

## **Lessons for National Background Check Program States: Pennsylvania's Lifetime Employment Ban Held Unconstitutional**

When enacting legislation pursuant to the National Background Check Program (NBCP), States must weigh multiple considerations, including protecting vulnerable populations and the rights of individuals with conviction records to gainful employment. Recently, Pennsylvania's Commonwealth Court<sup>1</sup> considered a background check law, applying these considerations. This case may provide useful information to States participating in the NBCP.

The case involved Pennsylvania's Older Adult Protective Services Act (OAPSA), which is aimed at protecting vulnerable adults. The section of the law at issue, 35 P.S. §10225.503, permanently banned individuals convicted of one of many enumerated crimes from working for covered employers. On December 30, 2015, the Court struck down the lifetime employment ban, holding that it violated the Pennsylvania Constitution.<sup>2</sup> [\*Peake v. Commonwealth\*](#), \_\_\_ A.3d \_\_\_, 2015 WL 9488235 (Pa. Commw. Ct. 2015).

### **The Statute at Issue**

The OAPSA requires applicants and employees of covered facilities to undergo criminal background checks. 35 P.S. §10225.502. Covered facilities were required to review the results, and if the background check indicated a conviction for any of the specified crimes, the facility was precluded from hiring or retaining the individual. 35 P.S. §10225.503. The prohibition on hiring encompassed a broad range of crimes, including homicide, concealing the death of a child, and retaliation against a witness. The ban was to be applied regardless of the job sought and the time since the conviction, and did not include any right to appeal. The statute contained only one exception: facilities were not required to exclude employees with an otherwise disqualifying conviction if they had at been employed by the covered employer for at least one year as of July 1, 1998. 35 P.S. §10225.508(a).

### **The Legal Challenge**

In 2003, the Pennsylvania Supreme Court considered the OAPSA's lifetime employment ban as applied to four individuals. In *Nixon v. Commonwealth*, it held that there was no rational basis for differentiating between those individuals with one year of employment as of July 1, 1998, and those without such an employment history. *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003). As a result, the Court allowed the petitioners in that case to seek employment in a covered facility. The Court's ruling did not affect the application of the law to other potential or current employees.

In *Peake*, the petitioners argued that the lifetime employment ban in the OAPSA is unconstitutional and may not be enforced against anyone. The petitioners included Tyrone Peake, a 52 year old man whose only brush with the law was riding with friends in a stolen car when he was 18 years old. He served probation for attempted theft. Another petitioner, Joan

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<sup>1</sup> The Commonwealth Court has original jurisdiction to hear cases brought against the government of Pennsylvania.

<sup>2</sup> PA CONST art. 1 §1.

Gray, is a Licensed Practical Nurse with over 20 years of experience. As a result of a 1998 conviction for drug possession with intent to deliver, she served a short jail term and completed a drug treatment program. They, along with the other individual petitioners, claimed that they were fully qualified for employment at covered facilities, and that the lifetime ban imposed by the OAPSA unlawfully disqualified them from working in such facilities.

The Commonwealth Court agreed, holding that the OAPSA's lifetime employment ban violates the due process protections of the Pennsylvania Constitution. The Court concluded that the legislature may enact laws limiting the right to work in an occupation to achieve important government interests, but "the means employed to reach the desired end cannot be 'unreasonable, unduly oppressive or patently beyond the necessities of the case.'" In the case of the lifetime ban, the law overreached. According to the Court, "[i]t defies logic to suggest that every person who has at any time been convicted of any of the crimes listed in ... the act... presents a danger to those in an act-covered facility."

The Court was particularly concerned with the permanence of the employment exclusion and the absence of any discretion allowing employers to consider other factors, such as when the offense occurred and the requirements of the job sought. The Court also took issue with the law's distinction between individuals who were already employed by a covered facility for at least one year as of July 1, 1998, and those who were not. It found no rational basis for permitting employment by members of one group while permanently excluding members of the other group who had the same conviction records. According to the Court, the law must be refined to relate the criminal conviction to the employment sought. The deficiencies in the OAPSA must now be addressed by the Pennsylvania legislature.

### **Lessons for NBCP States**

It is important to emphasize that the decision in *Peake* was based solely on Pennsylvania's Constitution. *Peake's* holding does not directly impact any other State and has no precedential value in any other State. However, the constitutional due process requirements at issue in *Peake* are similar to the requirements of other State constitutions and the United States Constitution. For this reason, the decision may be of interest to NBCP States.

State legislation under the NBCP must meet certain requirements that were missing from the OAPSA. The NBCP's enabling legislation obligates participating States to offer an independent process by which individuals may appeal or challenge the accuracy of the information contained in the rap sheet. 42 U.S.C. §1320a-7l(a)(4)(B)(iv). The appeals process must allow for "consideration of the passage of time, extenuating circumstances, demonstration of rehabilitation, and relevancy of the particular disqualifying information with respect to the current employment of the individual." *Id.* None of these considerations was permissible under Pennsylvania's OAPSA, an omission that was essential to the Court's decision to strike down its lifetime employment ban.

Similarly, under the NBCP, employment restrictions apply only to "direct patient access employees." 42 U.S.C. §1320a-7l(a)(6)(D). The employment restrictions in Pennsylvania's OAPSA applied to all employment with covered entities, regardless of the requirements of the

job. The OAPSA's exclusion was far broader than that allowed by the NBCP, which is aimed at employees who are expected to have "one-on-one contact" with long-term care residents.

While NBCP legislation requiring appeals and limiting the types of jobs subject to exclusion addresses some of the Court's concerns in *Peake*, the Court raised other concerns which are not specifically addressed by the NBCP's enabling legislation. NBCP States may wish to pay close attention to these aspects of *Peake*. For example, the Court took issue with the fact that all of the enumerated offenses in the OAPSA automatically required a lifetime disqualifications from employment. The disqualification period could not be reduced for any reason.

The NBCP grant requirements provide no guidance on the time period recommended for State employment disqualifications. In setting these restrictions, *Peake* serves as a reminder that across-the-board, lifetime exclusions may be impermissible, and that NBCP States should seek to relate exclusionary periods to the job sought. The United States Equal Employment Opportunity Commission (EEOC) has stated that lifetime employment exclusions for individuals with convictions are rarely justified. Rather, exclusions must be "job related and consistent with business necessity." CMS' National Background Check Program Long Term Care Criminal Convictions Work Group recommended setting exclusionary periods with recidivism rates in mind. For more information about setting these exclusionary periods, [Report of the CMS Long Term Care Criminal Convictions Work Group](#) is a helpful resource.

One final lesson from *Peake* is to avoid including arbitrary or unreasonable distinctions in the law. In *Peake*, the Court said there was no rational reason to allow some individuals with otherwise disqualifying convictions to work for covered facilities based on their date of hire, while prohibiting others with the same conviction from ever being employed. NBCP States should exercise caution in enacting and enforcing their legislation, ensuring that there are rational, job-related reasons for all exclusions from employment.