

Lawyer Insights

Employment Implications of Marijuana Pardons

By Kevin White and Scott Burton

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On October 6, 2022, President Biden issued a proclamation pardoning those convicted of simple possession of marijuana under federal law. The pardons may make a huge impact on individuals who receive them. For employers, the potential impact should be limited and will largely come into play in the hiring process. If an employer encounters a pardoned applicant, it should ensure that the pardon factors into the individualized assessment component of the background check, which is encouraged or in some cases required by state and federal laws. The employer should also consider any risks of negligent hiring.

The Scope of the Pardons

President Biden's proclamation granted a "full, complete and unconditional" pardon to U.S. citizens and lawful residents who have been charged with or convicted of simple possession of marijuana as of the date of the proclamation. Conspiracy, distribution, possession with intent to distribute, and other charges involving marijuana are not impacted by the proclamation. Significantly, the pardon also does not apply to state or local convictions, nor does it expunge the charge or conviction from an individual's record.

According to the U.S. Sentencing Commission, 7,699 people were convicted of simple possession of marijuana under federal law between 1992 and 2021. Many employers consider an applicant's criminal convictions for the seven-year period prior to their application. Data from the Sentencing Commission indicates only 1,675 people had such a conviction during the applicable timeframe (2015 to 2021). With so few people at issue, the pardons will likely have little effect on employers.

Implications for Pre-employment Screening

Employers will have information available about an applicant's pardon to consider as part of their hiring processes. Federal convictions for simple marijuana possession will still appear on a convicted individual's criminal background check along with the pardon. Individuals may also obtain a certificate of pardon from the Department of Justice, though the process for doing so has not yet been established by the Attorney General's office.

The question employers must grapple with is whether they should do anything differently when an applicant has been convicted of simple marijuana possession and then pardoned. If an employer would normally deny employment to an applicant with a simple marijuana possession conviction under state law, should they hire an applicant with a pardon? Should an employer treat two applicants with simple marijuana possession convictions differently if one has a pardon because they were convicted before the date of the proclamation and the other applicant does not because they were convicted later?

The answers to these questions can be complicated by ban-the-box laws and individualized assessment requirements that companies must follow when considering an individual's criminal history. In the past

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decade, a number of states and municipalities have passed “ban-the-box” laws, which prohibit employers from asking about an applicant’s criminal history in job applications and at various stages of the application process. They often also limit what employers can say about criminal background checks in job postings. California’s law is among several that prohibit disclosure of an applicant’s criminal history until a conditional offer of employment is made. Seventeen states and some major cities like Philadelphia and Austin have some form of a ban-the-box law.

Additionally, the Fair Chance Act, signed into law by President Trump in 2020, prohibits federal agencies and contractors from asking about an applicant’s criminal history before a conditional offer.

The purpose of these laws is to allow employers to form an impression about an applicant’s qualifications and suitability for a role before considering information about prior criminal convictions. The laws also seek to encourage more applicants to apply for employment by prohibiting job postings from mentioning criminal background checks, which can be a deterrent for those with a criminal history. In short, the laws seek to foster more opportunities for people with criminal convictions.

When encountering an applicant’s criminal history, many jurisdictions also require employers to conduct an individualized assessment of the applicant and his or her crime. For example, New York law requires employers to conduct an individualized assessment of an applicant or employee with a criminal history based on various factors. The Equal Employment Opportunity Commission encourages, but does not require, a similar individualized assessment.

While companies can consider criminal history as a factor, the Equal Employment Opportunity Commission reiterated in its guidance that screening based on such a history must not disparately impact individuals of a particular protected class and must be “job-related and consistent with business necessity.” The concepts of job relatedness and consistency with business necessity are typical of laws requiring an individualized assessment.

Essentially, to have a meaningful individualized assessment, the employer would have to articulate why it is a business necessity to hire one person for a job because they were convicted before October 6 and were pardoned, but refuse to hire another person for a similar job who was convicted at a later date for the same crime. The applicant denied a position will undoubtedly argue that being convicted of simple marijuana possession either poses a threat of some kind to the employer or it does not—the existence of a pardon does not change that risk.

Where ban-the-box laws are in place, employers will have already decided an applicant is an acceptable candidate by the time they learn of any criminal convictions, and would learn of the pardon at the same time. Thus, a pardon on a prospective employee’s background check may be another data point in favor of hiring, but it will not necessarily impact the decision to make an offer in ban-the-box states.

Implications for Negligent Hiring Claims

When considering whether to hire a pardoned applicant, employers must also assess the risk of negligent hiring claims. Criminal history screening is most relevant in occupations that courts have deemed particularly “sensitive.” For example, drug or alcohol use by people in hazardous industrial jobs could pose significant risk of harm.

Failing to screen out employees convicted of simple marijuana possession may increase employer liability under a theory of negligent hiring or retention. This is because such convictions often provide evidence

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that the employer “knew or had reason to know” of the employee’s proclivity for marijuana or other drug use. It is unclear what effect a presidential pardon might have on an employer’s defense against negligent hiring or retention claims. However, the appearance of such convictions on a criminal history check, regardless of whether it has been pardoned, is a fact known by the employer that cannot be “un-known.” Several states have passed laws that prohibit the use of such evidence at trial or provide presumptions against liability for complying with the state’s background check laws.

President Biden’s pardon proclamation is yet another example of the trend toward the decriminalization of marijuana as more states legalize medical and recreational use. Companies will need to monitor this ever-changing regulatory landscape to anticipate the impact new marijuana laws may have on their operations. In this case, however, pardoning those convicted of federal simple possession of marijuana offenses will likely have little impact on workplaces. Employers that choose to consider an applicant’s pardon should ensure that the pardon is reviewed appropriately as part of the pre-employment screening process and consider any risk of a negligent hiring claim.

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