

Federal Grants to Expunge Criminal Convictions

DOL program for ex-offenders raises hiring questions

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By Dana Wilkie

In the coming two years, more than 5,000 U.S. minors and young adults could have their criminal records expunged with the help of \$26 million in federal grants, which means that their future employers may never know about their convictions.

Or, if employers do find out about the erased convictions—and today's technology makes this possible—that raises the question: Do laws or regulations prevent them from discriminating against applicants because of their criminal history?

The U.S. Department of Labor, on June 26, 2013, awarded \$26 million in Face Forward grants to 28 organizations that help rehabilitate youth offenders so they can find jobs. Grant recipients, the DOL said, will work with nonprofit legal services to expunge juveniles' conviction records if the youths finish their programs.

Expungement removes from the justice system all information about criminal history—including fingerprints, trial records, and related electronic files or paperwork. Participants in the recently funded programs may be as young as 16 or as old as 24.

The programs that win grants must provide two years of services—"everything from literacy training or language instruction to individual or group counseling, service-learning opportunities, GED preparation, mentoring and training that leads to industry-recognized credentials for in-demand occupations," DOL spokesman Egan Reich explained. The grants are expected to serve 5,662 offenders who've never been convicted as adults or convicted of sex-related offenses other than prostitution. Judges decide who's eligible for the program, and even offenders with violent criminal histories may be considered.

Protected Status?

Having a criminal record is not a protected status under the Civil Rights Act of 1964 when it comes to employment. However, the U.S. Equal Employment Opportunity Commission (EEOC) published guidelines in December 2012 stating that "an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under" the act. The guidelines don't carry the weight of law, but employers still need to be careful when hiring to avoid discrimination lawsuits, advised Jonathan Segal, a partner in the employment group at Duane Morris LLP.

"They don't want rules like, 'We don't hire anyone with a conviction or felony,'" said Segal, who last year testified before the EEOC about the guidelines, on behalf of the Society for Human Resource Management. "They want three factors considered: the nature and gravity of the offense, the time that's passed since the offense or completion of the sentence, and the nature of the job sought."

The EEOC guidance says that employers can't automatically exclude a job applicant because of a criminal conviction except for "targeted exclusions." These exclusions are permitted to prevent, say, "a rapist from being a rape counselor," Segal said.

"Let's assume you're applying to work in a hotel," he said. "If you have any violent convictions in the last seven years, they're not going to hire you because you'll have unrestricted access to residents' rooms. That's a targeted exclusion."

Expunged Records Is Gray Area

The EEOC guidance doesn't speak specifically to expunged records, and that makes **employers' responsibilities in this area** murky, Segal said. Some cities and states have laws forbidding employers from asking about expunged records. And no matter where they live, job candidates who are asked about past convictions can legally answer no if the conviction's been expunged.

Still, about 92 percent of organizations subject all or some potential employees to criminal background checks, according to the EEOC, and Segal warned that convictions may still show up on the Web.

"You may still have Internet news reports [about a conviction] and sites that are less than reputable that will list expunged convictions," he said. "This is why employers must rely on a responsible background-reporting agency. I've advised clients, 'Don't Google the person to see what you find on criminal convictions; leave it to a third party.'"

And some programs receiving DOL grants advise participants to be upfront about their convictions and expungements.

Segal advises employers not to ask follow-up questions about an expunged conviction, even if an applicant reveals the conviction. He also said companies should make sure that background agencies check only court records, as "many of the [online] criminal-background-check services leave a lot to be desired."

"If there is a background check and the conviction was not expunged as stated, then I would reject the applicant for lack of veracity," he said.

Employers may violate the Civil Rights Act, Segal cautioned, if they treat criminal-history information differently for different applicants based on their race or national origin. For instance, Blacks and Hispanics are arrested at a rate that is two to three times their proportion in the U.S. population, the EEOC wrote in its guidelines. "Excluding applicants from employment based on certain criminal conduct may disproportionately impact some individuals protected under [the act] and may violate the law if not job-related and consistent with business necessity," the EEOC stated.

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