

The Violent Crime Control and Law Enforcement Act and You

Grieco, Jennifer M., | May 26, 2008



INTRODUCTION



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You may have heard of the Violent Crime Control and Law Enforcement Act of 1994 and assumed by its name that this would have no application to you. The Act was the largest crime bill in the history of the United States and was the product of six years of bipartisan negotiation. The Act is probably known best for the provision which bans the manufacture of semi-automatic "assault weapons" and the possession of magazines holding more than 10 rounds of ammunition. How could this Act have any relevance to you since you do not own a fire arm and/or do not intend to commit a violent crime?

As part of this far-reaching Act, Congress enacted the Insurance Fraud Prevention Act, Title 18 U.S.C. § 1033 and § 1034. This section of the crime bill was drafted to deal with interstate insurance fraud schemes that Congress felt were too complex for current "inadequate" federal and state laws to effectively deal with. According to the National Association of Insurance Commissioners (NAIC), insurance fraud is estimated to cost between \$80 billion and \$100 billion annually. In addition, NAIC has reported that the average cost of insider insurance fraud is \$72,000 per incident. Accordingly, Congress

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enacted section 1033 to prevent the destructive effects of embezzlement by multiple employees, agents and officers throughout the insurance industry, in order to preclude another crisis similar to the saving and loan failures of the 1980s. H.R. Rep. NO. 103-468 (1994).

Section 1033 of the Act creates criminal and civil penalties for insurance fraud committed by individuals in the insurance industry. In addition, it prohibits any individual with certain felony convictions from working in the business of insurance without a waiver. The Act actually outlines civil and criminal penalties, including prison terms, for individuals who have been convicted of any criminal felony involving dishonesty or breach of trust and who willfully continue to work in the business of insurance without receiving written consent from the appropriate regulatory official. Any individual who works in the business of insurance without receiving this written consent is considered a person who is prohibited from working in the insurance industry. The Act also provides for fines and imprisonment to those who knowingly employ such individuals.

- **Activities and penalties set forth in the Act.**

The Act defines the "business of insurance" broadly. It includes not only the writing of insurance but also "all acts necessary or incidental to such writing . . . and the activities of persons who act as, or are officers, directors, agents or employees of insurers or who are other persons authorized to act on behalf of such persons." Accordingly, the prohibition against working in the insurance business with a felony record applies to agents, directors, officers, administrators and even support staff. Any individual who has been convicted of a criminal felony involving dishonesty or breach of trust and willfully engages in the business of insurance, is subject to fines and/or imprisonment of not more than 5 years.

The Act did not define the term "a felony involving dishonesty or breach of trust" and this has led to much confusion as the state regulators attempt to interpret Congress' intention. However, a felony involving dishonesty typically includes any offense constituting or involving perjury, bribery, forgery, counterfeiting, false or misleading oral or written statements, deception, fraud, schemes, material misrepresentations and the failure to disclose material facts. A felony involving a breach of trust would include crimes constituting or involving misuse, misapplication or misappropriation of anything of value held as a fiduciary (i.e., as trustee, administrator, executor, conservator, receiver, guardian, agent, employee, partner, officer, director or public servant) or the misuse of one's official or fiduciary position to engage in a wrongful act or misappropriation. In 2002, the National Association of Insurance Commissioners (NAIC) prepared a suggested guide on these terms entitled "Guidelines for State Insurance Regulators to the Violent Crime Control Act" (www.naic.org). This guideline expands the felonies involving dishonesty or breach of trust to include crimes such as car jacking, kidnapping and sexual abuse.

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In addition to the prohibition against working in the field of insurance with a felony conviction, the Act creates new categories of federal crimes for insurance fraud. The following crimes are violations of the Act: 1) making a false material statement or report or willfully overvaluing any land, property or security in connection with any financial report or document presented to any insurance regulatory official or agency for the purposes of influencing the official or agency; 2) willfully embezzling or misappropriating money, funds, premiums, credits or other property; 3) knowingly making a false entry of material fact in any book, report or statement of a person engaged in the business of insurance with the intent to deceive any person; or 4) using threats of force or threatening letters or communication to influence, obstruct or impede the due and proper administration of law for any proceeding involving the business of insurance. An individual is subject to civil and criminal penalties for violating this act including fines and/or imprisonment of no more than 10 years. The civil penalties are defined as not more than \$50,000 for each violation or the amount of compensation which the person received for the prohibited conduct, whichever amount is greater.

o **Obtaining waivers for individuals felony convictions.**

It is the individual's responsibility to obtain the necessary consent to transact the business of insurance if they have a felony conviction. An insurance license is not a waiver. The individual must seek an exemption from the federal prohibition of engaging in the business of insurance by filing an application for licensure with the state's insurance department or commission. During the time in which a prohibited individual is applying for relief from the prohibition, they cannot work in the business of insurance. There is no grandfather provision for those individuals with convictions that occurred prior to the effective date of the Act who are currently employed or licensed in the business of insurance. Furthermore, there is no time limitation on how far back the felony conviction that would trigger the prohibition may have occurred. Although the requirements vary by state, the application process typically includes a statement of the circumstances under which the conviction arose with the attachment of court documentation and a statement explaining the conviction. Obviously, absolute and complete candor is required from the applicant as failure to fully and honestly complete the application may result in denial. The state department or commission will then conduct an investigation to determine whether to grant or deny the exemption. Iowa's Division of Insurance for example, established a Section 1033 Advisory Committee comprised of three individuals employed by the Division to review each application for a Consent to Work. If the exemption is denied, the individual may request an administrative hearing.

The Act does not contain any provisions which establish a standard of review for insurance regulatory officials to apply in considering applications for waiver of the prohibition. It would appear that Congress has left that subject to the discretion of the state officials. Several states have laws enacted which address the standards for review of applicants for occupational and professional licenses and for consideration of the presumed rehabilitation of felons that apply for such licenses.

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However, the laws on the books of these states were not enacted to deal specifically with relief from this federal Act. Accordingly, in 1998, the state insurance commissions acting through the National Association of Insurance Commissioners (NAIC) adopted the Guidelines for State Insurance Regulators to the Violent Crime Control and Law Enforcement Act of 1994. The Guidelines were adopted after extensive deliberations and an opportunity for public input. They recommend that all state regulators utilize uniform procedures for Section 1033 waiver applications. The NAIC guidelines provide that the following should be considered by the regulators:

- a. Whether the applicant has been fully rehabilitated and no longer poses a risk or threat to insurance consumers or the insurer; and
- b. Whether the issuance of written consent to the applicant is consistent with the public interest, Federal and state law and any applicable court orders.

The NAIC guidelines further provide that an individual is only required to obtain one grant of written consent from the appropriate commissioner of insurance to engage in the business of insurance and not consent from every jurisdiction in which the individual works in the business of insurance. The appropriate commissioner of insurance is considered to be the commissioner of the state where the individual resides and where the majority of the individual's business of insurance takes place.

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- An employer's compliance with the Act at the hiring stage.

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Insurance companies as well as others who employ anyone to conduct the business of insurance may be in violation of this Act if they willfully permit an individual with such a felony conviction to work in the business of insurance. The Act also subjects the employer of such individual to civil and criminal penalties. Accordingly, courts have found insurance companies and agencies to be justified in terminating the employment of any individual who is working in the business of insurance with a felony conviction without a waiver of prohibition in violation of Section 1033. It is the responsibility of insurers and other employers engaging in the business of insurance to make a diligent effort to ensure that individuals with felony convictions are not engaging in the business of insurance in violation of the Act. Many states have adopted regulations that require the employer to actively seek to determine whether or not any such prohibited individuals are engaging in the insurance business. Simply because an individual maintains a valid license to sell insurance, for example, does not waive the employer's obligation to actively determine whether any individual working in its employ has a felony conviction.

According to the NAIC guidelines, at the very least, the employer should request that every potential new hire certifies that they have never been convicted of a felony and/or completes a written application listing any such convictions so the employer can determine whether they have or would be violating 18 U.S.C. § 1033 by working in the business of insurance without obtaining a waiver. In addition, employers should determine if there are state statutes or regulations in their state governing employee criminal background checks and if so, what the requirements and limitations are. A written authorization should be obtained from the applicant that allows the employer to perform criminal background checks, check all references, and verify not only past employment but academic and professional credentials. In addition, the potential employee should provide a set of fingerprints for a criminal background search.

An employer should search its state criminal databases although there are many limitations with such searches. State databases may not contain federal convictions. In addition, it may be difficult to determine each state database that will contain the necessary information unless an employer performs a search of all 50 states. Otherwise, the employer is assuming that the applicant has been honest regarding all past employers and residences. Depending upon the sophistication of the record keeping at the state level, information contained at the county level may be more complete. However, a county-to-county search would be costly and time consuming. The Department of Justice and Federal Bureau of Investigations maintains a federal database that contains conviction information obtained from the federal government, state, local and foreign criminal justices agencies and courts. Unfortunately, access to this database is only authorized by statute and approval of the Attorney General of the United States. Private employers, including insurance carriers, cannot currently obtain access to the database. Accordingly, it is important to recall that the operative term of the statute is to preclude an employer from "willfully permitting" such a prohibited individual to engage in the business of insurance. The employer must have knowledge of the felony and can only obtain that knowledge with the resources available. It is therefore recommended that an employer document its due diligence efforts to assess the criminal background of any employee that it hires.

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- **Conclusion**

For those insiders who have considered assisting or committing insurance fraud, this federal Act attempts to implement penalties, including federal prison time, in order to curtail their efforts. However, the overwhelming majority of individuals who work in the business of insurance are law-abiding citizens and this Act will have no effect on such individuals. The Act does require convicted felons and their employers to take additional steps in either obtaining a waiver or in undertaking proper due diligence at the hiring stage to ensure that an individual working in its employ is not in violation of the Act. Although the burden of obtaining the written consent is on the individual, the employer cannot permit such an individual to work in the business of insurance without risking federal conviction. Everyone is encouraged to evaluate whether your current and future employees, consultants and subcontractors are in compliance with the federal law.

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