

## RECOMMENDED KEY PROVISIONS

The Legal Action Center recommends that state laws prohibiting employment discrimination against people with criminal records contain the following key provisions:

- **Protect applicants for employment or licensing from discrimination by both private and public employers, including licensing agencies.**<sup>1</sup> For ease of implementation, states may decide that their laws should only apply to employers of sufficient size to trigger other anti-discrimination laws in that state.
- **Protect applicants from discrimination based on records indicating they were arrested, but not convicted.** Employers should not be able to inquire about applicants' arrest records when those arrests did not lead to convictions.<sup>2</sup>
- **Apply to employers at all stages of employment: hiring, retention, promotion, and dismissal.** The statute should not simply apply to hiring decisions.
- **State that for employers to consider a conviction, there should be an individualized determination and the conviction should bear some type of rational relationship to the employment.** Some states require that the conviction be *substantially related* to the employment.<sup>3</sup>
- **Make clear to employers how they should determine whether the conviction is related to the employment.**<sup>4</sup> Important factors for employers to consider are:
  - the nature of the crime for which the applicant was convicted;<sup>5</sup>
  - whether the applicant has been rehabilitated;<sup>6</sup>
  - the time elapsed since the applicant was arrested,<sup>7</sup> and
  - the applicant's age when he or she was arrested.<sup>8</sup>

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<sup>1</sup> This is the practice in Hawaii, Kansas, New York, and Pennsylvania.

<sup>2</sup> States that specifically prohibit consideration of arrest records include Connecticut, New Mexico, New York, and Wisconsin.

<sup>3</sup> Wisconsin uses the "substantially related" standard, as does Delaware in its licensing requirements.

<sup>4</sup> Virtually every state with an anti-discrimination statute (Arizona, Connecticut, Kansas, Kentucky, Minnesota, New Mexico, and Washington) provides some type of balancing test for employers.

<sup>5</sup> States requiring employers to consider this factor include Connecticut, Florida, Kentucky, Minnesota, New York, and Pennsylvania.

<sup>6</sup> States requiring employers to consider this factor include Connecticut, Minnesota, New Mexico, and New York.

<sup>7</sup> States requiring employers to consider this factor include Connecticut, Minnesota, New York, and Washington.

- **Protect applicants against discrimination based on convictions that are not yet finalized** (e.g., if the defendant has not yet been sentenced or his or her direct appeal is still pending) **or that have been nullified by pardon, judicial overruling, etc.**
- **Make it explicit that it is a public policy of that state to encourage the licensing and employment of people with criminal histories.** The Legal Action Center’s toolkit on [Certificates of Rehabilitation](#) can be of particular additional help in this area.

Other provisions that some states have included in their anti-discrimination statutes increase the likelihood that statutes will be enforced. These provisions include:

- **Require employers and agencies to document in writing their decisions not to hire applicants because of their criminal records, and provide notice to these applicants of their rejection and the reason for it.** These tasks should be completed within a reasonable amount of time.<sup>9</sup>
- **Providing for the award of attorneys’ fees when people seek to enforce their rights through private lawsuits.**<sup>10</sup> Providing attorneys’ fees will allow private plaintiffs access to lawyers who can enforce their clients’ rights. In the words of Justice Blackmun, laws that provide attorneys’ fees grant private citizens “a meaningful opportunity to vindicate the important . . . policies which these laws contain.”<sup>11</sup>
- **Insulate employers who comply with its provisions against liability for negligent hiring.**<sup>12</sup> Employers who follow the law should be able to use their compliance as a defense if they are sued for the acts of an employee with a criminal record.

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<sup>8</sup> States requiring employers to consider this factor include Minnesota and New York.

<sup>9</sup> States with a documentation requirement include Connecticut, Louisiana, Minnesota, New Mexico, New York, and Pennsylvania.

<sup>10</sup> Florida and Hawaii provide for attorneys’ fees, although Florida has some limitations on this, as described *supra*.

<sup>11</sup> *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 735 (1987) (Blackmun, J., dissenting).

<sup>12</sup> Kansas is the only state that explicitly limits liability for employers who apply the statute’s standard of review for criminal records.