept. of Social & Health Servs., No. 3:18-cv-05874-RBL, 2020 WL 816017 (W.D. Wash. Feb. 19, 2020) ("[I]n cases where disqualification based on criminal history was at issue, courts have still required *some* data relevant to the defendant employer.").

III. FILING A CLAIM UNDER THE DISCRIMINATION LAWS

The MCAD accepts claims for violation of criminal record discrimination under Chapter 151B.

Both the MCAD and EEOC accept claims for violations of other types of discrimination (e.g., race, national origin).

These claims may be brought into court, but must first be filed at the agency level.

Information about filing claims is on the websites of the MCAD and EEOC.