

Encouraging “Healing” for Home Health Aides By Employing Individuals with Criminal Convictions—Balancing Risk with Rehabilitation

by Joann Sahl*

ABSTRACT

The United States faces a national crisis to provide adequate care for its aging population. A critical component of this crisis is the nation’s inability to provide enough home health care aides to assist with important, if not vital, long-term care needs.

This Article identifies a labor pool to help resolve this crisis: qualified workers with criminal convictions. But home health care aides with criminal convictions face an inhospitable landscape. Employers in the health care field are risk-averse to hiring these workers. Furthermore, most states’ laws impose permanent employment bans on home health aides with criminal convictions.

The Article examines the warren of laws used to disqualify home health care aides with criminal convictions. It urges policymakers to reexamine the underlying reasons for permanently disqualifying this potential group of employees and concludes by outlining several legal paths that would allow employers to hire home health aides with criminal convictions.

I. INTRODUCTION

The health care field is one of the fastest-growing employment fields in the United States.¹ Today, the health care industry comprises one-seventh of the United States economy.² The United States Department of Labor’s Bureau of Labor Statistics projects that by

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¹ See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Labor Force Statistics from the Current Population Survey*, <https://www.bls.gov/cps/certifications-and-licenses.htm> (last updated Jan. 18, 2019).

² Antonio Cobos, *Healthcare Licensing and Credentialing: Foreseeability of Upstream and Downstream Collateral Consequences*, 14 TEX. TECH. ADMIN. L.J. 57, 59 (2012).

2026, over twenty-one million employment positions will develop in the health care industry.³ Among these, health care support positions will predominate, and home health professionals will be in high demand.⁴

Health care support constitutes one of the greatest needs in our country. The Office for the Assistant Secretary for Planning and Evaluation (ASPE) estimates that “[t]he majority of Americans age 65 and older will require at least some support with activities of daily living—things like cooking, bathing, or remembering to take medicine.”⁵ By one estimate, seventy percent of Americans will need long-term care for at least three years of their lives.⁶

Given these numbers, home health aides (HHAs) are expected to be in the greatest demand. Home health care will be the second-fastest growing occupation in the nation.⁷ The Bureau of Labor Statistics anticipates that by 2026, our country will need more than

³See Bureau of Labor Statistics, U.S. Dep’t of Labor, *Occupational Outlook Handbook: Healthcare Occupations*, U.S. BUREAU OF LABOR STATISTICS, <https://www.bls.gov/ooh/healthcare/home.htm> (last updated Jan. 18, 2019) (as cited in OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION (“ASPE”), HEALTH AND HUMAN SERVS., LINKING PEOPLE WITH CRIMINAL RECORDS TO EMPLOYMENT IN THE HEALTH CARE SECTOR: 5 THINGS TO CONSIDER 4 (2018), <https://aspe.hhs.gov/system/files/pdf/259686/MeetingtheDemand.pdf> [hereinafter ASPE]).

⁴Megan Denver, Garima Siwach & Shawn D. Bushway, *A New Look at the Employment and Recidivism Relationship through the Lens of a Criminal Background Check*, 55 CRIMINOLOGY 174, 176 (2017) (“Health-care support positions will experience the largest growth in low-wage jobs in the next decade.”). Nationally, health care occupations are the fifth-fastest-growing occupations. Denver, Siwach & Bushway, *supra* note 4, at 180.

⁵THE ASSOCIATED PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH, LONG-TERM CAREGIVING: THE TYPES OF CARE OLDER AMERICANS PROVIDE AND THE IMPACT ON WORK AND FAMILY 2 (2017), https://www.longtermcarepoll.org/wp-content/uploads/2017/11/AP-NORC-Long-term-Care-2017_Caregivers_Issue-Brief.pdf.

⁶THE ASSOCIATED PRESS-NORC CENTER FOR PUBLIC AFFAIRS RESEARCH, LONG-TERM CARE IN AMERICA: EXPECTATIONS AND REALITY 1 (2014), https://www.longtermcarepoll.org/wp-content/uploads/2017/11/AP-NORC-Long-term-Care-2014_Trend_Report.pdf.

⁷COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, THE CONSIDERATION OF CRIMINAL RECORDS IN OCCUPATIONAL LICENSING 2 (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/12/TheConsiderationofCriminalRecordsinOccupationalLicensing.pdf> [hereinafter “CSG, OCCUPATIONAL LICENSING”]. Home health-care aides are those persons who are “directly employed by home health, hospice or mixed agencies and provide . . . assistance with activities of daily living (ADLs) including eating, toileting, bathing, dressing and transferring” or transporting patients. GALINA KHATUTSKY ET AL., UNDERSTANDING DIRECT CARE WORKERS: A SNAPSHOT OF TWO OF AMERICA’S MOST IMPORTANT JOBS, at vi (2011), <https://aspe.hhs.gov/system/files/pdf/76186/CNAchart.pdf>. “Over 60% of HHAs work in for-profit agencies; 74% work for home health agencies rather than hospices. A small minority of HHAs work for hospice agencies and for agencies that offer a mix of home health and hospice services.” KHATUTSKY ET AL., *supra* note 7, at 17.

1.2 million HHAs, a 41% increase since 2016.⁸ The great demand for HHAs is driven by what some experts call a “cultural shift” in America where people prefer to age at home.⁹

Attracting workers to the home health field, however, is difficult. The pay is dismal, and the work is often tedious and demanding.¹⁰ One in four workers lives below the federal poverty line and over half of them require public assistance to support themselves and their families.¹¹ Additionally, the work is physically taxing, messy, and potentially dangerous to workers.¹² One study showed that more than 14% of HHAs reported missing a day of work in the preceding year because of work-related injuries.¹³

⁸ ASPE, *supra* note 3, at 4.

⁹ See Robert Channick, “Crisis Mode”: As Boomers Age, a Shortage of Caregivers, CHI. TRIB. (Dec. 10, 2017, 1:05 AM), <https://www.chicagotribune.com/business/ct-biz-caregivers-demand-aging-20171116-story.html>. (“Part of the reason that we’re seeing a growing demand for home care workers is a cultural shift for aging at home . . .”) (citation omitted).

¹⁰ Channick, *supra* note 9 (“‘The working conditions can be very difficult. . . . And they can go down the street to McDonald’s and make as much if not more money.’”).

¹¹ STEPHEN CAMPBELL, U.S. HOME CARE WORKERS: KEY FACTS 2 (Phi Nat’l 2018), <http://phinational.org/wp-content/uploads/2018/08/U.S.-Home-Care-Workers-2018-PHI.pdf>. (revealing that the median income for home health worker is \$15,100). Some argue that low wages paid to HHAs is the product of racism, and the fact that for so many years they were excluded from minimum wage laws. See Kathryn Joyce, *Home Care in Crisis*, IN THESE TIMES (Oct. 9, 2014), http://inthesetimes.com/article/17228/home_care_in_crisis. In 2013, the Department of Labor amended its regulations to require the Fair Labor Standard Acts apply to HHAs, including the minimum wage and overtime provisions. 29 C.F.R. § 552 (2013). Additionally, women tend to dominate this field with nearly nine of ten workers being women. CAMPBELL, *supra* note 11, at 3.

Women’s concentration in low-wage jobs has increased in recent years-and the trend is likely to continue. More than one-third (35 percent) of women’s net gains during the recovery from the Great Recession have been in jobs that typically pay \$10.10 per hour or less; only 20 percent of men’s job gains have been in such low wage jobs.

JOAN ENTMACHER ET AL, NAT’L WOMEN’S LAW CTR., UNDERPAID & OVERLOADED: WOMEN IN LOW-WAGE JOBS 1 (2014), https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_lowwagereport2014.pdf. Additionally, “[a]ll groups of women of color are over-represented in the low-wage workforce.” ENTMACHER ET AL. *supra* note 11, at 14.

¹² Joyce, *supra* note, 11 at 5.

¹³ KHATUTSKY ET AL., *supra* note 7 at 37. The most commonly reported workplace injuries are needle sticks, abuse/assault by a patient, falls, back injuries and other types of personal injuries. KHATUTSKY ET AL., *supra* note 7, at 37. The work is viewed as messy because HHAs provide personal care to those who cannot perform basic caretaking functions for themselves. “Residents, patients, and consumers often have life-threatening illnesses and high levels of mortality and cognitive impairment.” KHATUTSKY ET AL., *supra* note 7, at 34. The taxing nature of the work is exacerbated by the fact that the positions are not filled by young people. The average age of an HHA is 46. KHATUTSKY ET AL., *supra* note 7, at 4.

Also, an HHA position normally offers no room for the HHA to advance in the company.¹⁴ Most HHAs spend their careers in entry-level positions.¹⁵ This lack of career advancement predictively results in a high turnover rate in HHA positions.¹⁶

Given the difficult working conditions and the poor pay, it is no surprise that there remains a substantial paucity in qualified HHAs to fill the disproportionately numerous open positions.¹⁷ The workforce shortage has been described as “unprecedented” and “desperate.”¹⁸ Others have characterized the lack of HHAs as a “crisis.”¹⁹ To fill this gap, some economists have proposed opening the employment pool to allow people with criminal convictions.²⁰ This employment pool is large because 70 to 100 million Americans have a criminal record.²¹

¹⁴Joyce, *supra* note 11, at 5.

¹⁵Joyce, *supra* note 11, at 5.

¹⁶KHATUTSKY ET AL., *supra* note 7, at 45.

¹⁷Susan Salka, *Looking Ahead 2016: Workforce Takes Center Stage in Health-care*, BECKER'S HOSP. REVIEW (Dec. 4, 2015), <http://www.beckershospitalreview.com/human-capital-and-risk/looking-ahead-2016-workforce-takes-center-stage-in-healthcare.html>.

¹⁸Judith Graham, *Severe Shortage of Home Health Workers Robs Thousands of Proper Care*, KAISER HEALTH NEWS (Apr. 26, 2017), <https://khn.org/news/severe-shortage-of-home-health-workers-robs-thousands-of-proper-care/view/republish/>.

¹⁹Channick, *supra* note 9.

²⁰Dylan Minor, Nicola Persico & Deborah M. Weiss, *Criminal Background and Job Performance*, 7 IZA J. LAB. POL'Y (2018), <https://izajolp.springeropen.com/track/pdf/10.1186/s40173-018-0101-0>, at 2 (“Individuals with criminal records represent an untapped productivity pool.”).

²¹U.S. DEP'T OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2012 (2014), <https://www.ncjrs.gov/pdffiles1/bjs/grants/244563.pdf>. Estimates show nearly 20 million have felony convictions, and a larger number have a misdemeanor conviction. Alessandro Corda, *More Justice and Less Harm: Reinventing Access to Criminal History Records*, 60 HOW. L.J. 1, 4 (2016). They are part of the seven million Americans seeking employment at any given time. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, THE EMPLOYMENT SITUATION—JUNE 2019 (July 5, 2019), <https://www.bls.gov/news.release/pdf/empst.pdf>. It is hard to quantify the number of people with criminal convictions seeking employment because the Department of Labor does not track the unemployment rate for former offenders. Megan Dunn, *Locked Up and Locked Out of the U.S. Labor Market*, MONTHLY LAB. REV. (Aug. 2015), <https://www.bls.gov/opub/mlr/2015/book-review/locked-up-and-locked-out-of-the-u-s-labor-market.htm> (reviewing STEVEN RAPHAEL, *THE NEW SCARLET LETTER? NEGOTIATING THE U.S. LABOR MARKET WITH A CRIMINAL RECORD* (2014)). Surveys of former offenders suggest that between 60% to 75% of them are unemployed one year after release. DEVAH PAGER & BRUCE WESTERN, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 1 (2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf> (final report for U.S. Department of Justice Award No. 2005-IJ-CX-0019); Rebecca Vallas & Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, CTR. AM. PROGRESS (Dec. 2, 2014), <https://www.americanprogress.org/issue>

Their exclusion from the job market because of their criminal record has an impact on our national economy. One study reported that excluding former offenders results in the loss of goods and services valued at 57 to 65 billion dollars.²²

With the proper training and proof of rehabilitation, this group of ready employees could fill the employment vacuum for HHAs, but the health care field has been resistant to hiring those with criminal convictions. In many circumstances, it has tenaciously clung to permanent bans on hiring those with criminal convictions, even when presented with objective proof of their rehabilitation.

This Article discusses permanent employment bans for HHAs with criminal records.²³ It will review and analyze the complicated web of laws that impose those bans and address the relevant case law. It will then focus on Ohio and its laws as representative of the problem facing HHAs with criminal convictions. It will conclude by urging the government and employers to abandon permanent employment bans for HHAs with criminal convictions. The Article will then set forth practices that would allow the employers to consider evidence of rehabilitation before rejecting an otherwise-qualified candidate. These practices would expand the pool of qualified candidates to address our country's crises in these much-needed health care positions.

II. CRIMINAL BACKGROUND CHECKS IN THE HEALTH CARE FIELD

Criminal background checks are standard practice within the home health care field. Employers conduct criminal background checks because an HHA has contact with vulnerable populations. Khatutsky and colleagues et. al. suggest that "a great majority of HHAs in home health agencies work in client homes (93%). Among HHAs in hospice agencies, almost 60% work in both client homes and inpatient facilities such as inpatient hospices, a quarter work in client homes only, and the rest (15%) work in inpatient facilities. Sixty-five

[s/poverty/reports/2014/12/02/102308/one-strike-and-youre-out/](https://www.povreport.org/poverty/reports/2014/12/02/102308/one-strike-and-youre-out/). For further discussion about the specific collateral consequences faced by those with criminal convictions, see Joann Sahl, *Battling Collateral Consequences: The Long Road to Redemption*, 49 CRIM. L. BULL. 383 (2013).

²²JOHN SCHMITT & KRIS WARNER, CTR. ECON. & POL'Y RES., EX-OFFENDERS AND THE LABOR MARKET 14 (Nov. 2010), <http://cepr.net/documents/publications/ex-offenders-2010-11.pdf>.

²³Permanent employment disqualifications are not just an issue for HHAs. The "ABA Inventory reports over 19,000 'permanent' disqualifications that could last a lifetime and over 11,000 'mandatory' disqualifications, for which licensing agencies have no choice but to deny a license." MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP. L. PROJECT, UNLICENSED & UNTAPPED, REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 1 (2016), <https://s27147.pcdn.co/wp-content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf>.

percent of HHAs work in home health and hospice agencies.”²⁴ Almost all states mandate some type of pre-employment criminal background checks for those who “have responsibility for the safety and well-being of children, the elderly, or individuals with disabilities.”²⁵

Forty-eight states and the District of Columbia require background checks for HHAs.²⁶ Each of these states considers the criminal background check at a different place in the employment process. Twenty-two states require the results of the background check before an employee can begin work.²⁷ The remaining states allow the employee to begin work pending the background results.²⁸ Twelve states continue periodic background checks after the person passes the initial background check.²⁹

²⁴KHATUTSKY ET AL., *supra* note 7, at 18.

²⁵34 U.S.C.A. § 40102 (2018).

²⁶ALA. CODE § 38-13-11 (2019); ALASKA ADMIN. CODE tit. 7, § 10.900 (2019); ARIZ. REV. STAT. ANN. § 36-411 (2019); ARK. CODE ANN. § 20-38-103 (2019); CAL. HEALTH & SAFETY CODE ANN. § 1796.19 (2019); COLO. REV. STAT. ANN. § 25-27.5-107 (2019); CONN. GEN. STAT. ANN. § 19a-491d (2019); DEL. CODE ANN. tit. 16, § 1145 (2019); D.C. CODE ANN. § 44-552 (2019); FLA. STAT. ANN. § 400.512 (2019); HAWAII REV. STAT. ANN. § 321-15.2 (2019); IDAHO CODE ANN. § 56-1004A (2019); 225 ILL. COMP. STAT. ANN. 46 (2019); IND. CODE ANN. 16-27-2 (2019); IOWA CODE ANN. § 135C.33 (2019); KAN. STAT. ANN. § 65-5117 (2019); 902 KY. ADMIN. REGS. § 20:081 (2019); LA. STAT. ANN. § 40:1203.2 (2019); ME. REV. STAT. tit. 22, § 1812-G (2019); MD. HEALTH-GEN. CODE ANN. § 19-1901 (2019); 105 CODE MASS. REGS. 155.010 G(3) (2019); MICH. COMP. LAWS ANN. § 333.27013A (2019); MINN. STAT. ANN. § 245C.03 (2019); MISS. CODE ANN. § 43-11-13 (2019); MO. REV. STAT. ANN. § 192.2495 (2019); NEB. REV. STAT. ANN. § 71-6603 (2019); NEV. REV. STAT. ANN. § 449.123 (2019); N.H. REV. STAT. ANN. § 151:2-d (2019); N.J. STAT. ANN. § 45:11-24.3 (2019); N.M. ADMIN. CODE 7.1.9 (2019); N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.4 (2019); N.C. GEN. STAT. ANN. § 131E-265 (2019); N.D. CENT. CODE ANN. § 12.1-33-02.1 (2019); OHIO ADMIN. CODE 3701-60-04 (2019); OKLA. STAT. ANN. tit. 63, § 1-1947 (2019); OR. ADMIN. R. 333-027-0064 (2019); PA. STAT. ANN. tit. 35, § 10225.502 (2019); R.I. GEN. LAWS § 23-17-34 (2019); S.C. CODE ANN. § 44-7-2910 (2019); ADMIN. R. S.D. § 67:54:06:08 (2019); TENN. CODE ANN. § 63-1-116 (2019); TEX. HEALTH & SAFETY CODE ANN. § 142.004 (2019); UTAH ADMIN. CODE R432-35 (2019); VT. ADMIN. CODE 12-4-205:5 (2019); VA. CODE ANN. § 32.1-162.9:1 (2019); WASH. REV. CODE ANN § 43.43.837 (2019); W.VA. CODE, § 16-49-3 (2019); WIS. STAT. § 50.065 (2019); WYO. STAT. ANN. § 7-19-201 (2019). Georgia and Montana do not require background checks.

²⁷Brian P. Ritchie, Acting Deputy Inspector General Dep’t of Health and Hum. Serv., Memorandum Report: Nationwide Program for National and State Background Checks for Long-Term-Care Employees—Results State Requirements for Conducting Background Checks on Home Health Agency Employees, OEI-07-14-00131, at 1 (May 29, 2014), <https://oig.hhs.gov/oei/reports/oei-07-14-00131.pdf> [hereinafter Ritchie memo].

²⁸Ritchie memo, *supra* note 27, at 1.

²⁹Ritchie memo, *supra* note 27, at 1.

States use different methods to conduct background checks. Twenty-eight states check both statewide records and FBI records.³⁰ The remaining states use only statewide criminal records to conduct the search.³¹

Although the states are responsible for conducting background checks, the federal government has an interest in these searches because a large number of HHA services are funded by the federal government.³² In 2012, “HHAs provided services to approximately 3.5 million Medicare beneficiaries, averaging 34 visits per beneficiary. Medicare paid nearly 18.5 billion dollars for HHA services that year.”³³

Recognizing the importance of thorough background checks, Congress established the Nationwide Program for National and State Background Checks on Direct Patient Access Employees of Long-Term Care Facilities and Providers in the Patient Protection and Affordable Care Act (National Background Program).³⁴ The statute codifying the program required the Secretary of Health and Human Services to “establish a program to identify efficient, effective, and economical procedures for long term care facilities or providers to conduct background checks on prospective direct patient access employees on a nationwide basis.”³⁵ The program, administered by the Centers for Medicare and Medicaid Services (CMS), awarded grants to twenty-five states totaling more than fifty million dollars.³⁶

The grant required each state to conduct a background search using three methods: 1) a search of state abuse and neglect registries

³⁰Ritchie memo, *supra* note 27, at 4. The states are Delaware, the District of Columbia, Florida, Idaho, Illinois, Michigan, Mississippi, Nevada, New York, Oklahoma and Utah. Four states (South Carolina, Ohio, North Carolina, and Arkansas) only require FBI check if certain criteria are met. Ritchie memo, *supra* note 27, at 4.

³¹Ritchie memo, *supra* note 27, at 4. Arizona, Maine, Maryland, Missouri, New Hampshire, Oregon, Virginia and Wisconsin conduct a statewide records search on all individuals. Ritchie memo, *supra* note 27, at 4. California, Iowa, Kansas, Louisiana, Rhode Island, Texas and Vermont conduct the background search on selected individuals. Ritchie memo, *supra* note 27, at 4. Tennessee only checks for sex offenses and adult or elder abuse. Ritchie memo, *supra* note 27, at 4.

³²There is no federal law that requires a background check prior to hiring an HHA. Ritchie memo, *supra* note 27, at 2.

³³Ritchie memo, *supra* note 27, at 3.

³⁴42 U.S.C.A. § 1320a-7 (2018).

³⁵42 U.S.C.A. § 1320a-7(a) (2018).

³⁶Ritchie memo, *supra* note 27, at 3. The states receiving grants: Alaska, California, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Illinois, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Nevada, New Hampshire, North Carolina, Ohio, Oklahoma, Oregon, Puerto Rico, Rhode Island, Utah, and West Virginia. See OFFICE OF THE INSPECTOR GEN., DEP’T OF HEALTH & HUM. SERV., NATIONAL BACKGROUND CHECK PROGRAM FOR LONG-TERM CARE EMPLOYEES: INTERIM

and databases; 2) a check of state criminal history records, and 3) a check of FBI records by fingerprint search.³⁷ Four years after the grants were first awarded, CMS conducted a survey of the grant recipients. It requested information on the stage of implementation in each state and the success of the background check process.³⁸ Only six states provided sufficient data on potential employees disqualified because of their criminal record.³⁹ The states reported that three percent, over 30,000 people, had been disqualified from a position because of their criminal record.⁴⁰

Three years later, the disqualifications climbed. By 2019, with eight states now reporting, the background checks disqualified 80,000 people.⁴¹ Even though the reports come from a small percentage of states, they are indicative of the level of those disqualified for HHA positions based on their criminal convictions.⁴²

Background checks and their resulting disqualifications do not treat all equally. Background checks for HHAs disproportionately impact women because women dominate the home health aide field. In 2012, 91 percent of home health-care aides were women.⁴³

REPORT 16 (2016), <https://oig.hhs.gov/oei/reports/oei-07-10-00420.pdf> [hereinafter OIG INTERIM REPORT].

³⁷OIG INTERIM REPORT, *supra* note 36, at 16.

³⁸OIG INTERIM REPORT, *supra* note 36, at 2.

³⁹OIG INTERIM REPORT, *supra* note 36, at 9. Those states are Alaska, District of Columbia, Florida, Michigan, New Mexico, and Oklahoma. OIG INTERIM REPORT, *supra* note 36, at 9.

⁴⁰OIG INTERIM REPORT, *supra* note 36, at 10. The survey asked the states to report disqualifications for ten job types: skilled nursing facilities, nursing facilities, home health agencies, providers of hospice care, long-term-care hospitals, providers of personal care service, providers of adult day care, residential care providers that arrange for, or directly provide long-term-care services, intermediate care facilities for the mentally retarded, and any other facility or provider of long-term-care services that a State determines to be appropriate. OIG INTERIM REPORT, *supra* note 36, at 3. While the survey did not focus specifically on HHAs, it reflects the ongoing difficulty that HHAs and others in the health care field face when they have a criminal conviction and apply for a job.

⁴¹OFFICE OF THE INSPECTOR GEN., DEP'T OF HEALTH & HUM. SERV., NATIONAL BACKGROUND CHECK PROGRAM FOR LONG-TERM-CARE PROVIDERS: ASSESSMENT OF STATE PROGRAMS CONCLUDED BETWEEN 2013 AND 2016 (OEI-07-16-00160), at 9 (2019), <https://oig.hhs.gov/oei/reports/oei-07-16-00160.pdf> (reporting on background checks completed from 2013 to 2016) [hereinafter "OIG ASSESSMENT REPORT"].

⁴²OIG ASSESSMENT REPORT, *supra* note 41, at 9. The report contains one sentence about the impact of the program as follows: "none of the States reported a reduction in available workforce for long-term care facilities or providers as a result of the Program." OIG ASSESSMENT REPORT, *supra* note 41, at 9. It is unclear what question the states were asked to provide this information, or if their failure to offer the information was recorded as no impact on the available workforce.

⁴³Denver et al., *supra* note 4, at 176.

Most are low-income because “[l]ow-income women cluster in caregiving and customer service work.”⁴⁴

Women’s crimes also differ from those committed by men and those crimes tend to be more disqualifying for HHA positions. Women are more likely “than men to be arrested and convicted for low-level, non-violent offenses.”⁴⁵ Most of these low-level offenses involve drugs or property crimes.⁴⁶ These drug and property crimes often operate as disqualifying offenses for HHAs.⁴⁷

There is also evidence that women with criminal records are treated more negatively by employers than men with criminal records. Women who have been incarcerated have lower job rates than men who have been incarcerated.⁴⁸ One study found that upon release, men were likely to be working full-time in skilled manual trades while released women were working part-time in retail or food services.⁴⁹

This same gender disparity seems to exist for online applications. One recent study found that for those submitting an online application for an entry-level position, being incarcerated does not influence an employer’s response to men as much as it does for woman.⁵⁰ The authors attributed this difference to the fact that “women with a prison record are seen as having committed two offenses, one against the law and one against social expectations of how women are supposed to behave.”⁵¹ By contrast, incarcerated men do not suffer this same “punishment.”⁵²

This disparate treatment is troubling given the social science

⁴⁴ Jesse Krohn & Jamie Gullen, *Mothers in the Margins: Addressing the Consequences of Criminal Records for Young Mothers of Color*, 46 U. BALT. L. REV. 237, 245 (2017).

⁴⁵ Krohn & Gullen, *supra* note 44, at 241.

⁴⁶ Krohn & Gullen, *supra* note 44, at 243.

⁴⁷ See *infra* note 69.

⁴⁸ Denver et al., *supra* note 4, at 177.

⁴⁹ NANCY G. LA VIGNE, LISA E. BROOKS & TRACEY L. SHOLLENBERGER, URBAN INST., WOMEN ON THE OUTSIDE: UNDERSTANDING THE EXPERIENCES OF FEMALE PRISONERS RETURNING TO HOUSTON, TEXAS 80 (2009), <https://www.urban.org/sites/default/files/publication/30401/411902-Women-on-the-Outside-Understanding-the-Experiences-of-Female-Prisoners-Returning-to-Houston-Texas.PDF>.

⁵⁰ SCOTT H. DECKER, Cassia Spohn, Natalie R. Ortiz, & Eric Hedberg, CRIMINAL STIGMA, RACE, GENDER AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT 57 (2014), <https://www.ncjrs.gov/pdffiles1/nij/grants/244756.pdf> (final report for U.S. Dep’t of Just. Award No. 2010-MU-MU-0004). The study found a distinct difference in the employer call backs based on gender: men would have been called back at a 57% rate, and women at only 30%. Decker et al., *supra* note 50, at 57.

⁵¹ Decker et al., *supra* note 50, at 57.

⁵² Decker et al., *supra* note 50, at 57.

around women's desistance from crime versus their male counterparts. The "transition from adolescence into adulthood is associated with desistance for women, but not for men, meaning that women desist earlier than men do, typically as a result of important life transition events."⁵³ Even though women abandon their criminal behavior earlier than men, they still suffer the disproportionate effect of having a criminal record.

The background checks and resulting disqualifications may have another, more personal, consequence for HHAs. Disqualification based on a criminal record may eliminate likely caregivers who are given the legal responsibility to care for other family members. "The exclusion of family members and legally responsible relatives as paid workers based on a criminal records check may clash with daily realities. Presumably, family members already have a relationship with the individual and may currently be providing informal assistance that will persist, regardless of criminal findings."⁵⁴

The background checks do limit the pool of applicants for positions in the health care field. In January 2012, The Department of Health and Human Services, Office of Inspector General, released a report reflecting a survey of administrators hiring long-term-care employees.⁵⁵ In its report, "twenty-three percent of administrators believed that their organizations' background check procedures reduced the pool of prospective employees."⁵⁶ Additionally, the administrators recognized some potential employees may not even apply for the job because they learn there is a background search process.⁵⁷ They recognize that their convictions might, rightly or wrongly, be an impediment to finding employment as a home health aide.⁵⁸

This belief is confirmed by work done at the University of Akron

⁵³Denver et al., *supra* note 4, at 197.

⁵⁴SARA GALANTOWICZ, SUZANNE CRISP, NAOMI KARP & JEAN ACCIUS, AARP PUB. POL'Y INST. SAFE AT HOME? DEVELOPING EFFECTIVE CRIMINAL BACKGROUND CHECKS AND OTHER SCREENING POLICIES FOR HOME CARE 27 (2010) ("[D]ata on elder abuse show that the most common category of abusers is family members. Most of the common law rules granting parental and spousal immunity in abuse cases have been overruled. Family members excluded from paid employment due to criminal convictions may well continue to have informal direct access to the program participant.").

⁵⁵Stuart Wright, Deputy Inspector General for Evaluations and Inspections, Dep't of Health and Hum. Serv., Memorandum Report: Nationwide Program for National and State Background Checks for Long-Term-Care Employees—Results of Long-Term-Care Provider Administrator Survey, OEI-07-10-00421, (Jan. 19, 2012), <https://oig.hhs.gov/oei/reports/oei-07-10-00421.pdf> [hereinafter "Wright memo"].

⁵⁶Wright memo, *supra* note 55, at 2.

⁵⁷Wright memo, *supra* note 55, at 2.

⁵⁸For a further discussion of disqualifying convictions for HHAs, see *infra* notes 64–98 and accompanying text.

School of Law (UA). UA hosts a free monthly reentry clinic to assist job applicants with remedies to ameliorate the collateral consequences of their criminal convictions.⁵⁹ One remedy the clinic offers is a Certificate of Qualification for Employment (CQE).⁶⁰ The CQE is court-issued and operates to lift mandatory job disqualifications that arise because of a criminal conviction. It permits an employer to consider the HHA applicant on a case-by-case basis. The CQE would allow an HHA to apply for a job where she was disqualified because of her conviction.⁶¹

The largest single group looking for a CQE at the UA clinics are those who want to work in the medical field. Between January 2014 and June 2019, 1,372 people completed a CQE petition with the clinic.⁶² Of those, 235 sought a CQE to work in the medical field. Eighty-five of them, or 5.9%, needed a CQE to help them find employment as a home health aide.⁶³

As this section has demonstrated, if someone with a criminal conviction chooses to work as an HHA, they undoubtedly will face a thorough background screening process. Once the employer finds their conviction, what happens next? The answer is simple: in most states, they may never be able to progress past the application process to prove their worth for the HHA position.

III. HEALTH CARE AND MANDATORY EMPLOYMENT BANS - A STATUTORY OVERVIEW

Thirty-eight states have laws that bar employment for HHAs with a criminal conviction, but there is no consistency across states in the criminal offenses that operate as a mandatory disqualification.⁶⁴ This inconsistency makes it difficult for someone with a criminal offense

⁵⁹ *Reentry Clinic*, UNIV. OF AKRON SCHOOL OF LAW, <https://www.uakron.edu/law/curriculum/clinical-programs/reentry.dot>. The clinic remedies include judicial sealing (OHIO REV. CODE § 2953.32) and a Certificate of Qualification for Employment (OHIO REV. CODE § 2953.25).

⁶⁰ OHIO REV. CODE § 2953.25.

⁶¹ OHIO REV. CODE. § 2953.25. For a further discussion of the CQE, see *infra* notes 124–129 and accompanying text.

⁶² *Reentry Clinic*, *supra* note 59 (charts with clinic statistics on file with author).

⁶³ *Reentry Clinic*, *supra* note 59 (charts with clinic statistics on file with author).

⁶⁴ ALA. CODE § 38-13-4; ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; CAL. HEALTH & SAFETY CODE ANN. § 1522; CONN. GEN. STAT. ANN. § 19A-491d; DEL. CODE ANN. tit. 16, § 1145; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; IND. CODE ANN. 16-27-2-5; IOWA CODE ANN. § 135C.33; KAN. STAT. ANN. § 65-5117; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; ME. REV. STAT. tit. 22, § 1812-G; 105 CODE MASS. REGS. 155.010 G(3); MICH. COMP. LAWS ANN. § 333.20173A; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; NEB. REV. STAT. ANN. § 71-6603; NEV. REV. STAT. ANN. § 449.174; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS.

to assess the obstacles they might encounter in finding HHA employment.

Most states have a statutory list of mandatory disqualifying offenses. Most recognize an expected list of serious disqualifying offenses, but even these offenses are not consistent across the states. Of the thirty-eight states that have identified offenses warranting mandatory disqualification, twenty-six recognize murder⁶⁵ and abuse of a child or the elderly.⁶⁶ Twenty-six states recognize manslaughter as a disqualifying offense⁶⁷ and twenty-five consider sex crime convictions disqualifying as well.⁶⁸ Some, but not all, have identified

tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE 3701-881; OKLA. STAT. ANN. tit. 63, § 1-1947; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842; W. VA. CODE, § 16-49-1; WIS. STAT. § 50.065.

⁶⁵ ALA. CODE § 38-13-4; ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; KAN. STAT. ANN. § 65-5117; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; NEV. REV. STAT. ANN. § 449.174; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE § 3701-881; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842; WIS. STAT. § 50.065.

⁶⁶ ALA. CODE § 38-13-4; ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; CAL. HEALTH & SAFETY CODE ANN. § 1522; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; IND. CODE ANN. 16-27-2-5; KAN. STAT. ANN. § 65-5117; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; ME. REV. STAT. TIT. 22, § 1812-G; 105 CODE MASS. REGS. 155.010 G(3); MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; NEV. REV. STAT. ANN. § 449.174; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; OHIO ADMIN. CODE § 3701-881; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WIS. STAT. § 50.065.

⁶⁷ ALA. CODE § 38-13-4; ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; KAN. STAT. ANN. § 65-5117; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; NEV. REV. STAT. ANN. § 449.174; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE 3701-881; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842; WIS. STAT. § 50.065.

⁶⁸ ALA. CODE § 38-13-4; ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; CAL. HEALTH & SAFETY CODE ANN. § 1522; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; 225 ILL. COMP. STAT. ANN. 46; KAN. STAT. ANN. § 65-5117; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN.

as disqualifying offenses assault,⁶⁹ kidnapping,⁷⁰ arson,⁷¹ rape,⁷² robbery,⁷³ and the sale of a controlled substance.⁷⁴

§ 192.2495; NEV. REV. STAT. ANN. § 449.174; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE 3701-881; OR. ADMIN. R. 333-027-0064; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842; WIS. STAT. § 50.065.

⁶⁹Twenty-one states recognize assault as a disqualifying offense. ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; 225 ILL. COMP. STAT. ANN. 46; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; NEV. REV. STAT. ANN. § 449.174; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE 3701-881; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842. But the states do not treat all assault convictions the same. While most of the twenty-two states require it to be a felony, three states—Arizona, Arkansas and North Carolina—would find an assault misdemeanor conviction enough to warrant a permanent employment disqualification.

⁷⁰Twenty states recognize kidnapping as a disqualifying offense. ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OHIO ADMIN. CODE 3701-881; OR. ADMIN. R. 333-027-0064; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842.

⁷¹Nineteen states recognize arson as a disqualifying offense. ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; LA. STAT. ANN. § 40:1203.3; MINN. STAT. ANN. § 245C.15; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842.

⁷²Nineteen states recognize rape as a disqualifying offense. ALA. CODE § 38-13-4; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; CAL. HEALTH & SAFETY CODE ANN. § 1522; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; IND. CODE ANN. 16-27-2-5; KAN. STAT. ANN. § 65-5117; 902 KY. ADMIN. REGS. § 20:081; MISS. CODE ANN. § 43-11-13; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 250; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842; WISCONSIN, WIS. STAT. § 50.065.

⁷³Seventeen states recognize robbery as a disqualifying offense. ALASKA ADMIN. CODE tit. 7, § 10.905; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; 225 ILL. COMP. STAT. ANN. 46; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37; UTAH ADMIN. CODE R432-35; VA. CODE ANN. § 32.1-162.9:1; WASH. REV. CODE ANN. § 43.43.842.

States do not limit mandatory employment disqualification to only the most serious offenses. The state-identified bars are plentiful and far-ranging; they include more than forty offenses.⁷⁵ For example, some states prohibit an employer from hiring an HHA if they have been convicted of criminal damaging,⁷⁶ drug possession,⁷⁷ theft,⁷⁸ or prostitution.⁷⁹

These offenses—criminal damaging, drug possession, theft, and prostitution, as well as assault—disproportionately impact African-American HHA job candidates. African-Americans get arrested at a higher rate for these offenses.⁸⁰ According to a recent study, the arrest rate for African-Americans was twice that of whites for drug possession, simple assault, theft, and vandalism.⁸¹ It also found the arrest rate for prostitution was five times higher for African-Americans

⁷⁴Sixteen states recognize sale of a controlled substance as a disqualifying offense. ALA. CODE § 38-13-4; ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; 225 ILL. COMP. STAT. ANN. 46; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; R.I. GEN. LAWS § 23-17-37; WASH. REV. CODE ANN. § 43.43.842.

⁷⁵The bars include the following crimes: battery, burglary, child endangering/neglect, child abandonment, computer crimes, coercion, cruelty to animals, criminal damaging, crimes against a child, driving while intoxicated, domestic violence, escape, failure to report abuse of elderly, forgery, firearms, fraud/money laundering/extortion, false imprisonment, gang activity, human trafficking, indecency, incest, identity theft, kidnapping, Medicaid/Medicare fraud, negligent homicide, drug possession, prostitution, promoting prostitution, resisting arrest, riot, stalking, threatening or intimidating, theft, voyeurism, welfare fraud, and offenses in 42 U.S.C.A. § 1320a-7. See *supra* note 64.

⁷⁶ARIZ. REV. STAT. § 41-1758.03; ARK. CODE ANN. § 20-38-105.

⁷⁷ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE ANN. § 20-38-105; HAWAII REV. STAT. ANN. § 321-15.2; 902 KY. ADMIN. REGS. § 20:081; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; R.I. GEN. LAWS § 23-17-37.

⁷⁸ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE ANN. § 20-38-105; FLA. STAT. ANN. § 435.04; HAWAII REV. STAT. ANN. § 321-15.2; 225 ILL. COMP. STAT. ANN. 46; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.2; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064; R.I. GEN. LAWS § 23-17-37.

⁷⁹ARIZ. REV. STAT. ANN. § 41-1758.03; ARK. CODE ANN. § 20-38-105; FLA. STAT. ANN. § 435.04; IDAHO ADMIN. CODE R. 16.05.06.210; 225 ILL. COMP. STAT. ANN. 46; MINN. STAT. ANN. § 245C.15; N.C. GEN. STAT. ANN. § 131E-265; UTAH ADMIN. CODE R432-35; VT. ADMIN. CODE 12-4-205:5; WASH. REV. CODE ANN. § 43.43.842.

⁸⁰Megan Stevenson & Sandra Mayson, *The Scale of Misdemeanor Justice*, 98 B.U. L. REV. 731, 769 (2018).

⁸¹Stevenson & Mayson, *supra* note 80, at 769.

than for whites.⁸² A higher arrest rate logically results in higher conviction rates for African-Americans for these offenses. As one author noted, “barriers, such as offense-based disqualifications, rest on a shaky foundation—a criminal justice system born of systemic racism.”⁸³

Even if an HHA has mitigating circumstances that can explain her disqualifying conviction, states are inconsistent in allowing the applicant to offer any evidence of rehabilitation. Twenty states provide some process for an applicant to offer evidence of rehabilitation and mitigating circumstances to show their worthiness for the position, notwithstanding their conviction.⁸⁴ These states consider a variety of factors that include the circumstances and seriousness of the offense,⁸⁵ the elapsed time since the offense occurred,⁸⁶ the age of the person at the time of the offense,⁸⁷ the age and level of harm to the

⁸²Stevenson & Mayson, *supra* note 80, at 759.

⁸³William J. Wilson, *Disciplinary Guidelines for Applicants and Licensees with Criminal Histories: The Need for Uniformity*, 8 J. NURSING REG. 49, 58 (2017). Race affects employment decisions for those with criminal convictions. In 2012, the Equal Employment Opportunity Commission (EEOC) issued a guidance on the use of convictions in employment decisions. The EEOC stated that, as the underpinning for the guidance, “[n]ational data supports a finding that criminal record exclusions have a disparate impact based on race and national origin.” EEOC, *Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* 15 (Apr. 25, 2012), https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

⁸⁴ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; FLA. STAT. ANN. § 435.07; 225 ILL. COMP. STAT. ANN. 46/40; IOWA CODE ANN. § 135C.33; KAN. STAT. ANN. § 65-5117; ME. REV. STAT. tit. 22, § 1812-G; MINN. STAT. ANN. § 245C.22; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.M. STAT. ANN. § 29-17-5; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OKLA. STAT. ANN. tit. 63, § 1-1947; OR. ADMIN. R. 333-027-0064; UTAH ADMIN. CODE R432-35; W.VA. CODE, § 16-49-5.

⁸⁵ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; FLA. STAT. ANN. § 435.07; 225 ILL. COMP. STAT. ANN. 46/40; IOWA CODE ANN. § 135C.33; MINN. STAT. ANN. § 245C.22; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064; UTAH ADMIN. CODE R432-35.

⁸⁶ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; FLA. STAT. ANN. § 435.07; IOWA CODE ANN. § 135C.33; KAN. STAT. ANN. § 65-5117; MINN. STAT. ANN. § 245C.22; MISS. CODE ANN. § 43-11-13; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OKLA. STAT. ANN. tit. 63, § 1-1947; OR. ADMIN. R. 333-027-0064; UTAH ADMIN. CODE R432-35.

⁸⁷ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; 225 ILL. COMP. STAT. ANN. 46/40; MISS. CODE ANN. § 43-11-13; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064.

victim,⁸⁸ and the degree of the applicant's participation in the offense.⁸⁹ A few states require the HHA to provide their entire criminal record,⁹⁰ their personal circumstances that may have led to committing the offense,⁹¹ and any evidence of rehabilitation including treatment, proof of employment, schooling, and letters of recommendation.⁹² Other states look for information that links the conviction to the specific position the HHA seeks, and the potential harm to patients.⁹³ Two states specifically require the applicant to offer evidence that the conviction information is inaccurate.⁹⁴

Unfortunately, in sixteen states, there are true permanent disqualifying convictions. These states offer no process that allows an HHA to offer mitigating evidence for their disqualifying offenses.⁹⁵ This prevents the applicant from offering any proof of rehabilitation or redemption that might make them a good candidate for the position.

Additionally, in fourteen states, if the employer hires someone with a permanently disqualifying conviction, they may face civil or criminal

⁸⁸FLA. STAT. ANN. § 435.07; MINN. STAT. ANN. § 245C.22; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3.

⁸⁹ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103.

⁹⁰ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; IOWA CODE ANN. § 135C.33; MINN. STAT. ANN. § 245C.22; N.J. STAT. ANN. § 45:11-24.3; UTAH ADMIN. CODE R432-35.

⁹¹ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; KAN. STAT. ANN. § 65-5117; MINN. STAT. ANN. § 245C.22; N.J. STAT. ANN. § 45:11-24.3.

⁹²ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; ARIZ. REV. STAT. ANN. § 41-619.55; ARK. CODE ANN. § 17-1-103; FLA. STAT. ANN. § 435.07; 225 ILL. COMP. STAT. ANN. 46/40; IOWA CODE ANN. § 135C.33; KAN. STAT. ANN. § 65-5117; ME. REV. STAT. TIT. 22, § 1812-G; MINN. STAT. ANN. § 245C.22; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.C. GEN. STAT. ANN. § 131E-265; OKLA. STAT. ANN. tit. 63, § 1-1947; OR. ADMIN. R. 333-027-0064; UTAH ADMIN. CODE R432-35; W.VA. CODE, § 16-49-5.

⁹³ALA. CODE § 38-13-7; ALASKA ADMIN. CODE tit. 7, § 10.930; FLA. STAT. ANN. § 435.07; 225 ILL. COMP. STAT. ANN. 46/40; KAN. STAT. ANN. § 65-5117; MISS. CODE ANN. § 43-11-13; MO. REV. STAT. ANN. § 192.2495; N.J. STAT. ANN. § 45:11-24.3; N.Y. COMP. CODES, R. & REGS. tit. 10, § 402.7; N.C. GEN. STAT. ANN. § 131E-265; OR. ADMIN. R. 333-027-0064.

⁹⁴N.J. STAT. ANN. § 45:11-24.3 AND OKLA. STAT. ANN. tit. 63, § 1-1947.

⁹⁵CAL. HEALTH & SAFETY CODE ANN. § 1522; CONN. GEN. STAT. ANN. § 19A-491D; DEL. CODE ANN. tit. 16, § 1145; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; IND. CODE ANN. 16-27-2; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; 105 CODE MASS. REGS. 155.010 G(3); MICH. COMP. LAWS ANN. § 333.20173A; NEB. REV. STAT. ANN. § 71-6603; NEV. REV. STAT. ANN. § 449.174; OHIO REV. CODE ANN. § 3701.881; R.I. GEN. LAWS § 23-17-37; TEX. HEALTH & SAFETY CODE ANN. § 142.011; AND VA. CODE ANN. § 32.1-162.9:1.

sanctions.⁹⁶ These states impose administrative penalties on an employer that includes loss of a license or monetary fines.⁹⁷ In three states, employers can be criminally charged for hiring someone with a disqualifying offense.⁹⁸

IV. OHIO—A MODEL OF THE PROBLEM

Ohio is one of the sixteen states that has permanently disqualifying offenses for HHAs.⁹⁹ These permanent disqualifiers exist for an HHA who wants to work in any home or community-based service in an Ohio Medicaid-administered waiver program.¹⁰⁰ The need is great for HHAs in these programs because nearly 100,000 Ohioans currently receive services under these programs.¹⁰¹

For these HHA positions, Ohio has an offense “tier” system that determines employment eligibility. The tier one offenses operate as permanent exclusions for any position. Twenty-nine offenses are permanent disqualifiers.¹⁰² If convicted of one of these offenses, the

⁹⁶ ARK. CODE ANN. § 20-38-107 (administrative penalties); CAL. HEALTH & SAFETY CODE ANN. § 1522 (civil penalties of \$100 per day); COLO. REV. STAT. ANN. § 25-27.5-103 (may revoke registration of home care agency); HAWAII REV. STAT. ANN. § 321-15.2 (may revoke, suspend, or deny an application for health care facility); 225 ILL. COMP. STAT. ANN. 46/33(i) (fine up to \$500.00); IND. CODE ANN. § 16-27-2-7 (administrative penalties); NEV. REV. STAT. ANN. § 449.174 (may deny, suspend or revoke a license for the agency); N.J. STAT. ANN. § 45:11-24.9 (fine up to \$1000.00); N.M. STAT. ANN. § 29-17-5(L) (administrative sanctions and penalties); OR. ADMIN. R. 333-027-0185 (license suspension and revocation); R.I. GEN. LAWS § 23-17-34 (revoke registration of employer); S.C. CODE ANN. § 44-7-2950 (fines of \$100.00 to \$500.00); UTAH ADMIN. CODE R432-35 (monetary penalties); W.VA. CODE, § 16-49-9 (monetary penalties).

⁹⁷ See sources cited *supra* note 96.

⁹⁸ MICH. COMP. LAWS ANN. § 333.20173a(12) (misdemeanor, may be imprisoned up to one year); MO. REV. STAT. ANN. § 192.2495(6) (class A misdemeanor, may be imprisoned up to one year); OKLA. STAT. ANN. tit. 63, § 1-1947 (misdemeanor, imprisoned no more than 30 days).

⁹⁹ Ohio is one of the leaders in the country with occupational licensing laws that contain mandatory restrictions for people with criminal records. The others are Florida, Indiana, New Hampshire, and Texas. RODRIGUEZ & AVERY, *supra* note 23, at 11.

¹⁰⁰ “Medicaid waivers allow individuals with disabilities and chronic conditions to receive care in their homes and communities rather than in long-term care facilities, hospitals or intermediate care facilities. These waivers also allow individuals to have more control over their care and remain active in their community.” OHIO DEP’T OF MEDICARE, HCSB WAIVERS, <https://www.medicaid.ohio.gov/FOR-OHIOANS/Programs/HCBS-Waivers>. For a full description of the programs see *infra* note 101.

¹⁰¹ OHIO DEP’T OF MEDICAID, OHIO MEDICAID WAIVER COMPARISON CHART—ENROLLMENT FIGURES FOR DECEMBER 2018, <https://www.medicaid.ohio.gov/Portals/0/For%20Ohioans/Programs/Waivers/HCSBWaivers/2018/WaiverComparison-12.pdf>.

¹⁰² OHIO ADMIN. CODE 5160-45-11 (aggravated murder, murder, voluntary manslaughter, felonious assault, permitting child abuse, failing to provide for a

applicant has no ability to offer any mitigating evidence about the circumstances of the offense or their rehabilitation.

Thirty offenses are labeled as tier two offenses carrying a ten-year period of exclusion for employment.¹⁰³ Twenty-five tier-three offenses prohibit employment for seven years.¹⁰⁴ Forty-one tier four offenses have a five-year disqualification period.¹⁰⁵ Only four offenses have

functionally impaired person, patient abuse or neglect, patient endangerment, kidnapping, abduction, human trafficking, unlawful conduct with respect to documents, rape, sexual battery, unlawful sexual conduct with a minor, gross sexual imposition, sexual imposition, importuning, voyeurism, felonious sexual penetration, disseminating matter harmful to juveniles, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance, soliciting or providing support act of terrorism, making terroristic threats, terrorism and Medicaid fraud). Applicants are also permanently disqualified if convicted of conspiracy, attempt, or complicity of one of the offenses. OHIO ADMIN. CODE 5160-45-11.

¹⁰³ OHIO ADMIN. CODE 5160-45-11 (involuntary manslaughter, reckless homicide, child stealing, child enticement, extortion, compelling prostitution, enticement or solicitation to patronize a prostitute, aggravated arson, arson, aggravated robbery, aggravated burglary, illegal use of SNAP or WIC program benefits, worker's compensation fraud, identity fraud, aggravated riot, carrying concealed weapons, illegally conveyance or possession of a dangerous ordinance in a school safety zone or courthouse, having weapons under a disability, improperly discharging a firearm at or into a habitation or school or a prohibited premises, improperly furnishing firearms to minor, engaging in a pattern of corrupt activity, participating in a criminal gang, corrupting another with drugs, trafficking in drugs, illegal manufacture of drugs, illegal assembly or possession of chemicals for the manufacture of drugs, and placing harmful or hazardous objections in food). A conviction of conspiracy, attempt, or complicity of one of the listed offenses is also a tier two offense. OHIO ADMIN. CODE 5160-45-11.

¹⁰⁴ OHIO ADMIN. CODE 5160-45-11 (cruelty to animals, prohibitions concerning companion animals, aggravated assault, aggravated menacing, menacing by stalking, coercion, disrupting public services, robbery, burglary, insurance fraud, inciting to violence, riot, inducing panic, endangering children, domestic violence, intimidation, perjury, falsification, escape, aiding escape, illegal conveyance of weapons onto grounds of detention facility or institution, drug trafficking, illegal administration of anabolic steroids, tampering with drugs, and ethnic intimidation). Complicity, attempt, or conspiracy of any of the listed offense also qualifies as a tier three disqualification. OHIO ADMIN. CODE 5160-45-11.

¹⁰⁵ OHIO ADMIN. CODE 5160-45-11 (assault, menacing, public indecency, soliciting, prostitution, deception to obtain matter harmful to juveniles, breaking and entering, theft, unauthorized use of a vehicle, computer, cable, or telecommunication property, telecommunication fraud, passing bad checks, misuse of credit cards, forgery, criminal simulation, defrauding a rental agency, tampering with records, securing writings by deception, impersonating an officer, unlawful display of law enforcement emblem, defrauding creditors, receiving stolen property, unlawful abortion, unlawful abortion upon a minor, unlawful distribution of an abortion-inducing drug, interference with custody, contributing to the unruliness or delinquency of a child, tampering with evidence, compounding a crime, disclosure of confidential information, obstructing justice, assaulting or harassing a police dog, horse, or service animal, impersonation of a peace officer, illegal administration, dispensing, selling, using or

no waiting period: non-support of dependents, minor drug possession, drug paraphernalia and illegal use or possession of marijuana drug paraphernalia.¹⁰⁶

Disqualifications in each tier do not align neatly with the seriousness of the offense as defined by Ohio law. Although the Ohio legislature has categorized, by statute, the seriousness of Ohio offenses by felony or misdemeanor, the administrative agency (Ohio Department of Medicaid (ODM)) tasked with identifying Ohio disqualifying offenses for HHAs has not used this same measure.¹⁰⁷ Rather, it appears that ODM has sorted through the criminal statutes to determine independently the years of disqualification, or to determine the offense is permanently disqualifying. A review of the ODM disqualifying offenses reveals a patchwork of offenses, with no corresponding connection to the offenses' seriousness as defined by Ohio law.

In the tier one offense category, the permanent disqualifications for employment, twenty offenses are felonies, eight are either felonies or misdemeanors depending on the circumstances, and the final offense is a misdemeanor under Ohio law.¹⁰⁸

For tier two—where employment is forbidden for ten years—felonies constitute twenty-four of the offenses, and six of those can be misdemeanors.¹⁰⁹ The seven-year exclusionary period in tier three contains thirteen felonies, eight offenses that are felonies or a

possessing any dangerous veterinary drug, drug possession, permitting drug abuse, deception to obtain a dangerous drug, illegal processing of drug documents, illegal dispensing of drug samples, unlawful purchase or sale of pseudoephedrine). Like the other tiers, conviction of complicity, attempt, or conspiracy of the listed offenses is also a tier four offense. OHIO ADMIN. CODE 5160-45-11.

¹⁰⁶OHIO ADMIN. CODE 5160-45-11.

¹⁰⁷In Ohio, a felony is an offense where the punishment results in imprisonment for more than one year. OHIO REV. CODE § 2901.02(E). Ohio law defines a misdemeanor as an offense where the punishment is less than one year in prison. OHIO REV. CODE § 2901.02(F).

¹⁰⁸OHIO ADMIN. CODE 5160-45-11(C). The felony offenses are aggravated murder, murder, voluntary manslaughter, felonious assault, permitting child abuse, kidnapping, abduction, human trafficking, unlawful conduct with respect to documents, rape, sexual battery, gross sexual imposition, importuning, felonious sexual penetration, pandering obscenity, pandering obscenity involving a minor, pandering sexually oriented matter involving a minor, illegal use of a minor in nudity-oriented material or performance, soliciting or providing support for act of terrorism, making terroristic threats and terrorism. The offenses that can be a felony or misdemeanor are failing to provide for a functionally impaired person, patient abuse or neglect, patient endangerment, unlawful sexual conduct with a minor, voyeurism, disseminating matter harmful to juveniles, and Medicaid fraud. The misdemeanor offense is sexual imposition.

¹⁰⁹OHIO ADMIN. CODE 5160-45-11(D). The felony offenses are involuntary manslaughter, reckless homicide, child stealing, extortion, compelling prostitution, promoting prostitution, aggravated arson, arson, aggravated robber, aggravated

misdemeanor, and four that are misdemeanors.¹¹⁰ The final five-year period lists nine felonies, twenty-three felony or misdemeanor offenses, and nine misdemeanors.¹¹¹

Even though the tiers identify offenses and their disqualifying years—either a permanent, ten, seven or five-year period—the ODM has recognized that it will allow those in all the categories, except the permanent disqualifiers—to offer evidence of rehabilitation. This evidence of rehabilitation can take one of three forms: a pardon, a

burglary, illegal use of SNAP or WIC benefits, identity fraud, aggravated riot, illegal conveyance or possession of deadly weapon or dangerous ordnance in a school safety zone or illegal possession of an object indistinguishable from a firearm in a school safety zone, illegal conveyance, possession, or control of deadly weapon or ordnance into courthouse, having weapons while under a disability, improperly discharging a firearm at or into a habitation or school, improperly furnishing firearms to a minor, engaging in a pattern of corrupt activity, participating in a criminal gang, corrupting another with drugs, trafficking in drugs, illegal manufacture of drugs or cultivation of marijuana, and the illegal assembly or possession of chemicals for the manufacture of drugs. The offenses that can be a felony or misdemeanor are child enticement, enticement or solicitation to patronize a prostitute, procurement of a prostitute for another, carrying concealed weapons and discharge of firearm on or near prohibited premises. The misdemeanor offense is placing harmful or hazardous objects in food or confection.

¹¹⁰OHIO ADMIN. CODE 5160-45-11(E). The felony offenses are aggravated assault, disrupting public services, robbery, burglary, intimidation, perjury, aiding escape or resistance to lawful authority, illegal conveyance of weapons, drugs or other prohibited items onto the grounds of a detention facility or institution, funding drug trafficking, illegal administration or distribution of anabolic steroids, and tampering with drugs. The offenses that can be a felony or misdemeanor are prohibitions concerning companion animals, aggravated menacing, menacing by stalking, insurance fraud, inciting to violence, inducing panic, endangering children, domestic violence, falsification, escape and ethnic intimidation. The misdemeanor offenses are cruelty to animals, and coercion.

¹¹¹OHIO ADMIN. CODE 5160-45-11(F). The felony offenses are breaking and entering, telecommunication fraud, forgery, unlawful distribution of an abortion-inducing drug, tampering with evidence, illegal administration, dispensing, distribution, manufacture, possession, selling or using of any dangerous veterinary drug, deception to obtain a dangerous drug, illegal processing of drug documents, and illegal dispensing of drug samples. The offenses that can be a felony or misdemeanor are assault, menacing, soliciting, prostitution, theft, unauthorized use a vehicle, unauthorized use of computer, cable or telecommunication property, passing bad checks, misuse of credit cards, criminal simulation, defrauding a rental agency or hostelry, tampering with records, securing writings by deception, defrauding creditors, receiving stolen property, unlawful abortion of a minor, interference with custody, contributing to the unruliness or delinquency of a child, obstructing justice, assaulting or harassing a police dog, horse or service animal, impersonation of a peace officer, drug possession, and permitting drug abuse. The misdemeanor offenses are public indecency, deception to obtain matter harmful to juveniles, personating an officer, unlawful display of law enforcement emblem, unlawful abortion, compounding a crime, disclosure of confidential information, unlawful purchase of pseudoephedrine product and unlawful sale of pseudoephedrine product.

Certificate of Achievement for Employability (CAE) or a Certificate of Qualification for Employment (CQE).¹¹²

The first two means of demonstrating rehabilitation—pardon and CAE—are very limited Ohio remedies and do not offer a viable path to employment for those who have disqualifying convictions. The pardon process in Ohio can be years long and few are pardoned.¹¹³ It is not an efficient remedy for someone seeking immediate employment.¹¹⁴

The CAE also has limitations as a measure of rehabilitation. The Ohio legislature created the CAE in 2011. It grants the Ohio Department of Rehabilitation and Correction (DRC), or the Ohio Parole Board, the power to issue a CAE.¹¹⁵ The CAE “grants the prisoner relief from one or more mandatory civil impacts that would affect a potential job within a field in which the prisoner trained as part of the prisoner’s in-person vocational program.”¹¹⁶ The prisoner granted a CAE may use it with any Ohio licensing board to lift mandatory disqualifications for the license.¹¹⁷ She may also present a CAE to an employer if her conviction operates as a mandatory disqualification for an employment position.¹¹⁸

The CAE is only available to those who are or were incarcerated in an Ohio prison or are under post-release control from prison.¹¹⁹ Additionally, to receive a CAE, the person must have completed a defined list of programming.¹²⁰ The CAE is not available once you are released from prison or DRC supervision.

¹¹²OHIO ADMIN. CODE 5160-45-11(H) to (I). The CAE remedy is codified in OHIO REV. CODE § 2961.22. The CQE is codified in OHIO REV. CODE § 2953.25.

¹¹³For a discussion of Ohio’s pardon process, see Sahl, *supra* note 21.

¹¹⁴Ohio is not alone in the pardon process failing to offer any relief for employment consequences. State pardon processes have been notoriously lacking for those seeking a pardon. See MARGARET COLGATE LOVE, JENNY ROBERTS & WAYNE LOGAN, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTION: LAW, POLICY, AND PRACTICE 516–20 (2018).

¹¹⁵OHIO REV. CODE § 2961.22(C).

¹¹⁶OHIO REV. CODE § 2961.22(C).

¹¹⁷OHIO REV. CODE § 2961.23(A).

¹¹⁸OHIO REV. CODE § 2961.23(B). The CAE also protects the employer from a negligent hiring claim.

¹¹⁹OHIO REV. CODE § 2961.22(A) to (B).

¹²⁰The programming includes the following: 1) Vocational programs: Career technical, apprenticeship or advanced job training. 2) Cognitive or behavioral improvement programs: thinking for a change or a substantially equivalent program available in the community; therapeutic community; intensive outpatient treatment program; succeeding at home or a substantially equivalent program available in the community; or an alcohol and drug addiction partnership treatment (ADAPT) or a substantially equivalent program available in the community. 3) Completed one hundred twenty hours of community service hours while incarcerated, under supervi-

The actual number of CAEs earned by Ohioans underscores its limited reach. Since 2012, Ohio has had an average yearly prison population of almost 44,000 prisoners.¹²¹ It ranks as one of the top five states in the number of people incarcerated.¹²² Notwithstanding the large number of people in Ohio prisons, since July 2012, only 736 inmates have earned a CAE.¹²³

The last remedy available for those in Ohio who face employment disqualification is the CQE.¹²⁴ The CQE, granted by an Ohio trial court, converts mandatory employment and licensing disqualifications to discretionary disqualifications.¹²⁵ It allows the employer to consider an applicant based on their merit for the position, not based on the fact they have a criminal conviction. If an employer hires someone who is a CQE recipient, the employer can use the CQE as a defense to any subsequent negligent hiring claim.¹²⁶

Ohio's CQE reaches mandatory disqualifications for Ohio licensing boards.¹²⁷ The statute mandates that all Ohio licensing agencies accept the CQE.¹²⁸ Further, it also provides that "[t]he certificate constitutes a rebuttable presumption that the person's criminal convictions are insufficient evidence that the person is unfit for the license."¹²⁹

But none of Ohio's mitigating remedies—no matter how limited—

sion, or both.; and 4)The offender has demonstrated achievement and rehabilitation while under the department's jurisdiction, as evidenced by the offender accomplishing one or more of the following: Completing a career enhancement program; completing adult basic education (ABE); obtaining a general education diploma (GED); completing pre-GED education; obtaining a high school diploma; completing an anger management course; completing the cage your rage program; completing a stress management program; completing the personal responsibility for violence elimination (PROVE) program; or completing the victim awareness program. OHIO REV. CODE § 2953.193.

¹²¹The specific population by year is as follows: 2012 (50,142); 2013 (49,820); 2014 (50,561); 2015 (50,480); 2016 (50,515); 2017 (50,362); and 2018 (49,512). For a summary of the Ohio prison population, see *Institution Census Reports*, OHIO DEP'T REHAB. & CORRECTION, <https://www.drc.ohio.gov/reports/institution-census>.

¹²²E. Ann Carson, *Prisoners in 2016* (U.S. Dep't of Just. 2018), <https://www.bjs.gov/content/pub/pdf/p16.pdf>.

¹²³Email from Irene Lyons, Office of Reentry and Enterprise Dev., Ohio Dep't Rehab. & Correction, to author (July 26, 2019) (on file with author).

¹²⁴OHIO REV. CODE § 2953.25.

¹²⁵OHIO REV. CODE § 2953.25(D).

¹²⁶OHIO REV. CODE § 2953.25(G).

¹²⁷OHIO REV. CODE § 2953.25(D)(1).

¹²⁸The licensing agency "shall consider on a case-by-case basis whether to grant or deny the issuance or restoration of an occupational license." OHIO REV. CODE § 2953.25(D)(1).

¹²⁹OHIO REV. CODE § 2953.25(D)(2).

are available to those HHAs who have a permanently disqualifying offense. ODM refuses to recognize any of the remedies for such offenses—even though the Ohio legislature has commanded otherwise.¹³⁰ This conflict between Ohio law and the agency's behavior highlights the ongoing problem of employers and licensing agencies rejecting evidence of rehabilitation and redemption.

V. THE COURTS' VIEW ON INDIVIDUALIZED CIRCUMSTANCES AND EMPLOYMENT BANS

Ohio is one of the sixteen states that offers no opportunity for the HHA to overcome a permanently disqualifying offense.¹³¹ Serious concerns arise in these states because there is no opportunity for the HHA applicant to offer proof of rehabilitation and fitness for the position. The critical question is whether HHAs can find any relief if they seek a solution from the courts.

While the United States Supreme Court has not expressly addressed permanent employment bans for HHAs, it has given some guidance on the appropriateness of employment or licensing bans for those with criminal convictions. The Court has recognized the interest someone has in the employment of their choice. In *Greene v. McElroy*, the Court articulated the basic principle that the “right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.”¹³² But the right is not unfettered, especially when the person has been convicted of a criminal offense.¹³³

As early as 1898, the Court recognized the connection between a criminal conviction and the fitness for employment:

¹³⁰ODM will need to reconsider its steadfast refusal to accept the CQE or CAE given the most recent pronouncement by the Ohio legislature. OHIO REV. CODE § 9.78. This newly enacted statute reaffirms the requirement that an agency must take the CQE/CAE for any of the agency's disqualifying convictions. The statute is specific in its command that any disqualification based on a criminal conviction “may be overcome if the individual applying for the license . . . holds a certificate of qualification for employment . . . or a certificate of achievement for employability.” OHIO REV. CODE § 9.78(C)(2).

¹³¹CAL. HEALTH & SAFETY CODE ANN. § 1522; CONN. GEN. STAT. ANN. § 19A-491D; DEL. CODE ANN. tit. 16, § 1145; HAWAII REV. STAT. ANN. § 321-15.2; IDAHO ADMIN. CODE R. 16.05.06.210; IND. CODE ANN. 16-27-2-5; 902 KY. ADMIN. REGS. § 20:081; LA. STAT. ANN. § 40:1203.3; 105 CODE MASS. REGS. 155.010 G(3); MICH. COMP. LAWS ANN. § 333.27013A; NEB. REV. STAT. ANN. § 71-6603; NEV. REV. STAT. ANN. § 449.174; OHIO ADMIN. CODE 3701-881; R.I. GEN. LAWS § 23-17-37; TEXAS, TEX. HEALTH & SAFETY CODE ANN. § 250; VA. CODE ANN. § 32.1-162.9:1.

¹³²*Greene v. McElroy*, 360 U.S. 474, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959).

¹³³*Barletta v. Rilling*, 973 F. Supp. 2d 132, 136 (D. Conn. 2013) (“The right to ‘make a living’ is not a ‘fundamental right’ for either equal protection or substantive due process purposes.”). Those with convictions are not considered a suspect class. *Barletta*, 973 F. Supp. 2d at 136.

It is not open to doubt that the commission of crime, the violation of the penal laws of a State, has some relation to the question of character. It is not, as a rule, the good people who commit a crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule- one having no relation to the subject-matter but is only appealing to a well-recognized fact of human experience. So if the legislature enacts that one who has been convicted of a crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.¹³⁴

In 1954, in *Barsky v. Board of Regents*, the Court explored in more detail what must occur if the legislature allows termination of a professional license based on a criminal conviction.¹³⁵ A New York statute allowed a physician's license to be revoked, suspended, or annulled if he had been convicted of a crime.¹³⁶ The physician could also face discipline by the state licensing board.¹³⁷

The Court recognized the power of the legislature to determine that a criminal conviction constitutes a violation of professional medical standards.¹³⁸ The Court also acknowledged another important power of the legislature—that it was not necessary that the legislature list every crime that could make a physician subject to discipline. “Realizing the importance of high standards of character and law observance on the part of practicing physicians, the State has adopted a flexible procedure to protect the public against the practice of medicine by those convicted of many more kinds and degrees of crime than it can well list specifically.”¹³⁹ The Court's decision gave an imprimatur to allowing broad-based employment restrictions based simply on the conviction of a crime.

The Court's approval of this type of employment restriction came with an important caveat: the recognition that deprivation of employment, and its corresponding liberty interest, requires due process protections. The New York process allowed for notice of the violation

¹³⁴ *Hawker v. People of New York*, 170 U.S. 189, 196, 18 S. Ct. 573, 42 L. Ed. 1002 (1898) (upholding New York's restriction on the practice of medicine for those with felony convictions).

¹³⁵ *Barsky v. Board of Regents of University*, 347 U.S. 442, 74 S. Ct. 650, 98 L. Ed. 829 (1954) (Dr. Barsky was convicted of a misdemeanor for failing to honor a subpoena of the House Un-American Activities Committee).

¹³⁶ *Barsky*, 347 U.S. at 444.

¹³⁷ *Barsky*, 347 U.S. at 444.

¹³⁸ *Barsky*, 347 U.S. at 452.

¹³⁹ *Barsky*, 347 U.S. at 452.

and a hearing process where the person could present evidence.¹⁴⁰ Commenting on this process, the Court stated, “the above provisions, on their face, are well within the degree of reasonableness required to constitute due process of law in a field so permeated with public responsibility as that of health.”¹⁴¹

The Court reinforced its view that due process concerns must be part of employment restrictions in *Schware v. Board of Bar Examiners of New Mexico*.¹⁴² In *Schware*, the Court stated, “[a] State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.”¹⁴³ The Court further explained “[a] State can require high standards of qualification, such as good moral character or proficiency in its law before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant’s fitness or capacity to practice law.”¹⁴⁴ The justices in the concurrence echoed this theme neatly, stating that “[r]efusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause.”¹⁴⁵

The Court seemed to take a different view of employment bans in *DeVeau v. Braisted*.¹⁴⁶ At issue in *DeVeau* was § 8 of the New York Waterfront Commission Act that barred those convicted of a felony from holding union office for five years.¹⁴⁷ Noting the due process concerns raised in the case, the Court looked to the purpose behind the legislation: the specific ill of waterfront corruption that was supported by extensive legislative investigation. “New York was not guessing or indulging in airy assumptions that convicted felons constituted a deleterious influence on the waterfront. It was acting on impressive, if mortifying, evidence that the presence on the

¹⁴⁰ *Barsky*, 347 U.S. at 453.

¹⁴¹ *Barsky*, 347 U.S. at 453.

¹⁴² *Schware v. Board of Bar Exam. of State of N.M.*, 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796, 64 A.L.R.2d 288 (1957) (New Mexico denied Schware the ability to take the bar exam because he lacked “good moral character” on account of having been arrested, but never convicted of a crime.).

¹⁴³ *Schware*, 353 U.S. at 238–39.

¹⁴⁴ *Schware*, 353 U.S. at 239–43 (holding that arrests, without corresponding convictions, do not show bad moral character).

¹⁴⁵ *Schware*, 353 U.S. at 249 (Frankfurter, Clark, and Harlan, J.J., concurring).

¹⁴⁶ *De Veau v. Braisted*, 363 U.S. 144, 80 S. Ct. 1146, 4 L. Ed. 2d 1109, 46 L.R.R.M. (BNA) 2304, 40 Lab. Cas. (CCH) P 66583, 1960 A.M.C. 1043 (1960).

¹⁴⁷ *DeVeau*, 363 U.S. at 157.

waterfront of ex-convicts was an important contributing factor to the corrupt waterfront situation.”¹⁴⁸

The focus on the legislative purpose in the case is critical. There was considerable legislative investigation that tied the employment ban to a well-researched reason. Thus, the legislation was not broad-based or without foundation; it was directed at a specific purpose, identified and investigated by the legislature.

Even more important, the *DeVeau* Court noted another significant argument underlying its due process rationale. Anyone who had a conviction, and faced a ban for a union position, did have two options to present mitigating evidence to allow them to obtain the position. They could show they had received a pardon or had received a certificate of good conduct.¹⁴⁹

This U.S. Supreme Court precedent provides an analytical framework to address states that have permanent employment bans. First, following *DeVeau*, legislatures and administrative agencies imposing an employment ban should have to demonstrate the permanent exclusion has been based on an extensive examination and analysis. There should be clear evidence-based research justifying the disqualification. Second, basic due process principles require that a person be able to present evidence of rehabilitation when faced with a mandatory disqualification.

Pennsylvania has squarely addressed this due process issue in the context of HHA employment bans.¹⁵⁰ In *Peake v. Commonwealth*, the Pennsylvania Commonwealth Court addressed a constitutional challenge to Pennsylvania’s Older Adults Protective Services Act. The Act contained a lifetime employment ban for those working with older adults if they had certain convictions.¹⁵¹ Among those challenging the law was Resources for Human Development, Inc., an agency that operated facilities for patients who suffered from mental illness, developmental disabilities, and chemical dependency.¹⁵² The agency joined the lawsuit because the employment ban negatively impacted

¹⁴⁸ *DeVeau*, 363 U.S. at 159–60.

¹⁴⁹ *DeVeau*, 363 U.S. at 159.

¹⁵⁰ *Peake v. Com.*, 132 A.3d 506 (Pa. Commw. Ct. 2015).

¹⁵¹ *Peake*, 132 A.3d at 511. The offenses included: homicide, aggravated assault, kidnapping, unlawful restraint, rape, sexual assault, involuntary deviate sexual intercourse, indecent assault, indecent exposure, arson, burglary, robbery, theft and related offenses, forgery, security execution of documents by decision, incest, concealing the death of a child, endangering the welfare of children, intimidation of, and retaliation against victims and witnesses, felony prostitution, obscene/sexual materials, corruption of minors, and sexual abuse of children.

¹⁵² *Peake*, 132 A.3d at 515.

its ability “to provide the best possible services to the clients.”¹⁵³ It had hired employees with criminal convictions, and it described those employees as “valuable.”¹⁵⁴

The *Peake* court, citing a prior decision by the Pennsylvania Supreme Court and the Pennsylvania constitution, recognized that individuals in Pennsylvania have a right under the Due Process Clause to “engage in lawful health care occupations.”¹⁵⁵ The court found the lifetime employment ban unconstitutional, striking down an “irrebuttable presumption of unfitness” applied to those with criminal convictions.¹⁵⁶ The *Peake* court found it constitutionally important that the employer be allowed the opportunity to consider whether the person is a good candidate for the job. “Act-covered facilities should not be required to employ a person with a criminal record, but they should have the opportunity to assess the situation and exercise their discretion to employ an applicant found to be sufficiently rehabilitated and a good fit for the job.”¹⁵⁷

More recently, the Washington Supreme Court, in *Fields v. Dep’t of Early Learning*, examined a permanent employment ban for Christal Fields. She was denied employment because she had a 30-year-old attempted second-degree robbery conviction.¹⁵⁸ While Fields was not seeking a job as an HHA, she did want to work with another vulnerable population, children. The court recognized the competing interests in the case—that Fields had “a strong interest in pursuing her chosen profession without arbitrary interference by the State,” and the administrative agency had a “strong interest in protecting children who are taught or cared for in licensed facilities without

¹⁵³ *Peake*, 132 A.3d at 515.

¹⁵⁴ *Peake*, 132 A.3d at 515.

¹⁵⁵ *Peake*, 132 A.3d at 516 (citing *Nixon v. Com.*, 576 Pa. 385, 839 A.2d 277 (2003)).

¹⁵⁶ *Peake*, 132 A.3d at 521.

¹⁵⁷ *Peake*, 132 A.3d at 521. The court also found the statute unconstitutional because it “did not bear a real and substantial relation to the stated goal of protecting older adults from ‘abuse, neglect and abandonment;’ infringed ‘on an interest protected by due process clause of the Pennsylvania constitution;’ and, the ‘statutory irrebuttable presumption is not universally true, as evidenced by the fact that the General Assembly has opted to allow certain individuals with criminal convictions to work in Act-covered facilities.’” *Peake*, 132 A.3d at 521.

¹⁵⁸ *Fields v. Department of Early Learning*, 193 Wash. 2d 36, 434 P.3d 999, 2019 I.E.R. Cas. (BNA) 56690 (2019). Fields argued that “her permanent disqualification based on a 30-year-old attempted second-degree robbery conviction constitutes an arbitrary deprivation of her protected interest in pursuing lawful employment in her chosen field.” *Fields*, 434 P.3d at 11. In addition to the long period since her conviction, Fields also noted that she was twenty-two-years-old when she committed the offense, had been addicted to drugs, homeless and in a violent relationship.

creating undue administrative burdens.”¹⁵⁹ Balancing these competing interests, the court concluded that Fields had the right to an individualized assessment of her particular circumstances by the administrative decisionmakers.¹⁶⁰ Without this individualized review, the court reasoned that the regulations “created an intolerably high risk of depriving Fields of her protected interest in pursuing her chosen, lawful occupation.”¹⁶¹

The recent decisions by the *Peake* and *Fields* courts reveal a hopeful trend in courts—permanent employment disqualifications need to have some rational reason for the disqualification. Just as importantly, the applicant should be given the opportunity to offer mitigating evidence for the disqualifying offense.

Support for allowing mitigating evidence for HHAs comes from other sources as well. In 2010, Congress enacted the Patient Protection and Affordable Care Act.¹⁶² As part of the Act, Congress codified a national and state background check program for employees who would have direct access to patients in a long-term care facility or as a provider.¹⁶³ The program requires that participating states:

[P]rovide an independent process by which a provisional employee or an employee may appeal or dispute the accuracy of the information obtained in a background check performed under the nationwide program, including the specification of criteria for appeals for direct patient access employees found to have disqualifying information which shall include 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.¹⁶⁴

This provision of the statute reflects Congress’s intent that states who participate in the background screening program must allow an opportunity for an HHA applicant to offer mitigating evidence about their disqualifying convictions. There are no exceptions to this mandate.

¹⁵⁹ *Fields*, 434 P.3d at 12.

¹⁶⁰ *Fields*, 434 P.3d at 22.

¹⁶¹ *Fields*, 434 P.3d at 22.

¹⁶² Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in as amended in scattered sections of 15, 26, 29, 30, and 42 U.S.C.A.).

¹⁶³ 42 U.S.C.A. § 1320a-7l. The facilities covered by the act include: a skilled nursing facility; a nursing facility, a home health agency, a provider of hospice care, a long-term care hospital, a provider of personal care services, a provider of adult day care, a residential care provider that provides long-term care, and an intermediate care facility for the mentally retarded. The legislation codified the pilot program authorized under section 307 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, 117 Stat. 2066 (codified as amended in scattered sections of 21 and 42 U.S.C.).

¹⁶⁴ 42 U.S.C.A. § 1320a-7l(a)(4)(B)(iv).

Twenty-five states are participating in the background check program.¹⁶⁵ Of those, nine states currently have permanent disqualifying convictions with no process to offer mitigating evidence, in contravention of the statute.¹⁶⁶ It remains to be seen whether these states will comply with the program requirements.

Other authorities have articulated the importance of individualized employment decisions for those with criminal convictions. In 2012, the Equal Employment Opportunity Commission (EEOC) issued a guidance on the use of convictions in employment decisions.¹⁶⁷ The EEOC iterated that if an employers' policy rejects a job applicant based on a criminal conviction, that rejection must be "job related and consistent with business necessity."¹⁶⁸ To meet this standard, the EEOC concluded that the employer should develop "a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job."¹⁶⁹ The guidance continued with this statement: "[a]lthough Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII."¹⁷⁰ The EEOC also urged individualized assessment in employment decisions because it concluded that a "significant number" of state and federal databases contain incomplete and inaccurate conviction information.¹⁷¹

Similarly, in 2007, the American Bar Association Commission on Effective Criminal Sanctions issued its report entitled *Second Chances in the Criminal Justice System, Alternatives to Incarcera-*

¹⁶⁵ Alaska, California, Connecticut, Delaware, Florida, Georgia, Hawaii Illinois, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, New Mexico, Nevada, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, Utah, and West Virginia. *NBCP State Award Chart*, CTR. MEDICARE & MEDICAID SERV., <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Dowloads/NBCP-State-Award-Chart.pdf>.

¹⁶⁶ California, Connecticut, Delaware, Hawaii, Kentucky, Michigan, Nevada, Ohio and Rhode Island. See *supra* note 95.

¹⁶⁷ EEOC, *supra* note 83, at 15. The Ninth Circuit recently reviewed the enforceability of this guidance. *Texas v. Equal Employment Opportunity Commission*, 933 F.3d 433, 2019 Fair Empl. Prac. Cas. (BNA) 291807 (5th Cir. 2019). The court found that EEOC-issued guidance was a substantive rule and the "EEOC lacks authority to promulgate substantive rules implementing Title VII." 933 F.3d at 451. Accordingly, it concluded that the "EEOC and the Attorney General may not treat the Guidance as binding in any respect." 933 F.3d at 451.

¹⁶⁸ EEOC, *supra* note 83, at 2.

¹⁶⁹ EEOC, *supra* note 83, at 2.

¹⁷⁰ EEOC, *supra* note 83, at 2. The guidance refers to employment discrimination under Title VII of the Civil Rights Act of 1964.

¹⁷¹ EEOC, *supra* note 83, at 5.

tion and Reentry Strategies.¹⁷² One of its recommendations directly related to employment bans for those with criminal convictions. The ABA urged

federal, state, territorial and local governments to require that each government agency, and professional and occupational licensing authority . . . [p]rovide for a case-by-case exemption or waiver process to give persons with a criminal record an opportunity to make a showing of their fitness for the employment or license at issue, and provide a statement of reasons in writing if the opportunity is denied because of the conviction.¹⁷³

“It based its recommendation on social science research showing that employers and landlords are predisposed to reject a person with a criminal record without regard to the actual risk that person may pose, and notwithstanding laws that prohibit unreasonable discrimination against individuals with criminal histories.”¹⁷⁴

This ABA recommendation gained endorsement from national groups including the National Association of Criminal Defense Lawyers, the National District Attorneys Association, and the National Legal Aid and Defender Association.¹⁷⁵

Similarly, in 2015, the Council for State Governments issued a report on the use of criminal records in occupational licensing.¹⁷⁶ In its report, it cited to positive steps states have taken to lessen the impact of criminal convictions on occupational licensing opportunities. One of the features noted was “[p]rohibiting the denial of a license based solely on an applicant’s criminal record unless there is a conviction that directly relates to the occupation.”¹⁷⁷

In 2005, the National Consortium for Justice and Information and Statistics convened a National Task Force on the Criminal Back-

¹⁷²AM. BAR ASS’N, COMM’N ON EFFECTIVE CRIM. SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES (2007), <https://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf> [hereinafter “ABA, SECOND CHANCES”].

¹⁷³ABA, SECOND CHANCES, *supra* note 172, at 26. The ABA commission “based its recommendation on social science research showing that employers and landlords are predisposed to reject a person with a criminal record without regard to the actual risk that person may pose, and notwithstanding laws that prohibit unreasonable discrimination against individuals with criminal histories.” ABA, SECOND CHANCES, *supra* note 172, at 7.

¹⁷⁴ABA, SECOND CHANCES, *supra* note 172, at 7.

¹⁷⁵ABA, SECOND CHANCES, *supra* note 172, at 6.

¹⁷⁶CSG, OCCUPATIONAL LICENSING, *supra* note 7, at 1.

¹⁷⁷CSG, OCCUPATIONAL LICENSING, *supra* note 7, at 2.

grounding of America.¹⁷⁸ The task force consisted of members of federal and state governments as well as private companies, employers, and academics.¹⁷⁹ One of its recommendations was the development of guidelines for those with criminal convictions to address redemption, forgiveness, and rehabilitation.¹⁸⁰ As part of this recommendation, its report stated that it “agreed that a risk management analysis is the appropriate relevancy approach, as opposed to automatic rejection on the basis of a criminal record.”¹⁸¹

Compelling support exists for not permanently disqualifying HHAs based on their convictions alone. Basic notions of fairness dictate that each applicant has the opportunity to present mitigating evidence about their convictions and why they should be hired. Nevertheless, the ever-present question remains, why should employers risk hiring HHAs who have criminal convictions?

VI. WHY GIVE THEM A SECOND CHANCE?

It is problematic for states to have permanent employment bans based solely on criminal convictions because social science research does not support such bans. “[L]ifetime bans for all felony convictions are not consistent with the research about desistance from developmental criminology.”¹⁸² As researchers noted in one study, “we are skeptical that blanket rules based exclusively on whether someone has a criminal record will provide useful information for behavioral predictions.”¹⁸³ This is because “if a person with a criminal record remains crime-free for a period of about 7 years, his or her risk of a new offense is similar to that of a person without any criminal record.”¹⁸⁴ This is consistent with other studies that show arrests, in

¹⁷⁸SEARCH: The Nat’l Consortium for Just. Info. and Statistics, Report of the National Task Force on the Criminal Backgrounding of America (2005), <http://www.search.org/files/pdf/ReportofNTFCBA.pdf> [hereinafter “SEARCH REPORT”].

¹⁷⁹SEARCH REPORT, *supra* note 178, at 2.

¹⁸⁰SEARCH REPORT, *supra* note 178, at 7.

¹⁸¹SEARCH REPORT, *supra* note 178, at 7.

¹⁸²Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483, 485 (2006).

¹⁸³Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQ. 64, 80 (2007). The authors also noted that “decision makers should place information about criminal records into a context that pays close attention to the recency of the criminal records as well as the existence of a criminal record.” Kurlychek et al., *supra* note 182, at 80.

¹⁸⁴Kurlychek et al., *supra* note 182, at 80.

general, occur in the first three years after someone is released from prison.¹⁸⁵

Further, employees with criminal convictions tend to be loyal employees. One recent study of customer service workers with criminal convictions found that “[i]n positions in which turnover is a major labor cost determinant, we find that workers with criminal records have a longer tenure and are less likely to quit their jobs voluntarily than other workers.”¹⁸⁶ Those workers “feel a sense of loyalty or gratitude to an employer who has given them a second chance.”¹⁸⁷ It also found that among the workers it studied, misconduct discharges were “a relatively rare event.”¹⁸⁸

Employment is a key factor in preventing recidivism and increasing the safety of our communities.¹⁸⁹ “Significant predictors of desistance include not only age but also the forming of positive social bonds such as work and marriage.”¹⁹⁰ One recent study in New York examined the recidivism rate for those with criminal convictions who passed background checks to work in certain non-licensed health care jobs.¹⁹¹ The study concluded that the clearance decision permitting them to work reduced recidivism by 2.2 percent over one

¹⁸⁵MARIEL ALPER & MATTHEW R. DUROSE, U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS, SPECIAL REPORT: 2018 UPDATE ON PRISONER RECIDIVISM: A 9-YEAR FOLLOW-UP PERIOD (2005–2014) 1 (2018), <https://www.bjs.gov/content/pub/pdf/18upr9yfup0514.pdf>. A recent study has questioned the methodology used in other studies discussing prisoner recidivism, particularly the “inherent bias of over-representing high-risk offenders.” William Rhodes, Gerald Gaes, Jeremy Luallen, Ryan Kling, Tom Rich, & Michael Shively, *Following Incarceration, Most Released Offenders Never Return to Prison*, 62 CRIME & DELINQ. 1003, 1020 (2016). The study, focusing on seventeen states, examined prisoner recidivism. It concluded that “most offenders who enter and exit prison do not return.” Rhodes et al., *supra* note 185, at 1020.

¹⁸⁶Minor, *supra* note 20, at 1.

¹⁸⁷Minor, *supra* note 20, at 15.

¹⁸⁸Minor, *supra* note 20, at 22.

¹⁸⁹Kurlychek et al., *supra* note 182, at 66 (“[A]n abundance of criminological research suggests that one of the key social bonds that help past offenders lead law-abiding lives is the attainment of stable employment.”); Minor, *supra* note 20, at 3 (“A failure to obtain legitimate employment is one of the strongest correlates of criminal recidivism, and recent evidence suggests that this relation may be causal.”).

¹⁹⁰Kurlychek et al., *supra* note 182, at 69. “Most people with a criminal justice contact at some point early in life actually pose little or no risk of going on to become long-term recidivists.” Kurlychek et al., *supra* note 182, at 488. There is some question by leading authorities on the methodology for determining recidivism; particularly, comparing those who have never offended with those who have. As one article noted, the “literature on redemption demonstrates that most people, even individuals with no criminal history, have at least a slight potential for offending.” Shawn D. Bushway, Paul Nieuwbeerta & Arjan Blokland, *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption*, 49 CRIMINOLOGY 27, 53 (2011).

¹⁹¹Denver et al., *supra* note 4, at 174.

year.¹⁹² Over three years, the decision lead to a 4.2 percent decrease in subsequent arrest.¹⁹³ The most significant result was for men cleared for employment: they were 8.4 percent less likely to be arrested three years after the clearance decision.¹⁹⁴

There is also a lack of evidence-based research in the health-care field that supports hiring decisions based on criminal offenses. Research shows “a general consensus that people with a history of abusing older adults should not be given the opportunity to do so again. Beyond that, the literature is scant.”¹⁹⁵ This lack of literature also exists for HHAs. According to a Department of Health and Human Service’s report, “[t]here is a paucity of literature examining nurse aides and criminal recidivism and propensity to commit abuse.”¹⁹⁶

There is also a lack of evidence-based research supporting employment bans. As one study concluded, the “results of recent social science research have not supported the idea of blanket bans.”¹⁹⁷ Another study reached a similar conclusion: “justification for the inclusion or exclusion of various crimes that constitute states’ lists of disqualifying offenses is unclear, and the lack of consensus across states on this issue illustrates the complexity of making a solid connection between past criminal activity and the proclivity to commit abuse in long-term care settings.”¹⁹⁸

Moreover, employers should be given the discretion to hire HHAs with criminal convictions. A recent survey showed that employers are willing to work with those who have a criminal conviction.¹⁹⁹ In the survey, employers identified their reasons for hiring someone who has a criminal conviction which included a desire to hire the best candidate for the job, to better the community, and to give the

¹⁹²Denver et al., *supra* note 4, at 196.

¹⁹³Denver et al., *supra* note 4, at 196.

¹⁹⁴Denver et al., *supra* note 4, at 176.

¹⁹⁵GALANTOWICZ ET AL, *supra* note 54, at 21. “There has been no robust scholarship on the relationship between general criminal behavior and elder mistreatment. GALANTOWICZ ET AL, *supra* note 54, at v.

¹⁹⁶THE LEWIN GROUP, U.S. DEP’T HEALTH & HUM. SERV. ENSURING A QUALIFIED LONG-TERM CARE WORKFORCE: FROM PRE-EMPLOYMENT SCREENS TO ON-THE-JOB MONITORING 27 (2006) (final report for contract #HHS-100-03-0027).

¹⁹⁷Denver et al., *supra* note 4, at 175–76 (Noting that the research has “supported the idea that individuals with criminal records can be differentiated a priori on the basis of different elements of the criminal history.”).

¹⁹⁸THE LEWIN GROUP, *supra* note 196, at 7.

¹⁹⁹SOC’Y FOR HUM. RES. MGMT. & CHALES KOCH INST., WORKERS WITH CRIMINAL RECORDS 2 (2018) [hereinafter “SHRM/CKI”] (“Large proportions of employees are willing to work with individuals with criminal records. Among managers, 55% are willing, 15% are unwilling, and 29% fall in between. Among non-managers, 51% are willing, 13% are unwilling, and 36% say they are neither willing nor unwilling.”).

applicant a second chance.²⁰⁰ They also report that the “‘quality of hire’ for workers with criminal records is about the same or higher than that of workers without records.”²⁰¹ Additionally, “few managers, non-managers, and HR professionals are concerned that [workers with criminal convictions] will be ineffective employees.”²⁰² Permanently closing the door on this applicant pool does a disservice to the employer and the HHA seeking employment.

VII. A WORKING PLAN—BALANCING RISK WITH THE NEED

It is important to have policies in place allowing qualified HHAs to be considered for positions when appropriate. To do this, we must eliminate permanent employment bans and allow applicants to present mitigating evidence on why they are qualified for the position notwithstanding their convictions.

The United States Supreme Court recognized the importance of mitigating evidence in hiring decisions. In *NASA v. Nelson*,²⁰³ the Court found that it was an appropriate employment-related question to ask if the applicant was receiving treatment or counseling for recent illegal-drug use.²⁰⁴ In finding this question legally appropriate, and the government’s use of treatment and counseling for its hiring decisions appropriate, the Court stated that “this is a reasonable, and indeed a humane, approach, and respondents do not dispute the legitimacy of the Government’s decision to use drug treatment as a mitigating factor in its contractor credentialing decisions.”²⁰⁵

We need a reasonable and humane approach for those who have criminal convictions and seek employment as a home health aide. The best approach would be for states to enact legislation banning any permanent disqualifying convictions. An example of such legislation is Maine’s law, providing that the “existence of [criminal history record] shall not operate as an automatic bar to being licensed, registered or permitted to practice any profession, trade or occupation.”²⁰⁶

Even if a state or federal government decides to have disqualifying offenses, the applicant must be given an opportunity to provide mitigating evidence to counter or explain the disqualifying offenses.

²⁰⁰ SHRM/CKI, *supra* note 199, at 2.

²⁰¹ SHRM/CKI, *supra* note 199, at 4. “Few managers, non-managers, and HR professionals are concerned that they will be ineffective employees.” SHRM/CKI, *supra* note 199, at 5.

²⁰² SHRM/CKI, *supra* note 199, at 5.

²⁰³ *National Aeronautics and Space Admin. v. Nelson*, 562 U.S. 134, 152–53, 131 S. Ct. 746, 178 L. Ed. 2d 667, 31 I.E.R. Cas. (BNA) 1057 (2011).

²⁰⁴ *Nelson*, 562 U.S. at 152–53.

²⁰⁵ *Nelson*, 562 U.S. at 152–53.

²⁰⁶ ME. REV. STAT. tit. 5, § 5301 (2019).

States could require this by legislation and could model their legislation after a Minnesota law that provides that the applicant “shall not be disqualified from the employment or occupation if the person can show competent evidence of sufficient rehabilitation.”²⁰⁷ Evidence of rehabilitation could be those factors identified by the EEOC in its 2012 Guidance on using arrests and convictions in the hiring process. The factors include “[t]he nature and gravity of the offense or conduct; the time that has passed since the offense, conduct and/or completion of the sentence; and the nature of the job held or sought.”²⁰⁸

Allowing evidence of rehabilitation gives employers the chance to balance the risk associated with the HHAs’ convictions with proof they are no longer a risk to hire. In 2005, the nonprofit consortium, SEARCH, and the Bureau of Justice Statistics formed a national task force to address the use of criminal background searches in employment decisions.²⁰⁹ It “agreed that a risk management analysis is the appropriate relevancy approach [for employment], as opposed to automatic rejection on the basis of a criminal record.”²¹⁰ The task force recommended that “guidelines be developed to address redemption, forgiveness, and opportunities for rehabilitation.”²¹¹

Allowing the HHA to present evidence of rehabilitation increases their chances of being hired. Without this rehabilitative evidence, “hiring authorities often rel[y] on stereotypes about applicants with criminal histories.”²¹² But, “these stereotypes can be overcome when authorities have discretion to consider applicants as individuals and the experience to make informed judgments.”²¹³

Presenting rehabilitative evidence also gives applicants a chance to meet with prospective employers. Studies have shown personal contact is important in the hiring process. For example, interviews may weaken racial bias of employers. Similarly, here, the rehabilitative evidence may humanize the HHA in light of past criminal convictions.²¹⁴

Allowing applicants to provide evidence of rehabilitation at the

²⁰⁷ MINN. STAT. § 364.03 (2019).

²⁰⁸ EEOC, *supra* note 83, at 15.

²⁰⁹ SEARCH REPORT, *supra* note 178, at 2. The group contained members from federal agencies, state agencies, private companies’ employers, state legislatures and others.

²¹⁰ SEARCH REPORT, *supra* note 178, at 17.

²¹¹ SEARCH REPORT, *supra* note 178, at 17.

²¹² Christopher Uggen, Mike Vuolo, Sarah Lageson, Ebony Ruhland, & Hilary K. Whitham *The Edge of Stigma: An Experimental Audit of Low-Level Criminal Records on Employment*, 52 CRIMINOLOGY 627, 646 (2014).

²¹³ Uggen et al., *supra* note 212, at 646.

²¹⁴ Uggen et al., *supra* note 212, at 631.

outset of the application process is one way to allow employers to have the discretion to hire qualified applicants. If evidence is not provided at the outset, employers should provide an appeal process to those who have been disqualified because of their criminal convictions upon denial.

Employers could use the process articulated in the statute implementing the National Background Program.²¹⁵ The statute mandates an appeal process for any applicant denied a position based on her criminal conviction.²¹⁶ It also dictates the factors that a state must consider in the appeal process including the passage of time since the conviction, extenuating circumstances, demonstrated rehabilitation, and the relevancy of the conviction to the job.²¹⁷ This process would permit the employer to make an individualized decision whether to hire the HHA.

Allowing the HHA to present evidence of rehabilitation, however, might not be enough for some employers. Lawmakers may still need to address the liability concerns that employers raise for those with criminal convictions. Employers choose not to hire someone with a criminal background because of their concern for liability for negligent hiring. Galantowicz et. al. suggests that “fear of liability is a key driver in the move to use background checks, along with a fear of adverse publicity.”²¹⁸

This concern could be allayed if the states and the federal government provide a process for a certificate of recovery or rehabilitation, which would allow a safe harbor provision to protect employers from a negligent hiring claim. Currently, thirteen states, in addition to Ohio, offer a certificate of recovery or rehabilitation.²¹⁹ Of these states, only seven offer a safe harbor provision for the employer.²²⁰

²¹⁵ OIG INTERIM REPORT, *supra* note 36, at 16.

²¹⁶ 42 U.S.C.A. § 1320a-7(a)(4)(iv).

²¹⁷ 42 U.S.C.A. § 1320a-7(a)(4)(iv).

²¹⁸ GALANTOWICZ ET AL, *supra* note 54, at 25. Other reasons include “public safety, compliance with legal requirements, limitation of liability, conditions of doing business, protection of vulnerable populations, customer assurance, avoidance of loss of business, fear of business loss, or public or media backlash over an incident caused by an individual with a past record, and to regain public or customer trust.” SEARCH REPORT, *supra* note 178, at 5.

²¹⁹ Alabama (Order of Limited Relief, SB163 — Eliminates mandatory disqualification for employment and permits consideration on the merits); Arkansas (ARK. CODE ANN. § 17-1-103—Removes automatic bar to registration, certification, or licensing for any trade, profession, or occupation); California (Certificate of Rehabilitation, Penal Code § 4852.01-4852.21—Removes mandatory bars and evidences rehabilitation); Connecticut (Certificate of Rehabilitation, CONN. GEN. STAT. § 54-130a(b) —Offers relief from legal barriers to employment and licensure); Georgia (Program and Treatment Completion Certificate, GA. CODE ANN. § 42-2-5.2(c)—Intended to encourage hiring, licensing, and admission to schools and other

All states should provide a certificate of rehabilitation or recovery, and ensure it contains a safe harbor provision for employers. Additionally, all employers and licensing agencies should be required to accept the certificate, and there should be no offenses that are exempt from the certificate. The certificates will give employers the freedom to choose the best candidate for the job notwithstanding any criminal record.

Certificates do make employers more comfortable in hiring those with criminal convictions. In a 2018 survey conducted by the Society for Human Resource Management, managers and human resource professionals reported that a certificate of rehabilitation would increase their likelihood of hiring someone with a criminal record.²²¹

The certificates offer another advantage to the job seeker. As this article previously detailed, home health aide positions have historically been low-paying positions.²²² For those with criminal convictions, a certificate of rehabilitation can remove the sense of

programs); Hawaii (The Uniform Act on Status of Convicted Persons, HAWAII REV. STAT. § 831-3.1(a)—Stops disqualification from public office, government employment, or from licensure, solely because of a prior conviction); Illinois (Certificate of Relief from Disabilities, 730 ILL. COMP. STAT. ANN. 5/5-5-5—A person awarded a CRD cannot be denied a license in 27 different fields simply because of conviction); Iowa (Certificate of Employability, IOWA CODE § 906.19(2)—Prevents licensing agencies from denying a license based on the felony conviction or based on a lack of good moral character, with exceptions); New Jersey (Certificate of Rehabilitation, N.J. STAT. § 2A:168A-7—Removes bars to public employment, with certain exceptions); New York (Certificate of Relief from Disabilities, N.Y. CORRECT. LAW § 703 (CRD) or § 703-b (CGC)—Removes bars to employment for people with no more than one felony; Certificate of Good Conduct, N.Y. CORRECT. LAW § 703-b—Removes bars to employment for people with multiple felonies); North Carolina (Certificate of Relief, N.C. GEN. STAT. § 15A-173.2—Relieves collateral sanctions for a person with misdemeanors or minor felonies); Rhode Island, (Certificate of Recovery and Reentry, R.I. GEN. LAWS § 13-8.2-1—Relieves collateral consequences for a person with no more than one non-violent felony); Tennessee (Certificate of Employability, TENN. CODE § 40-29-107—an order that materially assists a person in obtaining employment or occupational licensing); Vermont (Order of Limited Relief, VT. STAT. ANN. tit. 13, § 8010—Dispenses mandatory sanctions related to employment, education, public benefits or occupational licensing; Certificate of Restoration of Rights, VT. STAT. ANN. tit. 13, § 8011—Relieves all but certain specified collateral sanctions five years after sentencing or release from incarceration for a conviction in any jurisdiction).

²²⁰GA. CODE ANN. § 51-1-54(B); 730 ILL. COMP. STAT. ANN. 5/5-5.5-15(F); N.Y. EXEC. LAW § 296(15); N.C. GEN. STAT. § 15A-173.5; OHIO REV. CODE ANN. § 2953.25(G); TENN. CODE ANN. § 40-29-107(N)(1); and VT. STAT. ANN. tit. 13, § 8014.

²²¹SHRM/CKI, *supra* note 198, at 8. The other factors are demonstrated consistent work history, employment references, and job training. SHRM/CKI, *supra* note 198, at 8.

²²²CAMPBELL, *supra* note 11, at 6; Joyce, *supra* note 11, at 5.

powerlessness they face when looking for a job.²²³ The certificate offers them an opportunity to advocate their value to the employer.²²⁴ This includes not only why they should be hired, but why their skills should equate to a livable wage.

There are clear steps that lawmakers could adopt to increase the HHA labor pool. The most important is to eliminate permanent disqualifying offenses for HHAs and replace it with a process that allows HHAs to present evidence of rehabilitation.

VIII. CONCLUSION

By all estimates, the United States is facing a crisis in providing care to its aging population. It is time to consider all employment pools to avert the crisis, including the employment of those with criminal records. As this article has discussed, “[i]t is important to strike a balance between the need to protect vulnerable citizens from harm and creating unnecessary barriers to employment for qualified individuals, further reducing the potential pool of long-term care workers.”²²⁵

This article proposes a viable solution to staffing these critical HHA positions. Lawmakers and policymakers should reexamine their laws that impose permanent employment bans for HHAs. No state should erect a permanent ban without clear evidence-based research that justifies the disqualification. To date, it appears that no state has engaged in this analysis. The existing bans unfairly impact a vulnerable workforce—those of limited means and women of color. These employment bans should be eliminated.

Further, if a state does decide to erect employment bans for those with criminal convictions, it needs to allow proof of rehabilitation. Basic due process principles require this opportunity. This evidence of rehabilitation can take the form of mitigating evidence or a certificate of recovery or rehabilitation.

The looming health care crisis in our country should prompt

²²³ Workforce practitioners often find that negative attitude presents the largest barrier to success for people who have been in the criminal justice system. For many reentrants, the hardest part of finding a job is not employer discrimination. It is not their limited skills, education, or work history. Nor is it the restrictions placed upon them by their probation or parole officer. Rather, the biggest barrier can be the negative internal voice that tells them over and over that they will never succeed—and persuades them to give up without even trying.

DANIEL J. SALEMSON, DAVID JASON FISCHER & LOUIS D. MICELI, WORKFORCE PROF'L TRAINING INST., GETTING THE RAP DOWN: EMPLOYMENT STRATEGIES FOR NEW YORKERS WITH CRIMINAL RECORDS 20 (2010).

²²⁴ Heather R. Hlavka, Darren Wheelock & Jennifer E. Cossyleon, *Narratives of Commitment: Looking for Work with a Criminal Record*, 56 SOC. Q. 213, 215–36 (2015) (“The U.S. Labor Market often centralizes the individual and her story, passion, and connection to the employer as the primary employment determinant.”).

²²⁵ THE LEWIN GROUP, *supra* note 196, at vii.

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policymakers to take any necessary steps to make employment opportunities a reality for HHAs who are qualified for the position and present no safety concerns.