

Criminal Records: Risk Assessment and Discrimination

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Overview

- My background and work on criminal records
- Top-line points
- Knowledgeable and nuanced consideration of criminal records is critical
- Issues raised by ACLI presentation
- Recommendations



My Background and Practice

- Legal aid employment lawyer in Philadelphia since 1987
- Predominance of criminal record issues in our work



CLS's Policy Work on Criminal Records

- Title VII/racially disparate impact
 - EEOC's 2012 enforcement guidance
 - EEOC's making criminal records an enforcement and litigation priority
- PA's Clean Slate automated sealing law (2018)
 - We designed and advocated for it; now enacted in 12 states
 - 45 million+ cases sealed by automation in PA



Top-Line Points

- **Racially disparate impact of considering criminal records in civil matters** because of overrepresentation of Blacks and Hispanics in the criminal justice system.
- **Complexity of drawing valid conclusions** from criminal records requires expertise.



Knowledgeable and Nuanced Consideration of Criminal Records is Critical

- Why?
 - Avoid racially disparate impact.
 - Reach justifiable conclusions.
- Examples of mistakes
 - Considering all offenses the same is not warranted. Not only differences between felonies and misdemeanors, but between different felonies.
 - Lifetime predictions usually are not evidentiarily sound.



Issues raised by ACLI presentation

- Do studies/sources properly establish a correlation between criminal records and mortality/morbidity?
 - If sources are tied to incarceration, disqualifying people solely for having a record is wildly overinclusive.
- Is passage of time since criminal justice involvement factored into analysis?
- What crimes and grades (felony, etc.) are considered?
 - What is done with drug felonies?



Issues raised by ACLI presentation

- What methodologies are used in the analysis?
 - Is criminal justice expertise incorporated?
- What records are used to evaluate an individual's criminal convictions?
 - Both public and commercially produced records are often inaccurate.
- Are insurers tracking the risk of unfair and potentially illegal discrimination in evaluations of criminal records?



Recommendations

Prepared in consultation with NLADA Mutual Insurance Co.'s Karen Lash and Jo-Ann Wallace.

- Conduct a **survey** of life insurers to gather information about practices in the field.
- Develop a **model bulletin** for all stakeholders (regulators, insurance companies, agents, consumers) providing guidance on appropriate use of criminal record information.
- Prepare **training and technical assistance** for all stakeholders. Include in continuing education.



Recommendations (cont.)

- Prepare **Buyers' Guides** for people with records who want to buy insurance.
- Provide information about the risk of discrimination lawsuits.



Questions?

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