Indiana Law Takes a Bite Out of Employers' Ability to Obtain Criminal Background Info
EmployeeScreenIQ Blog by Angela Bosworth

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A new Indiana law further limits employers' ability to get a full picture of an employee or an applicant's criminal background. If this sounds familiar, the new law is an add-on to the legislation enacted last year that went into effect July 1, 2011.

Last year the "Restricted Access to Conviction Records" law gave ex-offenders the right, under certain circumstances, to erase their criminal history. The law granted anyone convicted of a misdemeanor, or a Class D felony that didn't result in injury, the legal right to petition the court to limit access to their criminal histories for eight years if they don't commit any more crimes. As we pointed out, as enacted it applied only to public agencies—the courts and institutions that actually handled the case. The resulting loophole was that there was no duty for private or proprietary commercial databases to scrub their records.

The impetus behind the law was to allow people with minor criminal convictions in their past to be able to obtain jobs. Interestingly, the law was in the news earlier this year, in April, when a reporter for the Bloomington Herald-Times discovered that that Monroe County, Indiana auditor candidate James Hans Huffman's cocaine arrest record was no longer available from official sources. Relying on its own archives, the paper ran a story titled: "Auditor candidate Huffman carries 2001 cocaine arrest, but has had record blocked under 2011 law: Democrat who graduated from drug court says 2001 arrest is 'not a secret.'" The Indiana Law Blog did a nice write up of that story, concluding that "it's OK to lie about your criminal past if a court has authorized a restricted disclosure request."

The new law that went into effect July 1, 2012, attempts to close that loophole in addition to strengthening the case for ex-offenders and further limiting employer's information. Here's a summary of the key provisions:

Ex-offender Rights

The new law provides that, effective July 1, 2012, persons with restricted records may legally state on an "application for employment or any other document" that they have not been convicted, found guilty or found to have committed the infraction recorded in the restricted records. While this was implied by the 2011 law, this new provision clarifies the rights of the ex-offender employee or applicant.

Restrictions on Information

Also effective July 1, 2012, the law limits information that employers and providers of criminal records can obtain from Indiana courts. The law prohibits courts from disclosing information pertaining to alleged infractions where the individual:

- **is not prosecuted or if the action against the person is dismissed;**
- **is adjudged not to have committed the infraction;**
- **is adjudged to have committed the infraction and the adjudication is subsequently vacated or reversed upon appeal;**

It further requires records relating to an infraction to be sealed five years after the judgment for the infraction is satisfied, and provides a procedure to do so.

Employer Restrictions on Inquiries About Sealed or Restricted Records

Another provision effective July 1, 2012 makes it a Class B infraction for an employer to ask an employee, contract employee, or applicant if a person's criminal records have been sealed or restricted. Employers who violate the law may be fined up to $1,000.

Criminal History Providers

Portions of the law that go into effect on July 1, 2013, broaden the scope of responsibility and define "criminal history provider" as a "person or an organization that assembles criminal history reports and either uses the report or provides the report to a person or an organization other than a criminal justice agency or law enforcement agency". A CRA, a background screening company, or a commercial database would all be a criminal history provider under the new law. The law requires a criminal history provider to:

(1) update its records annually to remove inaccurate information and information that has been expunged, restricted, or limited; and

(2) only disclose certain information relating to a conviction.

Criminal history providers will be prohibited from reporting:

- **an infraction, an arrest or a charge that did not result in a conviction;**
- **a record that has been expunged;**
- **a record indicating a conviction of a Class D felony if the Class D felony conviction has been entered as Class A misdemeanor or converted to a Class A misdemeanor conviction; and**
- **a record that the criminal history provider knows is inaccurate.**

Criminal history information may not be reported in an assembled report unless the provider updates the information to reflect changes to the official record occurring 60 days or more before the date the criminal history report is delivered.

The law also allows the attorney general and a person harmed by a criminal history provider to bring a private cause of action against the criminal history provider if the criminal history provider fails to update its records or discloses non-conviction information. Penalties may include statutory damages, actual damages including consequential damages or liquidated damages, court costs and attorney's fees.