Individualized Assessment of Applicants with Convictions

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ABSTRACT

Employers often rely on criminal background checks as part of the hiring process. Yet consideration of applicants’ criminal records clearly has an adverse impact on applicants of color, since a higher percentage of them have a record. This article reviews how an employer has been able to justify its consideration of criminal convictions under Title VII. In addition, state statutes that limit employers’ consideration of a criminal record provide guidance for employers who are trying to establish a business necessity for their reliance on criminal records. Typically, courts look at the nature of the crime and its relationship to the job in question. Beyond the case law, this article reviews the current criminal justice research and original surveys distributed to both agencies and employers associated with the Michigan Prisoner Reentry Initiative. This information highlights the need for courts and employers to look more closely at the individual characteristics and behavior of ex-offenders who are negatively impacted by hiring policies that consider applicants’ criminal records.
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Consider the following two applicants for a position: Joe is a criminal sex offender who was convicted at age 17 for having relations with his 15 year old girlfriend, who then obtains his GED and technical training in prison, while maintaining a spotless behavior record. Stan, the second applicant, uses alcohol frequently and has been convicted of several assaults, all misdemeanors, for which he spent significant time in jail but not prison, and has not received any treatment for his alcohol dependence. Under a blanket policy of hiring no ex-felons, an employer would hire Stan before Joe. But even without reviewing the research, one can predict that the first applicant would pose less of a risk and be more successful in the position being filled.

Many employers consider applicants’ criminal convictions, or the lack thereof, in making hiring decisions. At the same time, there is no question that such consideration has a greater negative impact on applicants of color, since a higher percentage of them have a record. This potential for adverse impact claims by applicants of color raises the question of how an employer can justify its consideration of criminal convictions under Title VII. The Equal Employment Opportunity Commission (EEOC) is in the process of creating new guidelines to instruct both employers and the courts on how employers can establish a business necessity for the consideration of applicants’ criminal records. This article looks to court decisions on adverse impact and those that interpret state statutes that limit employers’ consideration of a criminal record, as well as the recent criminal justice research, to provide additional guidance for both the courts and employers.

The Michigan Prisoner Reentry Initiative (MPRI) presents a unique opportunity to examine the factors that employers consider in hiring ex-offenders. One of the goals of the MPRI project is to assist ex-offenders in finding employment. As part of that goal, the MPRI plan includes the development of a Transition Accountability Plan for participating inmates, which includes a plan

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to find employment.\(^3\) The MPRI policy statement regarding employment specifically suggests the following:

- determination of which industries and employers are willing to hire people with criminal records and encourage job development and placement in those sectors,
- review of employment laws that affect the employment of people based on criminal history, and eliminate those provisions that are not directly linked to improving public safety, and
- promote individualized decisions about hiring instead of blanket bans and provide documented means for people with convictions to demonstrate rehabilitation\(^4\)

This paper encourages both employers and courts to individualize the level of consideration required for an application from an ex-offender. Specifically, decisions under business necessity test will be reviewed to clarify how an employer can establish a relationship between a conviction and a decision to reject an applicant. Yet neither these decisions nor the current EEOC guidelines require that an employer look beyond the nature of the crime committed and the specific job duties in question. Similarly, almost all of the state statutes which limit an employers’ consideration of criminal convictions, and the decisions interpreting those statutes, limit themselves to the relationship between a conviction and ability to perform a job. Neither the adverse impact decisions nor the state protective statutes require that employers consider the individual characteristics of an ex-offender which may better predict their success in the workplace.

Lastly, the results of surveys of agencies and employers in Michigan will be presented to provide actual data on which factors are considered to be most important by employers who hire ex-offenders through the Michigan Prisoner Re-entry Initiative. Like the decisions and statutes, employers in Michigan focus on the nature of the crime committed and the duties of the position.

In contrast to these decisions and statutes, as well as the practices of Michigan employers, the recent criminal justice research and the assessment tools used both by MPRI and other reentry efforts focus on more individual characteristics which have been proven to be predictive of an


\(^4\) Id. at p. 5.
ex-offenders likelihood of success in the community. For employers in Michigan, the pre-release assessments would provide much of this relevant information for employers.

Many states are releasing offenders in record numbers to reduce costs. These ex-offenders are being released into a tight labor market, which is even more difficult for ex-offenders with a limited education and work experience. The growing tendency of employers to conduct criminal background checks has increased the negative effects of convictions for applicants who are ex-offenders. Once the results of those checks are received, many employers will not consider hiring an ex-offender. Even if such a policy has an adverse impact on applicants of color, even the most protective courts would allow an employer to reject an applicant whose crime is related to the position he or she seeks. The research and the surveys suggest that employers as well as courts reviewing adverse impact claims should be looking at individual characteristics which can more accurately predict whether or not an ex-offender will be successful in the workplace.

I. Employer Consideration of Criminal Records

If an employer’s hiring practice or criteria has an adverse impact on members of a protected class, Title VII requires “some level of empirical proof that challenged hiring criteria accurately predicted job performance.” The employer must present real evidence that the challenged criteria "measure[s] the person for the job and not the person in the abstract." Generally, employers must show that a discriminatory hiring policy accurately predicts an applicant's ability to perform successfully the job in question. Under this standard, Title VII still allows an employer to hire the applicant it predicts will be most successful in the position.

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8 El, supra note 6, 479 F. 3d at 242.

9 Id.
Equal Employment Opportunity Commission (EEOC) regulations suggest limits on an employer’s consideration of applicants’ criminal records.\textsuperscript{10} The EEOC Compliance Manual states that consideration of applicants’ conviction history has an adverse impact on applicants of color, based on statistics which establish that they are convicted at a rate disproportionately greater than their representation in the population.\textsuperscript{11} Without a justifying business necessity, a total ban on hiring any ex-offenders is unlawful under Title VII.\textsuperscript{12}

The EEOC Compliance Manual goes on to explain that an applicant may be disqualified from a job on the basis of a previous conviction, but only if the employer takes into account the following factors:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.\textsuperscript{13}

The EEOC clarifies that "nature and gravity of the offense" means for employers to consider the circumstances of that offense.\textsuperscript{14} Yet the EEOC does not provide employers or the courts with any guidance to assess what “circumstances” surrounding the offense make the ex-offender more or less employable. In addition, the EEOC does not require or even suggest consideration of other individual characteristics, such a history of substance or alcohol abuse or the ex-offender’s behavior and activities during incarceration.

Employers and the courts reviewing hiring decisions do not adhere so closely to the EEOC guidelines. One employment law expert has stated that under the court of appeals decision in \textit{El}, to avoid violating Title VII, employers “must carefully craft their criminal record exclusionary policies, based on empirical evidence as to whether a person with a criminal record presents

\textsuperscript{10} Note that the EEOC’s Guidelines may not be entitled to great deference. \textit{El}, supra note 6, 479 F.3d at 244 (citing EEOC v. Arabian American Oil Co., 499 U.S. 244, 257 (1991)).

\textsuperscript{11} EEOC Compliance Manual: Appendix A-Conviction Records.

\textsuperscript{12} Id.


\textsuperscript{14} Id.
more than a minimal risk.” Many employers may not be investing the time or effort to develop criminal record policies with anything approaching this degree of care.Instead, employers often exclude any applicant with a record of a criminal conviction. Some employers make this policy explicit; others may claim to make more individualized assessments, but the conviction still operates as an absolute bar under unstated policies or practices.

**Exclusion Based on Convictions Has an Adverse Impact**

Criminal convictions affect a large portion of the U.S. working population. By June of 2008, state and federal prison authorities had 1,610,584 adult inmates under their jurisdiction, and 2,310,984 prisoners were held in federal or state prisons or in local jails – an increase of 0.8% from December 2007. Beyond the effect of incarceration on the population as a whole, the incarceration statistics consistently establish that consideration of criminal convictions has an adverse impact on applicants of color.

People of color make up a disproportionate number of inmates in the U.S. As of June 2008, there were 4,777 African American male inmates per 100,000 African American males held in state and federal prisons and local jails, compared to 1,760 Hispanic male inmates per 100,000 Hispanic males, and 727 white male inmates per 100,000 white males. In other words, an African American male was more than 6 times more likely to be held in prison than a white

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15 EEOC hearing, November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, Statement of Janet Ginzberg, Senior Staff Attorney, Employment Law Unit of Community Legal Services, Philadelphia, PA.

16 Id.

17 Id.

18 Id.


male. Additionally, African Americans were three times more likely than Hispanics and five times more likely than whites to be in jail.\textsuperscript{22}

The overall effect of this rate of imprisonment is remarkable for its broad effect on the employability of ex-offenders. In 2001, an estimated 2.7\% of adults in the U.S. had served time in prison, up from 1.8\% in 1991 and 1.3\% in 1974.\textsuperscript{23} An estimated 1 of every 15 persons will serve time in a prison during their lifetime.\textsuperscript{24} In Michigan, the number of prisoners under state or federal correctional jurisdiction rose from 48,883 in December 2004 to 50,482 in June 2008.\textsuperscript{25} The incarceration rate in 2005 was 489 per 100,000 residents. By June 2008, this rate had risen to 505 in Michigan, the second highest rate in the Midwest, and the twelfth highest rate in the United States.\textsuperscript{26}

Incarceration has a more significant impact on persons of color. Over a lifetime, an African American has an 18.6\% chance of going to prison is 18.6\% and for Hispanics a 10\% chance, compared to 3.4\% for whites.\textsuperscript{27} This means that as many as 32\% of all African American males will enter state or federal prison during their lifetime.\textsuperscript{28} Additional statistics show that African Americans in the United States are incarcerated at 8.2 times the rate of Whites.\textsuperscript{29} The prevalence of imprisonment in 2001 was higher for black males at the rate of 16.6\% and Hispanic males at 7.7\%, compared to the rate of 2.6\% for white males.\textsuperscript{30} For African American females, the


\textsuperscript{24} Id.


\textsuperscript{26} http://www.ojp.usdoj.gov/bjs/abstract/pim08st.htm.

\textsuperscript{27} BJS Criminal Offender Statistics, \textit{supra} note 23.

\textsuperscript{28} Id.

\textsuperscript{29} Jamie Fellner, Human Rights Watch, Punishment and Prejudice: The Racial Costs in the War on Drugs 15 (2000). See also Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records, 30 \textit{FORDHAM URB. L.J.} 1501, 1502 (2003). ("African Americans are at least seven times more likely than Whites, and two times more likely than [Latinos], to be incarcerated.").

\textsuperscript{30} BJS Criminal Offender Statistics, \textit{supra} note 23.
prevalence of imprisonment was 1.7%, for Hispanic females 0.7%, and for white females 0.3%. As of 1999, approximately 9% of all African American males in their late-twenties were in prison or jail, compared to 1% of Whites in the same age group. Nearly 40% of the almost 190,000 federal inmates, more than 75,000, were African American in 2006.

These statistics show that people of color consistently have had a significantly higher rate of incarceration than white people. Of course this means that among applicants for employment, the likelihood of a criminal history is much greater for African American or Hispanic applicants, compared to white applicants. As discussed below, this history has a significant impact on the probability that those applicants will find employment, and more generally, that they will be successful and productive members of their communities.

II. The Inherent Conflict

The employment of ex-offenders raises conflicting issues beyond just claims of adverse impact. Research has established a strong connection between employment and lower rates of recidivism, so work for ex-offenders “has a value to society that exceeds the wages those employees earn.” On the other hand, employers consider the impact of hiring ex-offenders on their “financial and legal well-being.” These hiring policies also raise questions about the safety of other employees, customers, and the general public, as well as whether ex-offenders are employable and are benefitted by employment.

31 Id.


35 Id.

36 Id.
A. The Employer’s Interests

A rational employer can be expected to choose applicants without a criminal record over ex-offenders, assuming the record-free applicants are otherwise equally qualified.\(^{37}\) This decision is particularly rational if the nature and circumstances of an individual’s criminal record show an unacceptably high level of risk for engaging in more criminal or otherwise negative behavior in a given position.\(^{38}\) In addition to more tangible fears of being exposed to liability for negligent hiring based on such behavior, employers often automatically exclude an applicant with a criminal record because of a general stigma attached to ex-offenders.\(^{39}\)

Since ex-offenders are not a class specifically protected against discrimination, some believe it is an employer’s prerogative to refuse to hire applicants with a criminal record. One commentator has stated simply that “employers, at their discretion, should be able to discriminate in hiring ex-convicts.”\(^{40}\) Like any other type of qualification, employers arguably should be able to consider an applicant’s criminal record and the effect it will have on their businesses.\(^{41}\) However, some employers may have some motivation to provide opportunities for ex-offenders, even if doing so is not “rational.” At least some employers that recognize “a moral obligation to offer opportunities on a fair and equal basis to the entire community.”\(^{42}\)

Ex-offenders have difficulty in finding employment, probably because most employers tend to act in what they believe is a rational manner. Studies have established that employers’ unwillingness to hire ex-offenders is “widespread.”\(^{43}\) Over sixty percent of employers responded

\(^{37}\) Id.

\(^{38}\) Id.


\(^{41}\) Id.

\(^{42}\) O’Brien, supra note 34, 42 WAKE FOREST LAW REVIEW at 1027.

in one study that they “probably would not” or “definitely would not” hire an ex-offender. A survey of employers in four major metropolitan areas showed that employers are “highly averse” to hiring ex-offenders: only 12.5% of employers surveyed would definitely accept an application from an individual with a criminal record, and 25.9% said that they probably would. According to another study of employers in Los Angeles, over 40% of employers surveyed would reject an applicant with a criminal record, without considering the nature of the offense or any other individual factors. This aversion has been found to be even stronger than an employer’s aversion to hiring other applicants who are commonly rejected, such as welfare recipients, or applicants without a high school diploma or with gaps in their employment histories.

A criminal record has been shown to have a greater effect for applicants of color. Controlling for the individual characteristics which can affect employability, one study found a significant effect of a criminal record that was larger for black applicants.

Many employers go beyond the information provided on an application and conduct a criminal background check on applicants. One study found that over eighty percent of large employers use criminal history checks in the hiring process. A similar 2004 survey found that 87% of

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45 Harry J. Holzer, Steven Raphael and Michael A. Stoll, WILL EMPLOYERS HIRE FORMER OFFENDERS?: EMPLOYER PREFERENCES, BACKGROUND CHECKS, AND THEIR DETERMINANTS, IN IMPRISONING AMERICA: THE SOCIAL EFFECTS OF MASS INCARCERATION 210 (Mary Pattillo, David F. Weiman, & Bruce Western, eds., 2004).


47 Id.


49 Id.

50 Jon Bonne, Most Firms Now Use Background Checks, Survey: 8 in 10 Probe Criminal History Amid Security Worries, MSNBC, Jan. 21, 2004, http://www.msnbc.msn.com/id/4018280 (SHRM report that 80 percent of companies said they run a criminal check on applicants before hiring, up nearly 30 percent
employers at least occasionally conduct criminal background checks on job applicants, including 68% that always check. Some companies that conduct background checks will even provide employers with a grading system based upon its search results, indicating that an applicant has been cleared to hire or should not be hired. One search firm noted that this system could be discriminatory since it results in automatic elimination of many applicants with a criminal conviction.

Many jurisdictions require criminal background checks in a variety of fields, and employers who conduct checks often decide not to hire an ex-offender after their record is obtained. Yet the use of background checks may not necessarily adversely affect applicants of color, compared to assumptions that employers may make about applicants of color. One study suggests that using background checks may in fact have a positive effect on the hiring of African Americans. This research showed that any adverse consequence of employer-initiated background checks on the likelihood of hiring African Americans is more than offset by the positive effect of eliminating statistical discrimination – assumptions made about the criminal records of African American applicants. Yet there is no doubt that given the greater rate of conviction among people of color, an employer’s consideration of criminal convictions generally has a greater negative effect on applicants of color than on other applicants.


53 Id.


56 Id.
B. Lack of Employability

The negative effects of a criminal conviction may be compounded because many of those applicants also lack other characteristics supporting their employability. For one, ex-offenders typically “lack the education and skills needed to compete in the labor market.”57 One study conducted in 1991 revealed that 65% of state prison inmates had not completed high school, and 53% earned less than $10,000 during the year prior to incarceration.58 A more recent study of California inmates showed that at least 50% of them were functionally illiterate.59 Similarly, the U.S. Department of Labor has found that ex-offenders typically have a limited education and few job skills.60 Under a tight labor market, ex-offenders will have an even more difficult time competing with other low-skill workers for a smaller number of positions.61

The work experience of offenders is also typically irregular. Generally, a history of unstable employment is associated with incarceration and recidivism.62 Only about two-thirds of one set of offenders nationwide had worked before incarceration.63 Among another group of ex-offenders, only half had ever held a permanent job and 31 percent were unemployed in the six months before incarceration.64 Another study found that 25% had been unemployed prior to


58 Allen Beck, supra note 32.


60 U.S. Dept. of Labor, FROM HARD TIME TO FULL TIME: STRATEGIES TO HELP MOVE EX-OFFENDERS FROM WELFARE TO WORK, at 3-4 (2001).


According to this study, which surveyed ex-offenders in Los Angeles, almost half had been discharged from a job at least once, and about a third reported sporadic attendance or loss of employment due to substance abuse.

Offenders’ employability typically does not improve after their incarceration. 88% of the ex-offenders in one study reported that they needed job training or more education. Despite this need, prison vocational training programs have been downsized due to budget constraints and the expenditure of funds on new prisons.

The time spent in prison also decreases employability. Even if an employer does not complete a criminal record check, incarceration creates an inconsistent work record, which decreases an applicant’s attractiveness. Time in prison removes offenders from any education or skilled occupations they may have had. Research also demonstrates that incarceration “reduces human capital,” due to a loss of “connections to potential employers, diminished work skills, and reduction in life skills, such as time management and interpersonal ability.”

65 Travis, supra note 46, at 31 n. 160 (citing Beck, supra note 32).
66 Id.
67 Id.
71 Visher, supra note 62. See also TRAVIS, supra note 46; Christopher Uggen et al., “Work and Family Perspectives on Reentry,” PRISONER REENTRY AND PUBLIC SAFETY IN AMERICA 209 (Jeremy Travis & Christy Visher eds., 2005).
Substance abuse is also a common inhibitor of employability among ex-offenders.\textsuperscript{72} In one Illinois survey, for example, 60 percent of ex-offender respondents cited substance use as the cause of at least one family, relationship, employment, legal, or financial problem.\textsuperscript{73}

Other less tangible barriers also affect the employability of ex-offenders. One expert found that employers often hire applicants with whom they feel an “intuitive rapport,” and applicants with a criminal background may face “special barriers to establishing such a rapport, even if possessing otherwise highly appealing characteristics.”\textsuperscript{74} Psychologists have established that negative stereotypes held by employers can interfere with positive interactions with ex-offender applicants, and limit the ex-offender’s ability to show traits that are inconsistent with those stereotyped expectations.\textsuperscript{75}

In two more specific studies, employers in both New York and Milwaukee were found to “strongly disfavor” applicants with criminal records.\textsuperscript{76} The negative effect of a criminal record was “especially large” for African American applicants - the criminal record penalty suffered by black applicants (60 percent) was roughly double the size of the penalty for whites with a record (30 percent).\textsuperscript{77} These studies found that employers tend to avoid talking about a conviction of an applicant, and provided “little indication of how they viewed the information.”\textsuperscript{78}

This research found that even though a criminal record often negatively impacts an applicant, some employers are willing to look beyond the record or to minimize its significance in light of

\textsuperscript{72} See Visher, supra note 64.

\textsuperscript{73} Justice Policy Center, Urban Institute, UNDERSTANDING THE CHALLENGES OF PRISONER REENTRY: RESEARCH FINDINGS FROM THE URBAN INSTITUTE’S PRISONER REENTRY PORTFOLIO (2005).


\textsuperscript{77} Pager, supra note 74, at 199.

\textsuperscript{78} Id. at 206.
other information about the applicant who is interviewed. The employer sometimes develops empathy with the applicant, but race and ethnicity can negatively affect some employers' interpretations of the seriousness of the criminal background and the depth of empathy developed during an interview.

A criminal record has been found to have significant negative impact on hiring decisions, even for applicants with other attractive characteristics. The Pager study found that a criminal record reduces the likelihood of a callback or job offer by nearly 50 percent (28% vs. 15%). This effect is substantially larger for African Americans than for whites.

For employers who may be reluctant but not totally opposed to hiring ex-offenders, interaction with the applicant allows the employer to address these concerns directly. It may be for this reason that two experts recommended that the EEOC should delay the upfront inquiry into criminal background by postponing criminal background checks until final hiring stages. Certainly if an employer automatically screens out applicants with a criminal record, even if only for certain crimes, the applicant will have no opportunity to demonstrate personal characteristics that might make them a good employee.

More generally, some employers may view a criminal record to be the “result of choice, reflecting incompetence and immorality.” One critic of legislation that limits the consideration of criminal records has argued that statutes that require employers to explain a decision to not hire based on a criminal record provide protection to “a class unworthy of being rewarded with such extra protection.” This view is based on the assumption that employment decisions to not

79 Id. at 205.
80 Id.
81 Id. at 208.
82 Id.
83 Id.
84 EEOC Hearing, Statement of Foreman, supra note 46; EEOC Hearing, Statement of B. Diane Williams, President and CEO, Safer Foundation (recommending removing the question "Have You Ever Been Convicted of a Misdemeanor or a Felony?" from the job application form).
85 Simonson, supra n. 43, 13 GEO. J. POVERTY LAW & POL’Y at 290.
hire ex-offenders from the workplace are seen as "rational and morally appropriate despite any impact they may have on other protected groups."\(^{87}\)

These studies establish that employers may have many “rational” reasons for not hiring ex-offenders. Yet at least some of these reasons appear to have a greater adverse effect on ex-offenders of color. In addition, under anti-discrimination laws, blind screening based on criminal record alone has an adverse impact. Moreover, as discussed in the following section, there are compelling public reasons to support the hiring of ex-offenders, even if employers would find such a decision to be irrational.

**C. Public Policy Interests**

No one would argue that a practice that reduces recidivism is “irrational,” as long as interests of public safety are promoted by that reduced recidivism. Obtaining employment after a conviction has been found time and time again to be closely related to reduced recidivism rates.\(^{88}\) There is no question that recidivism is significant among ex-offenders: among state parole discharges in 2000, only 41% successfully completed their term of supervision.\(^{89}\) The rates of recidivism are alarming: of the 272,111 persons released from prisons in 15 states in 1994, an estimated 67.5% were rearrested for a felony or serious misdemeanor within 3 years, 46.9% were reconvicted, and 25.4% resentenced to prison for a new crime.\(^{90}\)

Research has shown consistently that the most important factor in the reduction of recidivism is “an individual's ability to gain ‘quality' employment.”\(^{91}\) Public safety suffers when former

\(^{87}\) Simonson, *supra* n. 43, 13 GEO. J. POVERTY LAW & POL'Y at 290.


offenders return to their communities without the financial support and social stability from permanent employment. Many studies have made a link between unemployment and recidivism, with one expert concluding that “ex-offenders who are unable to secure jobs upon release are much more likely to re-offend than those who are employed.”

In addition to the direct prevention of recidivism, psychologists have found that work “brings a sense of fulfillment, achievement, and belonging,” in addition to reducing the temptation to engage in criminal activity to earn. It seems obvious, but research has also proved that if someone earns a paycheck, he or she is less likely to be involved in criminal activity.


Simonson, supra note 43, 13 GEO. J. POVERTY LAW & POL'Y at 284. See generally, Jared Bernstein & Ellen Houston, Economic Policy Institute, CRIME AND WORK: WHAT WE CAN LEARN FROM THE LAW-WAGE LABOR MARKET (2000); Bruce Western and Becky Petit, “Incarceration and Racial Inequality in Men’s Employment,” 54 INDUS. & LAB. REL. REV. 3 (2000); Uggen and Thompson, supra n. 89; Sampson and Laub, supra note 91.


Travis, supra note 46, at 168 (citing Christopher Uggen et al., Crime, Class and Reintegration: The Scope of Social Distribution of America's Criminal Class (paper presented at the annual meeting of the American Society of Criminology, Nov. 18, 2000)). See also, EEOC Hearing, Foreman Statement, supra note 46; EEOC Hearing, Statement of Devah Pager, Professor of Sociology at Princeton University; Leonard M. Lopoo and Bruce Western, “Incarceration and the formation and stability of marital unions,” 67 JOURNAL OF MARRIAGE AND FAMILY 721–734 (2005); Sampson and Laub, supra note 89; Uggen, Christopher, “Work as a turning point in the life course of criminals: A duration model of age, employment, and recidivism,” 65 AMERICAN SOCIOLOGICAL REVIEW 529–546 (2000).
Some of the states which have adopted statutory limitations on the consideration of criminal convictions by employers have done so based on these positive effects of employment for ex-offenders. In interpreting one of these statutes, the Wisconsin Supreme Court has noted that employment should discourage future criminal activity and help to rehabilitate ex-offenders, which the court deemed “a worthy goal.”95 In justifying its interpretation of Wisconsin’s limited protection against discrimination based on criminal record, the Wisconsin Supreme Court relied on the summary of a study on recidivism conducted by the Bureau of Justice Statistics.96 The report stated that for the study period in 1979, roughly sixty-one percent of those admitted to prison were recidivists (i.e., they had previously served a sentence to incarceration as a juvenile, adult, or both).97

Like Wisconsin, New York has justified its protective statute based on the great difficulty ex-offenders were having in finding employment, “even though there was an absence of any connection between the employment or license and the crime committed, its circumstances or the background of the offender.”98 One New York court noted that failure to find employment not only resulted in personal frustration for the ex-offender, but also injured society as a whole by contributing to a high rate of recidivism.99

Despite the importance of work, about two-thirds of ex-offenders remain out of work a year after prison release, and 60 percent are re-arrested within three years.100 The civil consequences of criminal convictions, including the problems in finding employment, has profound effects on the ex-offenders’ communities.101 The children, families and communities are affected if they

96 Id.
99 Id. (citing 1976 NY Legis Ann, at 50).
100 Bureau of Justice Statistics 2002; See also Petersilia, supra note 63; Travis, supra n. 46.
101 Simonson, supra n. 43, 13 GEO. J. POVERTY LAW & POL'Y at 285.
depend on the ex-offender for financial support. As the availability of low-skilled jobs declines, the economic consequences of collateral sanctions that restrict employment opportunities will increase for ex-offenders, their families, and their communities.

D. Lack of Oversight

Very few states and no federal statutes directly limit an employer’s consideration of criminal history among applicants. In most states, private employers are free to consider criminal convictions without state regulation. Only five states (Minnesota, Wisconsin, New York, Pennsylvania, Kansas and Hawaii) specifically restrict an employer’s use of criminal convictions in making private employment decisions. Other states only offer protection for ex-offenders seeking public employment.

Courts in the 45 other states have not offered much additional protection for public employment applicants under the U.S. Constitution. Courts have sometimes overturned blanket bans on public employment of ex-offenders. However, employers’ refusal to consider candidates with a criminal record have been often upheld, under a rational-basis review, so long as the ban is

102 Id. at 285-86. See also Western, Pettit and Guetzkow, BLACK ECONOMIC PROGRESS IN THE ERA OF MASS IMPRISONMENT, IN INVISIBLE PUNISHMENT 165 (Mauer and Chesney-Lind eds., 2002); Thompson, supra note 68.


narrowed in any way or targeted to certain types of offenders or government positions.\textsuperscript{107} Under very limited circumstances, a court has stricken a tailored collateral consequence for lack of adequate rational relationship between the restriction and the government's interest, but only where the offense has been minor,\textsuperscript{108} nonexistent,\textsuperscript{109} or long before the time of application.\textsuperscript{110}

Because of this lack of statutory or constitutional protection, ex-offenders are left with a potential claim for adverse impact. As outlined below, this claim will only be successful if the applicant can show a lack of business necessity for the employer’s consideration of the applicant’s criminal record.

III. Discrimination Claims by Ex-Offenders

An applicant or employee can allege discrimination based on an employer’s consideration of a criminal record. Even though criminal activity does not protect an applicant against


\textsuperscript{108} See \textit{Comings v. State Bd. of Educ.}, 100 Cal. Rptr. 73 (Ct. App. 1972) (discharge of teacher for one marijuana possession conviction was arbitrary and capricious).

\textsuperscript{109} See \textit{Schware v. Bd. of Bar Exam’rs}, 353 U.S. 232 (1957) (allowing applicant’s registration for bar exam despite arrests at labor demonstrations, use of aliases to avoid anti-Semitism, and membership in Communist Party).

discrimination directly, since they are not a protected class under Title VII, applicants sometimes have been successful in establishing a claim of discrimination because an employer’s consideration of their criminal records has had an adverse impact on their protected class.\footnote{Hunter v. Erickson, 393 U.S. 385, 392 (1969). See also Levy v. Louisiana, 391 U.S. 68 (1968); Korematsu v. United States, 323 U.S. 214 (1944).}

To sustain a claim of discrimination, the applicant must produce statistical evidence that shows that the exclusion of applicants based on a criminal record caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.\footnote{112 Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645-646 (1989), superseded by statute on other grounds, Civil Rights Act of 1991, § 105, 42 U.S.C. § 2000e-2(k).} In addition, that statistical disparity must be substantial enough to raise an inference of causation based on the applicant’s protected class.\footnote{113 Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994-95 (1988).} This disparity would show that the policy or practice has an adverse impact on a protected class.

As discussed above, the rates of incarceration for different racial and ethnic groups establish an adverse impact caused by an employer’s blanket refusal to hire an applicant with a criminal record. Once an adverse impact is established, the employer must show that the employment policy or practice is "job related for the position in question and consistent with business necessity."\footnote{114 Id.} For example, an employer that has a blanket policy against hiring ex-offenders may have difficulty justifying that policy based on job-relatedness and business necessity unless that employer can show that a lack of a criminal record is a business necessity for every position in that organization.

When faced with an adverse impact or equal protection claim, or a challenge under a state statute that limits consideration of criminal records, an employer typically must establish a justification for its consideration of an applicant’s criminal record. Employers can rely on a number of factors about someone’s previous convictions in making hiring decisions. Courts reviewing adverse impact and disparate treatment claims have relied on particular justifications to find that an employer has sufficiently supported its reliance on a criminal record. Similarly, the states that have adopted some limitations on an employer’s consideration of a criminal record still allow consideration of that record based on most of these same factors:

\footnote{Id.}

The Model Sentencing and Corrections Act similarly includes a list of factors that would limit an employers' ability to deny employment to ex-offenders. The Act delineates the following five factors as the sole basis for employers' decisions:

1. whether the occupation, profession, or educational endeavor provides an opportunity for the commission of similar offenses;
2. whether the circumstances leading to the offense will recur;
3. whether the person has committed other offenses since the conviction or his conduct since conviction makes it likely that he will commit other offenses;
4. whether the person seeks to establish or maintain the relationship with an individual or organization with which his victim is associated or was associated at the time of the offense; and
5. the time elapsed since release

None of these factors require that an employer consider the specific circumstances of an offense, personal traits of a particular ex-offender, or the precise degree of her rehabilitative efforts. Instead, the factors look at the relatedness of a conviction to a particular type of employment,

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16 MODEL SENTENCING AND CORR. ACT § 4-1005(c).


18 MODEL SENTENCING AND CORR. ACT § 4-1005(c).

and consider the risks created by hiring ex-offenders with certain criminal tendencies in positions where those tendencies might result in additional criminal activity.  

A. Public Trust

The public trust justification for not hiring ex-offenders is the least connected to the ex-offender’s individual characteristics. Yet the general notion of preserving the public trust has been relied upon consistently to justify consideration of criminal convictions, particularly for public employers. This factor allows an employer to refuse to hire an ex-offender based on predictions about how the public would react to the employment of an ex-offender, regardless of how that applicant can be expected to actually perform. The assumption behind this factor is that employment of a person with a criminal record will undermine the public’s confidence in the ability of the employer to deliver the services it provides. Most courts have been willing to adopt this assumption. Some have even allowed an employer to rely on an arrest record under this justification.

As an example of this reliance on the public trust factor, an applicant for admission to the Philadelphia police academy could not defeat the city’s showing that it had a business justification to rely on his arrest record. Even though the criminal charges had been dismissed and his record expunged, the court found that lack of a conviction may have been due to a lack of evidence, unwillingness of witnesses to testify, or rehabilitation. The court assumed that “even an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as a quick temper, poor attitude or argumentativeness.” The court allowed the exclusion based only on an arrest record based on its finding that “to give someone a badge, a gun, and -- practically speaking -- almost unlimited authority over his or her fellow citizens is a grave responsibility.”

Another court relied on this same logic to find that an applicant for a Chicago police officer position was not qualified for that position based on his arrest record. In dismissing his

120 Id.
122 Id. at *4.
123 Id.
124 Id.
discrimination claim, the Chicago court used exactly the same language as the court hearing the Philadelphia police academy case. 126 The police department’s policy served “substantial and legitimate interests” since “police officers have an awesome responsibility in serving the public.” 127

Similarly, a federal court of appeals determined that an employer could exclude ex-offender applicants for state trooper positions based on the state’s purpose of ensuring public safety and respect for the law. 128 The applicant had been convicted of stealing $4,000 from a former employer seven years earlier. 129 Like the trooper applicant, an applicant for a peace officer position in California was unable to show that the state lacked a business purpose for excluding from consideration applicants who had a felony record. 130 This African American male applicant was convicted of grand theft, and the public employer justified the ban against hiring him based on its need for “good character and integrity of peace officers and to avoid any appearance to members of the public that persons holding public positions having the status of peace officers may be untrustworthy.” 131

The public trust justification has not been limited to public employees who carry a weapon. The discharge of a mail carrier based on a misdemeanor theft charge by the Postal Service was found to be “properly concerned about public confidence in the rural mail delivery system,” since the employee’s lack of trustworthiness was shown by his admission of guilt to criminal theft. 132 Similarly, a postmaster’s removal was upheld after he pled guilty to shoplifting. 133 Rather than focusing on the morality of the employee, the court considered the stature of the position of

126 Id. at 943.

127 Id. at 943, 945.


131 82 Cal. App. 3d at 590.

132 Johnson v. United States Postal Service and National Rural Letter Carriers Assoc., 756 F.2d 1461, 1466 (9th Cir. 1985).

postmaster as well as the integrity and honesty of previous Postmasters, as well as their responsibility for all revenues received. 134 The amount of publicity that the criminal case had received was also influential. 135 The conviction had a significant effect on the postmaster’s reputation for honesty and integrity, since it involved “dishonesty involving the goods or property of another,” and because the postmaster held a fiduciary position. 136

Like these post office employees, New York’s denial of a license for an owner-trainer-driver of harness race horses was upheld based on public safety interests: preventing even the “appearance or the fact of impropriety” in the sport of horse racing.” 137 Another New York court upheld the removal of a civil court employee after he was convicted of a engaging in racketeering. 138 The discharge was justified for two reasons: (1) to avoid even the appearance of impropriety, and (2) to prevent the convicted employees from taking advantage of a similar situation. 139 These cases demonstrate how the personal characteristics of an employee or applicant may have no influence on a court’s review of an employer’s decision when the “public trust” card is played.

In rare circumstances, general notions of public trust or safety have been rejected as justification for an employer’s reliance on a criminal record. In contrast to the other post office cases, one court upheld an arbitrator’s reinstatement of a United States Postal Service employee who entered a deferred prosecution program and being charged with criminal sexual misconduct. 140 The court refused to find that the award would violate the public policy of removing USPS employees who commit morals offenses from positions of public trust. 141

Like this rare refusal to rely on public trust, the City of Des Moines could not justify a complete ban on hiring for fire, police or civil service positions if the applicants had a felony conviction. 142 The City failed to show that its employees occupied positions of “special trust”

134 645 F.2d at 1032.
135 Id.
136 Id.
137 Bonacorsa, supra note 96, 71 N.Y.2d at 612.
139 Id. at 920.
141 Id. at 1530.
or that they lacked the moral qualities and characteristics and the “habits of industry, obedience and fidelity” which are essential for public employment. Under the Equal Protection Clause, the city needed to tailor its hiring requirements “to conform to what might be legitimate state interests.” The city should have considered “the nature and seriousness of the crime in relation to the job sought, the time elapsing since the conviction, the degree of the felon’s rehabilitation, and the circumstances under which the crime was committed.”

The majority of these cases illustrate how a vague notion like “public trust” often can be used to justify the exclusion of applicants with a criminal record. This justification has been used in various work settings, including those where the job duties are not directly related to the crime which was committed by the applicant or employee. Moreover, the notion of “public trust” does not allow an ex-offender, or even a person with a prior arrest only, any opportunity to demonstrate their personal capacity to succeed in the position.

B. Workplace Safety

Many employers have adopted a ban on hiring applicants with a criminal record to protect the safety of other employees or members of the public. These bans may be based on the perceived increase in workplace violence. Workplace violence is recognized as a significant public policy concern: according to a U.S. Department of Justice National Crime Victimization Survey, two million assaults and threats of violence occur each year in the workplace. Based on this threat, many employers may choose to reject applications from ex-offenders based on arguably “rational” fears of risks to workplace safety. Since ex-offenders arguably commit

143 Id.


145 Id. at 581.

146 See Simonson, supra n. 43, 13 GEO. J. POVERTY LAW & POL’Y at 295.

147 EEOC Hearing, Statement of Donald R. Livingston, Partner, Akin, Gump, Strauss, Hauer & Feld.

new crimes at higher rates than individuals without records, employers may find it “rational” to exclude ex-offenders from the workplace.149

Generally, an employer has an obligation to provide employees with a work environment that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”150 The Wisconsin Supreme Court recognized, in applying that state’s protective statute, that the community should bear an “unreasonable risk” that an ex-offender be given the opportunity to engage in more criminal activity, given the “well-documented phenomenon of recidivism.”151

Employers are also understandably concerned about liability for harm to employees based on “hiring mistakes.” An employer faces liability in tort claims for negligent hiring and retention, respondeat superior liability for the acts of employees, and premises liability, as well as protections against sexual harassment or sexual violence in the workplace.152 Under any of these theories, injured employees may try to hold employers liable when an ex-offender injures them on the job.153 The Attorney General’s Report on Criminal History Background Checks recognized that employers could be held liable under negligent hiring doctrines “if they fail to exercise due diligence in determining whether an applicant has a criminal history that is relevant to the responsibilities of a job and determining whether placement of the individual in the position would create an unreasonable risk to other employees or the public.”154

Employers’ concern about liability for workplace injuries is well-documented. One commentator recognized that these employer preferences may seem "rational," based on an assumption that individuals who have committed crimes in the past are more likely to pose risks in the workplace.155 Employers have been liable to employees who have been injured by a

149 Id. at 295-96.


152 Livingston Statement, EEOC Hearing, supra note 145.


155 Simonson, supra n. 43, 13 GEO. J. POVERTY LAW & POL’Y at 284.
coworker, if the employer knew or should have known that his employee might render harm to the other employee.\textsuperscript{156} This knowledge can be established in part by the fact that the employee who caused the injury had a criminal conviction.\textsuperscript{157} An employer may even have a duty to discover any criminal conviction that his employees have, since the employer may be liable if the coworker's injury is foreseeable because that employee had a conviction.\textsuperscript{158}

The Restatement of Torts deals specifically with the retention of employees, and states that an employer may be liable for the harm caused by an employee “by retaining in his employment servants who, to his knowledge, are in the habit of misconducting themselves in a manner dangerous to others.”\textsuperscript{159} In a claim of negligent hiring, supervision, and/or retention against an employer,\textsuperscript{160} an injured person typically needs to prove the following:

1. the existence of an employment relationship;
2. the employee's incompetence;
3. the employer's actual or constructive knowledge of such incompetence;
4. the employee's act or omission causing the injuries; and
5. the employer's negligence in hiring or retaining the employee was the proximate cause of the injuries.\textsuperscript{161}

\textsuperscript{156} Clark, supra n. 153, 38 U.S.F. L. REV. at 196-97.

\textsuperscript{157} Id.

\textsuperscript{158} Id. at 197. See also Archer & Williams, supra n. 103, 30 N.Y.U. REV. L. & SOC. CHANGE at 536; Demleitner, supra note 103, 11 STAN. L. & POL'Y REV. at 156.

\textsuperscript{159} Section 317, Restatement (Second) of Torts.

\textsuperscript{160} See generally Amy D. Whitten & Deanne M. Mosley, “Caught in the Crossfire: Employers' Liability for Workplace Violence,” 70 MISS. L. J. 505 (2000) (and cases discussed therein). See also RESTATEMENT (SECOND) OF AGENCY 213 cmt. d (1958) (an employer "may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him").

Negligent hiring and retention cases generally turn on two fundamental elements—knowledge of the employer and the foreseeability of harm to third parties. Generally, the injured employee must show that the employee who caused the injury had some propensity, proclivity, or course of conduct to put an employer on notice of the possible danger. In most states, foreseeability depends in large part on the number and nature of prior acts of misconduct by the employee, and the nexus or similarity between the prior acts and the current harm caused.

The foreseeability that some injury may occur due to the conduct of an ex-offender generally determines whether the employer will be held liable. Foreseeability can be established by "prior similar incidents" of the person who causes the harm, or based on the "totality of the circumstances." Prior incidents resulting in a conviction can establish foreseeability if the conviction was sufficiently similar to the conduct in question. Under the "totality of the circumstances" test, foreseeability may also be established based on several factors, including the time that has passed since the conviction, mitigating factors, and the number of convictions.

887 (S.D. Ohio 2003); Ehrens v. Lutheran Church, 385 F.3d 232, 235 (2d Cir. 2004) (injured party must show that the employer knew or should have known of the employee's propensity for the conduct which caused the injury' prior to the injury's occurrence); Stalbosky v. Belew, 205 F.3d 890, 894, 896 (6th Cir. 2000) (no proof that employer could have reasonably foreseen that employee might assault a total stranger or that his retention placed him in a special position to inflict harm on others).


Id.

Id.

Id.
Unfortunately, many courts hearing negligent hiring or retention claims have not provided specific guidelines for employers to determine how much investigation is required to avoid a finding of foreseeability.\textsuperscript{169} If a claim survives a motion to dismiss, liability may be imposed by a jury without an employer knowing the specific reason why. Rather than guessing how this standard will be applied, employers tend to err on the side of eliminating applicants with criminal convictions.\textsuperscript{170}

A few courts have given some guidance as to how the foreseeability factors would be applied to an employer that hires an ex-offender who later causes harm. For example, negligent hiring claims have been dismissed when the claim rests on a small number of prior incidents of misconduct.\textsuperscript{171} In one case, an employer was not liable for a murder committed by a truck driver who had been convicted of arson as well as aggravated assault, and had a history of drug abuse, where there was not enough evidence that the employer should have reasonably foreseen that the driver might assault a total stranger or that his retention placed him in a special position to inflict harm on others.\textsuperscript{172}

A thorough investigation of applicants’ backgrounds may relieve an employer of liability for negligent hiring. For example, an employer was relieved of liability where it contracted with a professional investigation service to perform a background check on an employee. At the time it hired him, the employer had no reason to question the accuracy or thoroughness of the information provided by the investigation service, which showed that the employee had no convictions for any crimes or any record of criminal activity.\textsuperscript{173}

Yet contrary to these cases, liability for negligent retention or hiring sometimes can occur based on one single incident of prior misconduct, particularly where the harm caused by employee is


\textsuperscript{170}Todd, supra note 165, at 954.

\textsuperscript{171}See Sullivan v. St. Louis Station Assocs., 770 S.W.2d 352, 357 (Mo. Ct. App. 1989)(single prior incident did not establish negligent retention); Moore v. Hosier, 43 F.Supp.2d 978, 993-994 (N.D. Ind. 1998)(no liability based on single, prior incident that did not equate to a habit or propensity toward misconduct).

\textsuperscript{172}Stalbosky, supra note 161, 205 F.3d at 896.

\textsuperscript{173}Munroe v. Universal Health Services, Inc., 277 Ga. 861, 865 (2004).
serious. The employer of an apartment complex manager, for example, was liable for the manager’s rape of a tenant where the employer failed to investigate the manager’s background, which included convictions for receiving stolen property, armed robbery and burglary, and a discharge for drinking on the job.

Similarly, a motor freight company went to trial on a claim based on its driver raping a hitchhiker. The claim was not dismissed since the employer could not justify its failure to check the driver’s criminal history based on cost, when compared to the potential utility of conducting a check. The driver had a history of violent sex-related crimes, and it could be expected that drivers would pick up hitchhikers. These cases support an employer’s practice of checking for a criminal record, and refusing to hire an applicant with one, especially if the employee would be in a position to cause harm to others.

Some courts have held more specifically that the extent of the duty to investigate applicants depends on the duties of the position being filled. Where the job duties involve frequent contact with members of the public or close contact as part of a special relationship between the injured person and the employer, some courts have expanded the employer’s duty to investigate. In these situations, the employer may need to investigate beyond the job.

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177 Id. at 269.

178 Id.


180 See, e.g., Williams v. Feather Sound, Inc., 386 So. 2d 1238, 1240 (Fla. App. 1980) (no duty to inquire about employee hired for outside maintenance, but duty was greater after transfer to inside work).
application form and personal interview, and conduct an independent inquiry into the applicant's background.\(^\text{181}\)

For the employer to be liable, the victim may need to show that the previous incident or incidents were sufficiently linked with the employee’s more recent misconduct - a close connection or relationship between the victim and the employer's business.\(^\text{182}\) The link must be enough to put the employer on notice that the employee was likely to commit the most recent misconduct.\(^\text{183}\) The conviction of the above-referenced truck driver, for example, lacked “at least some connection between the injured victim and the employment.”\(^\text{184}\)

Absent a causal connection between the employee's particular incompetency for the job and the injury sustained by the plaintiff, the employer is not liable to the injured party for hiring an employee with that particular incompetency. For example, no liability followed for a security services company that hired a security guard who allowed others to conduct a drug deal on the property he was guarding.\(^\text{185}\) The company had investigated his criminal and employment record, and could not have known of his criminal propensities based on that investigation.\(^\text{186}\)

The previous conduct only creates foreseeability if it was illegal or actionable. For example, a radio deejay’s defamatory comments were not foreseeable by the radio station that hired him, so as to establish the station’s liability for negligent hiring.\(^\text{187}\) The station was not expected to know that the deejay was likely to make false, defamatory statements during his radio show, since his prior conduct may have been offensive or outrageous, but it was not defamatory.\(^\text{188}\)

\(^\text{181}\) Id.


\(^\text{183}\) Id.

\(^\text{184}\) Stalbosky, supra note 161, 205 F.3d at 896-97.


\(^\text{186}\) Id. at 380.

\(^\text{187}\) Van Horne v. Muller, 185 Ill. 2d 299 (1998).

\(^\text{188}\) Id. at 313-14.
Like the adverse impact cases discussed above, these negligent hiring cases focus mainly on the nature of the crime, and sometimes consider the relationship between the previous crime and the harm caused after the ex-offender was hired. These cases do not appear to require that an employer conduct an inquiry into the applicant’s personal characteristics, and likewise do not appear to relieve an employer of liability if those personal characteristics would have led an employer to believe that the applicant would not cause harm to others as an employee.

C. Serious or Violent Crimes

Like considerations of workplace safety, the seriousness of the crime committed by an applicant has been considered to be a rational factor for employers to rely upon in making selection and retention decisions. However, for reliance on this factor to be a rational way to prevent future harm or liability, an employer must be able to accurately predict, based on the crime committed, whether the applicant will commit another crime in the future. This may not be possible, since even experts on recidivism may not be able to do so.

An expert in the SEPTA case reported that the “criminological discipline is incapable of distinguishing accurately between violent criminals who are and are not likely to commit future violent crimes.”

Another expert in that same case testified that “the strength of violent criminal activity as a predictor of future criminal activity ‘moderates over time but remains regardless of how much time passes.’” According to the reviewing court, this evidence was enough to support SEPTA’s argument that the paratransit positions were “extraordinarily sensitive, and that screening out individuals with violent convictions -- no matter how remote -- is appropriate.”

Like the SEPTA court, the seriousness of the offenses committed was a major factor in another court’s review of a federal agency’s consideration of an employee’s conviction. The court found that other employees of the agency might not want to work with someone who has been convicted of shooting someone. Conviction for possession of an instrument of crime, possession of a concealed weapon, simple assault, aggravated assault and recklessly endangering another person “raised a ‘strong and secure’ presumption that the efficiency of the service would be adversely affected by his continued employment with the agency.”

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189 El, supra n. 6, 479 F.3d at 247.

190 Id.


192 Id.

193 Id.
employee commits a violent crime during off-duty hours, a "strong and secure" presumption arose that the employee's misconduct adversely affected the efficiency of the service.\textsuperscript{194}

This same court recognized that if a federal employer establishes this connection between the crime and the “efficiency of the service,” the employee may try to show that his off-duty conduct will not interfere with or adversely affect his performance of his job or his co-employees’ performance of their jobs and the overall accomplishment of the agency's duties and responsibilities.\textsuperscript{195} In that particular case, the presumption supporting his dismissal was not rebutted by his acceptance by his fellow employees, the fact that his position did not entail any public duties, the absence of prior discipline for any violent conduct, or the lack of impact his conviction had on his ability to perform his duties.\textsuperscript{196} Instead, the court focused on the effect of the conviction on the agency's ability to meet its responsibilities and other employees' performance of their jobs, based on the anticipation that other employees would be afraid that the employee would engage in similar criminal behavior.\textsuperscript{197} This case suggests that an employer can rely on coworkers’ fears that someone who committed a serious crime may do so again in the future, even if there is no objective reason to make such an assumption.

The seriousness of the offense may not always show an effect on the person’s ability to do the job. A New York City employee’s discharge based on a manslaughter conviction was overturned despite the seriousness of the offense.\textsuperscript{198} In light of other evidence that he was “a suitable employee” in general, the court rejected the city’s opinion that he was “not somebody that we should have working at the Transit Authority.” In finding that the policy violated the Equal Protection clause, the court held that the policy was too broad to accomplish any legitimate governmental purpose.\textsuperscript{199} Before excluding all ex-felons from public employment, an

\textsuperscript{193} Id.
\textsuperscript{194} 714 F.2d at 1223. See also Gueory v. Hampton, 510 F.2d 1222, 1226 (D.C. Cir. 1974) (conviction for manslaughter has significant relationship to position of janitor supervisor despite lack of regular contact with public).
\textsuperscript{195} 714 F.2d at 1223.
\textsuperscript{196} Id. at 1224.
\textsuperscript{197} Id.
\textsuperscript{198} Furst v. N.Y. City Transit Authority, 631 F. Supp. 1331, 1334 (E.D. N.Y. 1986).
\textsuperscript{199} 631 F. Supp. at 1338.
employer should demonstrate “some relationship between the commission of a particular felony and the inability to adequately perform a particular job.”

The seriousness of an offense has been relied upon successfully to justify employers’ adverse actions in some disparate treatment cases. Typically the seriousness of the criminal offense can show that the discharged employee alleging discrimination was not similarly situated to another employee who was not discharged. In one disparate treatment case, a guard discharged after being convicted of shooting someone (allegedly) in self defense could not show discrimination, even though others had not been discharged for similar conduct. This guard’s conduct was different enough since it involved the use of deadly force, showing that his retention could be “detrimental to the interests of the government and may constitute a threat to employees, coworkers and the general public.” The guard’s behavior also showed that he lacked an important characteristic of a guard – being able to respond well in stressful situations.

Schools are also often justified in making employment decision based on the severity of the offenses in employees’ or applicants’ criminal records. One African American employee unsuccessfully challenged his discharge after four arrests and pleading no contest to a charge of lewd assault on a female child. The court considered the violence associated with the crimes of assault and child molestation, as well as the fact that he had four arrests, two of which were recent. This was enough to show that he was not similarly situated to the other white employee who had been arrested but were not discharged.

One state statute also considers the seriousness of the crime in its statute addressing employers’ reliance on criminal records. In Massachusetts, reliance on less serious crimes to make employment decisions may be inappropriate: an employer cannot “exclude, limit or otherwise

\[200\] Id.


\[202\] 1982 U.S. Dist. LEXIS 14457 at *12.

\[203\] Id. at *12-13. See also Ricks v. Riverwood Int’l, 782 F. Supp. 83 (W.D. Ark. 1992), aff’d, 38 F.3d 1016 (8th Cir. 1994)(discharge of sawmill employee based on drug conviction upheld).

\[204\] Silvera v. Orange Co. School Board, 244 F.3d 1253 (11th Cir. 2001), rev’g 87 F. Supp. 2d 1265 (M.D. Fla. 2000).

\[205\] 244 F. 3d at 1259.

\[206\] Id.
discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace…”

This is the only protective state statute that specifically distinguishes between different types of crimes.

These cases illustrate the influence that sometimes comes from the seriousness of the applicant’s crime. Even if experts cannot agree on whether the seriousness will predict future recidivism, the perception of an employer or even its employees may be enough to justify a negative hiring decision. The crime is used as a predictor of the person’s unlikelihood of succeeding in the workplace, regardless of any individual circumstances surrounding their involvement in the crime, or any positive characteristics evidenced by their behavior since engaging in the criminal activity.

D. Relation to Job Duties

As discussed above, some courts validate a decision to not hire an ex-offender based on notions of public trust or the nature of the crime alone. Yet more and more courts, as well as the state statutes which limit an employer’s consideration of criminal convictions, rely heavily on the perceived relationship between the crime for which someone was convicted and the job duties of the position they seek. In El v. SEPTA, El was not hired by SEPTA based on a 40-year-old conviction for second degree murder, under SEPTA’s policy of not hiring applicants who had a record of any felony or a misdemeanor for a “crime of moral turpitude or of violence against any person(s).”

SEPTA justified its policy based on these characteristics of the paratransit driver position:

(1) the job requires that the driver be in very close contact with passengers

(2) the job requires that the driver often be alone with passengers, and

(3) paratransit passengers were vulnerable because they typically had physical and/or mental disabilities.

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208 El, supra note 6, 479 F.3d at 235-36.

209 Id. at 235.
SEPTA also relied on its conclusions that disabled people are disproportionately targeted by sexual and violent criminals, and that violent criminals recidivate at a higher rate.\textsuperscript{210} SEPTA also noted the extreme difficulty of predicting with any accuracy which criminals will recidivate.\textsuperscript{211} As noted in the discussion on seriousness of offenses, SEPTA assumed that someone with a conviction for a violent crime is more likely than someone without one to commit a future violent crime, regardless of the amount of time since the conviction, and that its policy was the most accurate way to screen out applicants who present an unacceptable risk.\textsuperscript{212}

This court is one of the first federal courts to suggest that individual assessment may be appropriate. In reviewing SEPTA’s policy, the court noted that SEPTA relied too heavily on the impossibility of predicting which criminal will recidivate, since the court found that it was also difficult or even impossible to predict if someone will commit a crime for the first time.\textsuperscript{213} Instead, the court focused on “the risk that the individual presents, taking into account whatever aspects of the person’s criminal history are relevant.”\textsuperscript{214}

Yet the \textsuperscript{El} court did not go so far as to require that employers review each applicant to judge his or propensity to commit a crime in the future. Drawing from the reasoning of earlier federal court opinions, the \textsuperscript{El} court approved SEPTA’s policy of excluding ex-offenders from the driver position in part because it “only prevents consideration of people with certain types of convictions -- those that it argues have the highest and most unpredictable rates of recidivism and thus present the greatest danger to its passengers.”\textsuperscript{215} An employer can use a “bright line policy” to screen applicants, if that policy still makes a distinction between individual applicants based on level of risk, but that criteria used by an employer “must distinguish with sufficient accuracy between those who pose that minimal level of risk and those who pose a higher level.”\textsuperscript{216}

The particular duties of the position were also influential in a recent federal trial court’s dismissal of the claim of a law firm employee who was discharged because of his thirty year old

\begin{footnotes}
\footnote{210} \textit{Id.} at 235-36.
\footnote{211} \textit{Id.}
\footnote{212} \textit{Id.} at 245.
\footnote{213} \textit{Id.} at 246 n. 15.
\footnote{214} \textit{Id.}
\footnote{215} \textit{Id.} at 243.
\footnote{216} \textit{Id.} at 245 n. 12.
\end{footnotes}
record as a sex offender.\textsuperscript{217} There was an “adequate business necessity” for the dismissal since opportunities for his misconduct existed in an unguarded office work place, and the employer sought to protect employee morale.\textsuperscript{218} That court concluded that Title VII did not impose an obligation on employers to “overlook significant potential dangers, at least to employee morale.”\textsuperscript{219}

These cases provide more detailed guidance for employers by building on earlier federal court decisions which required that employers justify a blanket exclusion of applicants based solely on their criminal record. One of the first federal district courts to address exclusion based on criminal convictions found that discrimination resulted from the policy of excluding any applicant with a criminal record, since the practice had an adverse impact on African American applicants.\textsuperscript{220} An employer should not disqualify applicants based solely on past behavior, where that disqualification has a disproportionate racial impact and “rests upon a tenuous or insubstantial basis.”\textsuperscript{221} Relying on any conviction to bar consideration of an applicant did not meet the adverse impact defense requirement that “the system in question must not only foster safety and efficiency, but must be essential to that goal.”\textsuperscript{222}

This employer which barred all applicants with a criminal record failed to show that any of these reasons were empirically validated with convictions records, or that a less restrictive alternative would not serve the purposes of preventing theft, meeting bonding qualifications, avoiding impeachment of an employee as a witness or liability for hiring persons with known violent tendencies, preventing disruption caused by recidivism, and an ex-offender’s lack of moral character.\textsuperscript{223} Excluding applicants based on conduct which occurred long ago or did not relate closely to the particular job requirements was “an unnecessarily harsh and unjust burden.”\textsuperscript{224}

\begin{itemize}
\item \textsuperscript{217} Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028 (W.D. Mo. 2008).
\item \textsuperscript{218} Id. at 1031.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Green v. Missouri Pacific Railroad Co., 523 F. 2d 1290 (8th Cir. 1975).
\item \textsuperscript{221} 523 F. 2d at 1296.
\item \textsuperscript{222} Id. at 1298.
\item \textsuperscript{223} Id.
\item \textsuperscript{224} Id. See also, Marshall v. Klassen, No. IP 75-306-C, 1977 U.S. Dist. LEXIS 17375 (S.D. Ind. Feb. 14, 1977)(denying summary judgment for employer which excluded applicants based on criminal record).
\end{itemize}
Yet on appeal after remand, this same court refused to overturn the employer’s consideration of criminal convictions on a less than absolute basis.\textsuperscript{225}

Relying on similar reasoning, a Minnesota court found discriminatory the use of any criminal conviction for a felony as an absolute bar to working as a firefighter.\textsuperscript{226} The trial court concluded that the employer could not show a purpose its absolute felony bar against applicants for fire fighter positions, particularly where the employer failed to distinguish between types of crimes, did not consider the length of time since the conviction, and did not attempt to determine which convictions should act as a bar for potential fire fighters.\textsuperscript{227} The Minnesota court ordered that the department no longer reject applicants for felonies that were more than five years in the past or misdemeanors more than two years old.\textsuperscript{228} The court also required that a person to be rejected based on their record be given notice and an opportunity to respond regarding the circumstances surrounding the conviction.\textsuperscript{229}

On appeal, the court’s order was changed significantly.\textsuperscript{230} The parties agreed that a conviction of a felony or misdemeanor should not be an absolute bar to employment, but the appellate court’s order allowed the department to consider that applicants’ conviction records, “at least in cases of aggravated offenses and multiple convictions, may have a bearing on the suitability of an applicant for a fire department position both from the standpoint of protecting fellow firemen and the public.”\textsuperscript{231}

The appellate court also noted that it would support a rule “giving fair consideration to the bearing of the conviction upon applicant's fitness for the fire fighter job.”\textsuperscript{232} On remand, the trial court ordered that “no conviction be an absolute bar to employment.”\textsuperscript{233} The policy adopted at

\textsuperscript{225} \textit{Green v. Missouri Pacific Railroad Company}, 549 F.2d 1158 (8th Cir. 1977)(appeal after remand).


\textsuperscript{227} 1971 U.S. Dist. LEXIS 14278 at *17.

\textsuperscript{228} \textit{Id.} at *64-65.

\textsuperscript{229} \textit{Id.}

\textsuperscript{230} 452 F. 2d at 324.

\textsuperscript{231} \textit{Id.}

\textsuperscript{232} \textit{Id.}

\textsuperscript{233} No. 4-70 Civ. 399, 1972 U.S. Dist. LEXIS 14309 at *9 (D. Minn. April 6, 1972).
that time required that convictions be a basis for rejection only if their “number, nature and recency would cause the applicant to be unfit for the position,” and specifically prohibited the consideration of misdemeanors with no jail sentences.\textsuperscript{234} The trial court found, 27 years later, that the department inappropriately continued to consider both arrests and convictions in its hiring decisions.\textsuperscript{235}

Following the reasoning in these earlier decisions, another federal court found that an employer discriminated by barring applicants or removing employees who had criminal records.\textsuperscript{236} Plaintiff Rios worked successfully for several years as a casual driver, but was rejected for a regular driver position under this policy based on his more than ten-year-old convictions for receiving stolen property and larceny.\textsuperscript{237} The trucking company policy prohibited the hiring of line drivers with any criminal conviction within the three year period immediately preceding the application if the sentence exceeded a $25.00 fine or six months suspension.\textsuperscript{238} An applicant would not be hired with any felony, theft, or larceny conviction which resulted in an active prison or jail sentence.\textsuperscript{239}

The trucking company justified its policy based on its history of employee theft, which may have occurred because its drivers worked with little supervision.\textsuperscript{240} In addition the value of the truck and the cargo, as well as the “high risk” associated with many of the shipments, justified the employer’s exclusion based on applicants’ past convictions.\textsuperscript{241} The duties of reporting freight deficiencies to the terminal and turning over cash collected from customers also justified the policy.\textsuperscript{242}


\textsuperscript{235} \textit{Id.}

\textsuperscript{236} \textbf{EEOC v. Carolina Freight Carriers Corp.}, 723 F. Supp. 734 (S.D. Fla. 1989).

\textsuperscript{237} \textit{Id.}

\textsuperscript{238} \textit{Id.} at 737-38.

\textsuperscript{239} \textit{Id.}

\textsuperscript{240} \textit{Id.} at 739.

\textsuperscript{241} \textit{Id.} at 752.

\textsuperscript{242} \textit{Id.}
Rejecting the reasoning of the Green court, this court opined that “to say that an applicant's honest character is irrelevant to an employer's hiring decision is ludicrous,” and found that no personality trait is more important than the honesty of a prospective employee.\(^{243}\) The court concluded that it was reasonable for the employer to rely upon applicants’ criminal records to determine their trustworthiness.\(^{244}\) The court’s biases were revealed by its comment that “If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing.”\(^{245}\)

Similar to this line of reasoning, a forced resignation of a Social Security Office employee was upheld because of the link between her job duties and her crime.\(^{246}\) Pleading guilty to possessing a stolen government check justified her forced resignation from a position which gave her access to the mailroom where several government checks had disappeared, even though there had no specific complaints about her job performance.\(^{247}\) Her offense caused the office to consider her a “high risk employee,” and the office wanted to deter further thefts from the mail room.\(^{248}\) The employer met its burden of justifying any adverse impact, and specifically distinguished the Green decision, by not having a blanket policy of removing employees based on a criminal record.\(^{249}\)

More recently, courts began moving closer to the job-relatedness required in the El decision. In a claim of sex and age discrimination, one court opined that a complete bar on hiring ex-offenders with recent criminal records would not be discriminatory if the conviction “involved conduct which demonstrates a person’s lack of qualification for the job.”\(^{250}\) The court entered

\(^{243}\) 723 F. Supp. at 753 (citing Richardson v. Hotel Corp. of America, 332 F. Supp. 519, 521 (E.D. La. 1971)).

\(^{244}\) 723 F. Supp. at 753.

\(^{245}\) Id.


\(^{247}\) 508 F. Supp. at 1056.

\(^{248}\) Id.

\(^{249}\) 508 F. Supp. at 1057. See also Richardson v. Hotel Corporation of America, 332 F. Supp. 519 (E.D. La. 1971), aff’d without opinion, 468 F.2d 951 (5th Cir. 1972)(applicants for hotel bellmen with access to guest property could be rejected based on criminal conviction for serious crime).

judgment on behalf of the employee who had been discharged based on her conviction that arose from her attempts to retrieve her granddaughter in the midst of a child custody battle.\textsuperscript{251} The conviction was insufficiently related to her bookkeeper position, where she had worked for the company for many years “without any hint of scandal or misconduct,” and had been rated an “exceptional” employee.\textsuperscript{252}

Even states that have adopted limitations on an employer’s consideration of previous convictions generally still allow an employer to consider a conviction that is related to the person’s job duties. In Pennsylvania, for example, employers can consider felony and misdemeanor convictions “only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied.”\textsuperscript{253} Yet a Pennsylvania court dismissed a car sales representative's claim based on his employer’s consideration of his criminal record, since representatives were responsible for depositing monies for the employer, and had the ability to see customers' confidential financial information.\textsuperscript{254} The court concluded that “their criminal background clearly had a major role in their suitability for employment.”\textsuperscript{255}

As in Pennsylvania, an employer in Hawaii may rely on an individual's criminal conviction record concerning hiring, termination, or the terms, conditions, or privileges of employment, but only if the conviction record bears a “rational relationship to the duties and responsibilities of the position.”\textsuperscript{256} Similarly, several states require a relationship between a conviction and disqualification for licenses and permits which may be required for certain employment.

In Minnesota, an ex-offender can be barred from employment if “the crime or crimes for which convicted directly relate to the position of employment sought or the occupation for which the license is sought.”\textsuperscript{257} Additional guidance in the statute provides that this relationship depends on the following:

\textsuperscript{251}Id.

\textsuperscript{252}Id. at *2-3.

\textsuperscript{253}18 PA.C.S. § 9125(b) (2008).


\textsuperscript{255}Id. at *6-7.


\textsuperscript{257}Minn. Stat. § 364.03 (2008).
(1) the nature and seriousness of the crime or crimes for which the individual was convicted;

(2) the relationship of the crime or crimes to the purposes of regulating the position of public employment sought or the occupation for which the license is sought;

(3) the relationship of the crime or crimes to the ability, capacity, and fitness required to perform the duties and discharge the responsibilities of the position of employment or occupation.\textsuperscript{258}

Job-relatedness is also considered in Louisiana and Connecticut with regard to licenses and permits related to employment. In Louisiana, a person cannot be disqualified, or held ineligible to practice or engage in any trade, occupation, or profession for which a license, permit or certificate is required solely because of a prior criminal record, except in cases where the applicant has been convicted of a felony, and that conviction directly relates to the position of employment sought, or to the specific occupation, trade or profession for which the license, permit or certificate is sought.\textsuperscript{259}

Similarly, in Connecticut, a person may be denied state employment or a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, profession or business by reason of the prior conviction of a crime if the person is suitable for the state position or the specific occupation, trade, vocation, profession or business for which the license, permit, certificate or registration is sought.\textsuperscript{260} The factors to be considered include:

(1) the nature of the crime and its relationship to the job for which the person has applied;

(2) information pertaining to the degree of rehabilitation of the convicted person; and

(3) the time elapsed since the conviction or release.\textsuperscript{261}

Like these states, a New York statute allows consideration of a person’s conviction record in hiring decisions as well as applications for licenses, but only if “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment

\textsuperscript{258} \textit{Id.} at § 364.03(2).

\textsuperscript{259} LA. R.S. § 37:2950 (2008).


\textsuperscript{261} \textit{Id.}
sought or held by the individual;” or if the license or the employment “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”

In determining whether there is a relationship between the conviction and the employment or license sought, the employer or licensing body in New York must consider “the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.”

The interpretations of Wisconsin’s protective statute by its state courts are helpful in further defining the “relationship” requirement. Wisconsin’s restrictions weigh the relatedness of the conviction to the duties of the position: employers can consider convictions if the circumstances of the crime “substantially relate to the circumstances of the particular job or licensed activity.” This relationship between the crime and the employment has been examined by numerous Wisconsin courts.

The Wisconsin Supreme Court found a relationship between the crime of homicide by reckless conduct and the position of a "crisis intervention specialist" under a program operated by the Medical College of Wisconsin. These charges were based on a nursing home patient who wandered away from a nursing home and died from exposure. The court rejected the findings of the administrative agency, which first heard these claims, that the employee’s prior offense did not show an inability to continue his duties of providing direct crisis intervention assistance for those with acute mental health problems.

The Wisconsin Supreme Court found that this employee’s conviction was sufficiently related to his position because the circumstances surrounding the conviction and the particular job were “substantially related.” An employer need not make a detailed inquiry into the facts surrounding the offense and the job in question, since “such factual inquiry would have as its

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262 NY CLS Correc § 752 (2008).

263 Id. at § 753.


266 Id.

267 Id. at 823.
purpose ascertaining relevant, general, character-related circumstances of the offense or job."\(^{268}\)

The court was wary of overburdening employers, finding that a full-blown factual hearing would be both unnecessary and impractical, since employers should be able to make employment decision in a “confident, timely and informed way.”\(^{269}\)

Instead of requiring such a broad fact-finding activity to justify reliance on a criminal conviction, the Wisconsin court held that “[i]t is the circumstances which foster criminal activity that are important.”\(^{270}\) In reversing the Commission’s finding of discrimination, the court found that “the responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences.”\(^{271}\)

The Wisconsin Court of Appeals has followed the logic of the Supreme Court in allowing several employers’ justifications for considering the convictions of their employees or applicants. In a 2004 case, the Wisconsin Court of Appeals determined that an employer could refuse to hire as a truck driver an applicant who had been convicted of armed robbery and theft.\(^{272}\) The convictions were “substantially related” to the position he sought since new drivers were required to drive in Canada, and his convictions prevented him from driving there.\(^{273}\) The court also noted that he lacked the “trustworthiness” needed to haul valuable freight.\(^{274}\)

In a second case, an employee’s shoplifting conviction led to his discharge.\(^{275}\) The court referenced the public interest in protecting citizens from an unreasonable risk that the convicted person will commit a similar offense if he is placed in an employment situation

\(^{268}\) Id. at 825.

\(^{269}\) Id. at 826-27.

\(^{270}\) Id. at 824.

\(^{271}\) Id. at 828. See also Gibson v. Transportation Commission, Department of Transportation, 106 Wis. 2d 22 (1982)(upholding denial of license for school bus driver based on armed robbery conviction).

\(^{272}\) Jackson v. Labor and Industry Review Commission and Transport America, 276 Wis. 2d 308 (Wis. Ct. App. 2004).

\(^{273}\) Id.

\(^{274}\) Id.

offering a chance to engage in criminal activity related to his or her previous crime. Because the job involved unsupervised visits to residential and commercial customers' premises, the employment provided “temptations and opportunities” related to the circumstances of the conviction. The court concluded that the opportunity for theft from the employer's customers posed an unreasonable risk. These courts have refused to consider other factors which might predict the ex-offender’s success in the workplace. The line of reasoning relied upon in these Wisconsin state court decisions allows an employer to screen applicants based on their conviction record alone, rather than considering more individualized circumstances.

Like these Wisconsin decisions, other states’ courts have not been reluctant to find a relationship between the crime committed and the job duties involved. One federal court in Texas, for example, upheld a state rule that felons could be barred from serving as a police officer, even if they have been pardoned. That court reasoned that a police officer who has a conviction record would lose the ability to testify credibly, even if he or she has been pardoned. An additional rationale for the ban was to make sure that employees in emergency or dangerous situations are “sober and alert, and possess qualities such as honesty, integrity, reliability and obedience to the law.” The court observed that “the law clothes an officer with authority to handle many critical situations, including those that occur in a lightning moment and which never can be re-enacted or reversed.”

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276 1988 Wisc. App LEXIS 674 at *2 (citing County of Milwaukee v. LIRC, 139 Wis.2d 805, 821 (1987)).

277 Id.


281 Id. at 719 n. 7.

282 Id. at 721.

283 Id.
In contrast to these decisions, some reviewing courts have looked more closely at individual circumstances when determining the job relatedness of a conviction record. In one case, the Court of Appeals in Wisconsin found Wal-Mart liable for the suspension and discharge of an employee for a pre-hire drug-related misdemeanor conviction, given the lack of evidence that the employee had used or distributed drugs since Wal-Mart hired her.284

Similarly, the Milwaukee Board of School Directors unlawfully discriminated against a former employee by refusing to re-hire him as a Boiler Attendant Trainee, based on his conviction for "Injury by Conduct Regardless of Life."285 Given “the violent nature” of the crime and the young age of the victim, the school argued that the crime was sufficiently related to the boiler attendant position in a public school.286 Even while referencing the Supreme Court’s concerns about recidivism, the court still held that “circumstances of Moore's conviction were not substantially related to the job of Boiler Attendant Trainee.”287

This court adopted the commission’s conclusion that even though the conviction could show “gross negligence or indifference to the safety of others,” the crime did not demonstrate a “propensity to intentionally inflict harm on others.”288 The Boiler Attendant Trainee job was not a “particularly safety-sensitive” and did not involve a ‘high level of responsibility.’289 In addition, the employee’s duty of handling numerous potentially dangerous substances was not enough to support the failure to re-hire him.290 Even though the attendant worked at a school, the court was not concerned about potential occasional contact with students, since the crime in question did not involve “circumstances that pose a particular risk for children.”291


287 Id.

288 Id.

289 Id.

290 Id.

291 Id.
These less common decisions show that a court, and an employer, could engage in a closer analysis of the duties of a particular position, to determine if there is a business necessity to exclude applicants based on a criminal record. These courts have also been able to consider the individual characteristics of the applicant, beyond the conviction and the nature of the crime, to determine if the applicant would pose any time of risk for the employer if he or she was hired into a particular position.

E. Time Since Conviction

The last factor of the Model Sentencing and Correction Act test - the passage of time since the date of the last conviction or the date of the release – suggests that employers should consider hiring ex-offenders whose convictions occurred in the more distant past. This factor corresponds to the relatedness of the crime to the job the ex-offender seeks, since the time that an individual continues to lead a crime-free life can establish a lower expectance of recidivism, and therefore an ability to perform those job duties well. 292

Some courts and protective statutes have recognized that a conviction may be less relevant as the time since that conviction increases. 293 Yet many employers still do not consider time since conviction as a relevant factor. One expert has stated that the most significant reason ex-offenders had difficulty finding employment was either a blanket company policy totally excluded anyone with a criminal conviction, or a policy requiring a lengthy amount of time to have passed (usually a minimum of seven years, often times ten) since the last conviction. 294

In the discrimination case challenging SEPTA’s policy of excluding ex-offenders, one of SEPTA’s experts recognized that “[i]t is also the case that an individual’s propensity to commit a future violent crime decreases as that individual’s crime-free duration increases.” 295 The expert explained that someone with a prior violent conviction who has been crime-free in the community for twenty years is less likely to commit a future crime than one who has been crime-

292 Kurlychek, supra note 50, 5 CRIMINOLOGY & PUB. POL’Y at 483 (study showing that after 6-7 years of crime-free conduct, ex-offenders' risk of reoffending starts to approximate risk posed by people without convictions); Peter B. Hoffman & Barbara Stone-Meierhoefer, “Reporting Recidivism Rates,” 8 J. CRIM. JUST. 53, 57 (1980) (rates of recidivism at 15% during the first year, 10% during the second, 7% during the third). See also Kashcheyeva, supra note 119, 2007 MICH. ST. L. REV. at 1085.


294 EEOC hearing, Statement of B. Diane Williams, President and CEO, Safer Foundation.

295 El, supra note 6, 479 F.3d at 246.
free in the community for only ten years.\textsuperscript{296} At the same time, the expert acknowledged that neither of these individuals can be judged to be less or equally likely to commit a future violent act than someone who has no prior violent history, and admitted that predictions of comparable low-probability may not be correct.\textsuperscript{297} The court interpreted this testimony to mean that “former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act.”\textsuperscript{298}

Some courts do not hesitate to enforce a particular time frame. Without any evidence to support the time frame, a federal court upheld the Illinois bar against felons serving as armed guards or investigators based on convictions within the past ten years.\textsuperscript{299} A reviewing court upheld the constitutionality of that ban, finding it “patently obvious” that the State could refused to hire people who had been convicted within the previous ten years, because they have shown themselves to be “unfit for a potentially sensitive position” of working for a detective agency.\textsuperscript{300}

The Illinois trial court concluded that the ten year time frame was “rational” because an ex-offender would be less reliable in a sensitive position than someone without a felony record.\textsuperscript{301} On appeal, the Seventh Circuit upheld the 10 year period as reasonable, without explaining why ten years was an appropriate cut-off.\textsuperscript{302} Like the Wisconsin decisions, these courts leave little opportunity for an applicant to present individual circumstances which might show that they are better able to fulfill the duties of the position than their relatively recent criminal record would suggest.

Like this Illinois court, time since conviction was not a dispositive factor that warranted affirmation of a state commission’s findings on an adverse impact claim of an African American applicant for a police officer position.\textsuperscript{303} The applicant had been convicted of possession of a

\textsuperscript{296}Id.

\textsuperscript{297}Id.

\textsuperscript{298}Id.


\textsuperscript{300}Schanuel v. Anderson, 546 F. Supp. 519, 522 (S.D. Ill. 1982), aff’d, 708 F.2d 316 (7th Cir. 1983).

\textsuperscript{301}546 F. Supp. at 522.

\textsuperscript{302}708 F.2d at 320.

\textsuperscript{303}Board of Trustees of Southern Illinois University v. Knight, 163 Ill. App. 3d 289 (1987).
firearm almost five years earlier.\textsuperscript{304} Despite this length of time, the university could deny him the position based on the surrounding circumstances, since an employer can show a business necessity for relying on criminal information if the associated conduct relates to the particular job requirements in question.\textsuperscript{305}

Similarly, some states that limit an employer’s reliance on criminal convictions do not place great importance on the time the crime was committed. For example, a Wisconsin appellate court noted that its protective statute intended to balance the goal of rehabilitation against the interest in protecting others from the risk of future criminal activity.\textsuperscript{306} That court concluded that the “precise timing of the discharge and formal conviction is not a factor that affects that balance.”\textsuperscript{307}

Like the Wisconsin court, the federal court in Carolina Freight court allowed an employer to maintain a lifetime bar on the employment of persons with a conviction record.\textsuperscript{308} Employees had argued that a five to ten year limit on consideration of convictions was an available option for Carolina Freight, but court found a lack of “proof that such a limited conviction policy would be either equally effective in deterring employee theft or have a less restrictive effect on the hiring of Hispanic truck drivers.”\textsuperscript{309} Instead, the court relied on Carolina Freight's management’s belief that “its conviction policy is both effective and integral to maintaining employee theft at an acceptable level.”\textsuperscript{310}

In contrast to these decisions, other discrimination cases have given some weight to the length of time since the conviction occurred. Current criminal justice research supports a decrease in consideration of a criminal record as the time since conviction increases.\textsuperscript{311} Researchers have

\textsuperscript{304} Id. at 292.

\textsuperscript{305} Id. at 297-98.


\textsuperscript{307} 1988 Wisc. App. LEXIS 883 at *3-4.


\textsuperscript{309} 723 F. Supp. at 753.

\textsuperscript{310} Id. at 754.

\textsuperscript{311} See Vicher, Lattimore and Linster, “Predicting the Recidivism of Serious Youthful Offenders Using Survival Models,” 29 CRIMINOLOGY 329-66 (1991); Patrick A. Langan and David J. Levin, “Recidivism of
found that among ex-offenders in New York, an ex-offender was no more likely to recidivate than someone without a record after 4 1/2 to 8 years without more arrests.\textsuperscript{312} Age at the time of offense and the type of offense were factors that determined the length of time within that range that the effects of a prior conviction were eliminated.\textsuperscript{313}

Some courts have followed this reasoning. In one case, an employee was entitled to a jury trial, since questions of fact existed as to whether a conviction for Lewd and Lascivious Acts Upon a Minor that occurred twenty years before he was discharged for that conviction gave PacBell just cause to discharge him.\textsuperscript{314} The court refused to conclude that he was a threat to other employees given “the significant lapse in time” since his conviction, in light of the nature of the crime.\textsuperscript{315}

A remote conviction may not be reasonably related to the present ability to perform acceptably on the job, if a court is willing to consider other applicant characteristics. One court refused to uphold a failure to hire where the conviction occurred five years before the application was denied, and the ex-offender had a positive record of professional and responsible work which involved the use of firearms.\textsuperscript{316} The university who refused to hire this ex-offender could not show that he was likely to recidivate.\textsuperscript{317} In addition, the university failed to show that this applicant’s one conviction was as serious as the multiple convictions of another officer who was discharged, where the university did not thoroughly investigate the circumstances surrounding this applicant’s arrest.\textsuperscript{318}

Some state protective statutes also recognize the importance of the amount of time that has passed since the offensive conduct occurred. In California, state law prohibits the inquiry into


\textsuperscript{313} \textit{Id.} at 12-13.

\textsuperscript{314} \textit{Pastrana}, supra note 293, at *27.

\textsuperscript{315} \textit{Id.} at *27.

\textsuperscript{316} \textit{Board of Trustees}, supra note 303, 163 Ill. App. 3d at 296.

\textsuperscript{317} \textit{Id.} at 298.

\textsuperscript{318} \textit{Id.} at 297-98.
convictions for a limited number of marijuana possession charges that are more than two years old.\textsuperscript{319} as well as arrests or other detentions that did not result in conviction.\textsuperscript{320} Similarly, in the District of Columbia, employers can only inquire about convictions that have occurred within ten years of the time the record is requested.\textsuperscript{321}

The Hawaii statute similarly states that an employer “may consider the employee's conviction record falling within a period that shall not exceed the most recent ten years, excluding periods of incarceration.”\textsuperscript{322}  Likewise, in Massachusetts, an employer cannot rely on any conviction of a misdemeanor where the date of such conviction or the completion of incarceration occurred five or more years prior, unless the same person has been convicted of another offense within five years immediately prior to the time of their application for employment or a request for the information.\textsuperscript{323}

Courts and legislatures seem divided as to the importance of the amount of time that has passed since an applicant’s conviction. As discussed below, this lack of a clear direction may be because the research is mixed regarding the relationship between time since conviction and the likelihood that someone will recidivate. Of course this makes it difficult for an employer to know whether it should ask about or consider how much time has passed since the applicant was engaged in criminal activity.

\textbf{F. Evidence of Rehabilitation}

Related to the time that has passed since the offense, other evidence of a person’s unlikelihood of committing another criminal act is considered in Minnesota and New York. Under Minnesota’s protective statute, a person who has been convicted of a crime or crimes which directly relate to the public employment sought or to the occupation for which a license is sought cannot be disqualified from the employment or occupation if the person can show “competent evidence of

\textsuperscript{319} Cal Lab Code § 432.8 (2009).
\textsuperscript{320} Id. at § 432.7(a).
\textsuperscript{323} Mass. Gen. Laws Ch. 151B § 4(9).
sufficient rehabilitation and present fitness to perform the duties of the public employment sought or the occupation for which the license is sought.”

In Minnesota, sufficient evidence of rehabilitation may be established by the production of:

1. a copy of the local, state, or federal release order; and

2. evidence showing that at least one year has elapsed since release from any local, state, or federal correctional institution without subsequent conviction of a crime; and evidence showing compliance with all terms and conditions of probation or parole; or

3. a copy of the relevant Department of Corrections discharge order or other documents showing completion of probation or parole supervision.

In addition to the documentary evidence presented, the licensing or hiring authority must consider any evidence regarding mitigating circumstances or social conditions surrounding the commission of the crime or crimes, the age of the person at the time the crime or crimes were committed, and “all other competent evidence of rehabilitation and present fitness presented, including, but not limited to, letters of reference by persons who have been in contact with the applicant since the applicant’s release.”

Similarly, in New York, the protective statute requires the consideration of any information regarding the applicant’s rehabilitation and good conduct. Specifically, employers or the state body issuing licenses are required to consider “any information regarding rehabilitation and good conduct.” Decision makers in New York are also directed to consider the public policy of encouraging the issuance of licenses and the employment of ex-offenders.

These standards are some of the few that include individual factors regarding the ex-offender. Yet this mandated consideration of individual factors does not necessarily benefit the ex-offender. One New York court considered whether a state board wrongfully denied a license for an owner-trainer-driver of harness race horses, based on the applicant’s criminal record. Even


325 Id.

326 N.Y. Correction Law § 753(1).

327 Id.

328 Clark, supra n. 153, 38 U.S.F. L. REV. at 209.

though the applicant was presumably rehabilitated based on a certificate of good conduct, and several years had passed since the convictions, the denial of the license was still appropriate because the applicant was an adult at the time of his crimes, the crimes were both felonies carrying sentences of five years, and he knew that he was committing those crimes.\textsuperscript{330}

Only six states issue official certificates of rehabilitation.\textsuperscript{331} These certificates are designed to remove statutory bars to jobs or licenses and can be "a way for qualified people with criminal records to demonstrate evidence of ... or a commitment to rehabilitation."\textsuperscript{332} Yet not all of these states require that an employer consider these certificates when reviewing the application of an ex-offender.

New York and Minnesota recognize the guidance provided by the research on recidivism, discussed below, that indicates that if the ex-offender has engaged in productive, non-criminal behavior since their conviction, they are less likely to recidivate. Other courts tend to focus more on the nature of the crime and its relatedness to the position in question, rather than considering individual characteristics of the ex-offender applicant.

G. Individual Assessment

The most precise measure of the appropriateness of hiring an ex-offender would be an individual assessment of his or her aptitudes for the position being filled. Yet individual assessment can be time consuming and expensive. However, some courts have come close to requiring such an assessment, particularly if a blanket exclusion of ex-offenders has been shown to have an adverse impact.

In the SEPTA case, the court upheld the policy based on the expert testimony that justified it, but was concerned that “not one of the witnesses that SEPTA named was able to explain -- beyond a general concern for passenger safety -- why this particular policy was chosen from among myriad possibilities.”\textsuperscript{333} The court suggested that SEPTA should “explain how it

\textsuperscript{330} \textit{Id.} at 615.


\textsuperscript{333} \textit{El, supra} note 6, 479 F.3d at 247-48 (citing Dothard, 433 U.S. at 331).
decided which crimes to place into each category, how the seven-year number was selected, and why SEPTA thought a lifetime ban was appropriate for a crime like simple assault.\footnote{334} However, the court upheld the policy based on expert testimony that the policy accurately screened out applicants who were expected to commit acts of violence against SEPTA’s passengers.\footnote{335}

One federal district court reviewing a state law restricting licenses for ex-offenders came close to requiring individual assessment. Under Connecticut law, all private investigators and security guards must be licensed by and registered with the Department of State Police.\footnote{336} Private detectives gather evidence in civil and criminal matters, make background checks in employment cases, and perform general investigative functions, whereas security guards generally patrol and guard stores, shopping malls, schools, commercial buildings and industrial sites.\footnote{337} Both could carry firearms only if they were authorized to do so by a special permit procedure which applied to all private citizens. Applicants for a license to act as an investigator or a guard were automatically disqualified if they have been convicted of a felony.\footnote{338}

Even though the district court agreed that Connecticut could prohibit individuals of bad character from employment as private detectives and security guards, the legislation failed “to recognize the obvious differences in the fitness and character of those persons with felony records.”\footnote{339} The court found that the statute should not distinguish between felons and those convicted of misdemeanors, and also failed to “consider probable and realistic circumstances in a felon’s life, including the likelihood of rehabilitation, age at the time of conviction, and other mitigating circumstances related to the nature of the crime and degree of participation.” The court concluded that the ban was invalid under the due process clause.\footnote{340}

\footnote{334} 479 F.3d at 248 (citing Griggs, Albemarle, and Dothard).
\footnote{335} Id.
\footnote{336} Conn. Gen. Stat. § 29-153 et seq.
\footnote{338} Id. at 1079.
\footnote{339} Id. at 1080.
\footnote{340} Id. at 1082.
Like this federal court in Connecticut, another federal court in California found that a city’s ban on hiring felons violated the equal protection clause.\textsuperscript{341} The across-the-board ban on hiring ex-felons, which resulted in the discharge of a well-performing city employee who worked as a janitor, was not reasonably related to any legitimate state goal.\textsuperscript{342} The ban was not justified based on an applicant’s single prior felony conviction, since one conviction did not establish that the applicant was unfit for public employment, without considering the type of crime or the particular job sought.\textsuperscript{343} The court conclude that the ban that applied only to felons was under inclusive and therefore not rationally related to any government purpose, since someone convicted of a misdemeanor like an assault or theft could still be hired, even though that crime might be more related to the position of janitor than some felonies.\textsuperscript{344}

Like the California and Connecticut bans on felons, an Alabama policy that prevented felons or misdemeanants from inclusion on a list of wreckers used by the state was found to be unconstitutional.\textsuperscript{345} The claim was filed by a wrecker driver who had been convicted on five worthless check misdemeanor violations.\textsuperscript{346} The state argued that the policy banning persons convicted of crimes against “moral turpitude” would protect the property of those who were involved in accidents, assuming that a person convicted for even a misdemeanor “cannot be relied on to be honest and trustworthy.”\textsuperscript{347} The ban was unconstitutional because it was both over and under inclusive, since a misdemeanor conviction did not adequately determine whether the wrecker operator was honest and trustworthy.\textsuperscript{348} The regulation should have focused on more individual characteristics, but instead gave “no consideration to the nature, circumstances and seriousness of the crime in relation to the job sought, the time elapsing since the conviction, or the degree of the misdemeanant's rehabilitation.”\textsuperscript{349}

\textsuperscript{341} \textit{Kindem v. City of Alamada}, 502 F. Supp. 1108, 1111 (N.D. Cal. 1980).
\textsuperscript{342} \textit{Id.} at 1111.
\textsuperscript{343} \textit{Id.} at 1112.
\textsuperscript{344} \textit{Id.}
\textsuperscript{346} \textit{Id.}
\textsuperscript{347} \textit{Id.} at 826.
\textsuperscript{348} \textit{Id.}
\textsuperscript{349} \textit{Id.} at 827.
At least one state protective statute has been commended because it requires a more individualized analysis of applicants with a record. One commentator has observed that the New York statute is valuable because it does not allow “per se disqualifications” of ex-offenders based only on the existence of a conviction.\textsuperscript{350} Instead, the statute requires that an employer engage in a “contextual evaluation of the impact of a conviction on the applicant’s capacity to perform a specific job efficiently, and without undue risk to others encountered in the normal course of work.”\textsuperscript{351}

These cases and some of the protective state statutes suggest that more individualized analysis is appropriate to determine whether an employer should hire an applicant who is an ex-offender. Cases and statutes which consider the factors described above, like the type of crime committed and time since conviction, have taken one step in the direction of individualized analysis. However, very few courts or legislatures have required that an employer in the private sector consider each applicant individually to determine whether their criminal history would impede their ability to perform the duties of the position, and whether the employer could potentially be liable for their future criminal behavior.

Policy makers may believe that ex-offenders should be able to force a more individualized inquiry of their applications under the Fair Credit Reporting Act (FCRA).\textsuperscript{352} Under the FCRA, an employer must advise an applicant of the name and address of the reporting agency that has provided a record of an applicant’s convictions and his or her right to obtain a free copy of that report, where an applicant is adversely affected by the dissemination of that information.\textsuperscript{353} Notice is required to allow the ex-offender an opportunity to request disclosure from the reporting agency the nature and scope of the information in his file.\textsuperscript{354}

If an employer relies on this reported information in making a negative decision about an applicant, then that employer must also inform an applicant of his or her right to dispute with the

\textsuperscript{350} Clark, supra n. 153, 38 U.S.F. L. REV. at 209.

\textsuperscript{351} Id. See N.Y. Correction Law § 753(1).

\textsuperscript{352} 15 U.S.C. § 1681m.


\textsuperscript{354} 853 F. Supp. at 490 (citing Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 149 (5th Cir. 1983)).
reporting agency the accuracy or completeness of the information provided.\textsuperscript{355} If the ex-offender files a statement of dispute that is not frivolous or irrelevant, the reporting agency must note in any \textbf{subsequent} report that the information is disputed by the subject of the report, and provide either the subject's statement or a clear and accurate codification or summary of that statement.\textsuperscript{356} However, nothing requires consideration of that statement by an employer which requested the original report.\textsuperscript{357} Therefore, an employer may still reject an applicant based on inaccurate information. Of course, the FCRA does not require that an employer request additional clarifying information directly from an applicant who is an ex-offender.

Section 605(a)(5) of the FCRA, which was repealed in November 1998, did prevent a consumer reporting agency (CRA) from making a consumer report containing information about "][r]ecords of arrest, indictment, or conviction of crime which, from the date of disposition, release, or parole, antedate the report by more than seven years."\textsuperscript{358} This section of the FCRA prohibited employers, in most cases, from obtaining from FCRA information about a conviction that was more than seven years old.\textsuperscript{359}

As described above, very little case law or statutory protection requires that an employer look beyond the crime committed and the duties of the job to determine whether or not an ex-offender would be successful in that job, or whether that applicant is likely to recidivate. As discussed below, it is those individual characteristics and experiences that may best determine the ex-offender applicant’s success.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{355} 15 U.S.C. § 1681m(a)(3)(B). \textit{See} Mathews v. GEICO, 23 F. Supp. 2d 1160, 1162 (S.D. Cal. 1998)(failure to provide notice to applicants that credit reports were considered in hiring decisions). Note that an employer would not be liable under the FCRA for failure to notify an applicant if it shows that at the time of the alleged violation, the employer maintained “reasonable procedures to assure compliance” with the notice requirements. 15 U.S.C. § 1681m(c).
\item \textsuperscript{356} 15 U.S.C. § 1681i.
\item \textsuperscript{357} \textit{See} 853 F. Supp. at 492.
\item \textsuperscript{358} 15 U.S.C. § 1681 (effective Sept. 30, 1997).
\end{itemize}
\end{footnotesize}
IV. Criminal Justice Research

In searching for a standard to determine whether an ex-offender applicant should be hired, the extensive research on recidivism provides important guidance. Numerous studies have established that ex-offenders who have committed more serious crimes, have prior offenses, drug problems, and little education are more likely to recidivate. Risk assessment tools with “robust predictive utility” include the Psychotherapy Checklist-Revised (PCL-R) and the Violence Risk Appraisal Guide (VRAG). These assessment tools focus on static risk factors including age at time of first offense and number of prior offenses.

The Michigan Prisoner Reentry Initiative (MPRI) administers the COMPAS tool to assess inmates prior to their release. Northpointe Institute for Public Management, the developer of COMPAS, found the following scale reliability among parolees who had been administered the COMPAs prior to release in Michigan:

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Criminal Involvement 0.85 Leisure/Boredom 0.86
(number of prior arrests, probation, conviction or jail time) Residential Instability 0.68
History of Non-compliance 0.66 Juvenile Socialization Problems 0.68
History of Violence 0.66 Criminal Opportunity 0.71
Current violence 0.62 Social Isolation 0.84
Criminal Associates/Peers 0.74 Family Criminality 0.63
Substance Abuse 0.78 Criminal Attitudes 0.77
Financial Problems 0.77 Criminal Personality 0.75
Vocational/Educ. Problems 0.69 Risk of Violence 0.69
Social Environment 0.87 Social Adjustment 0.59

These COMPAS sub-scores were found to be correlated with the criminal history indicators of age at first arrest, previous arrests, and probation revocation. Northpointe found that a lower age at first arrest and a higher arrest rate, as well as high scores on criminal involvement, financial problems, vocational/educational problems, residential instability, drug problems (offense history, current charges, current arrest, drug treatment history, expressed need for treatment), and criminal personality score were predictive of future recidivism, while the factors of use of leisure time, social adjustment and criminal attitudes were not so predictive.

Like the COMPAS, the Level of Service Inventory-Revised (LSI-R) assesses changeable risk factors for recidivism. The LSI-R considers these factors:

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365 Id. at 16.

366 Id. at 21.

Most of these factors are rated for the year prior to the person’s incarceration. The LSI-R has been found to be useful in predicting community recidivism for probationers and minor offenders as well as released prisoners.\textsuperscript{370} A 2008 study also found that the LSI-R is a good predictor for general recidivism among released long term inmates, and an even better predictor when taking into account criminal and prison history.\textsuperscript{371}

The family/marital and peers/companions factors used in the LSI-R reflect the research showing that criminal behavior can be affected by the neighborhood of the ex-offender,\textsuperscript{372} including the propensity to engage in violent behavior.\textsuperscript{373}

\begin{itemize}
  \item Criminal history
  \item Education/employment
  \item Financial
  \item Family/marital
  \item Accommodation
  \item Leisure/recreation
  \item Peers/companions
  \item Alcohol/drug problems
  \item Emotional/personal
  \item Attitudes/orientation\textsuperscript{369}
\end{itemize}

\textsuperscript{368} Manchak, et al., \textit{supra} note 363, at 478.

\textsuperscript{369} \textit{Id.} at 478-79.


\textsuperscript{371} Manchak, et al., \textit{supra} note 363, at 483-84.

Some researchers have found a combined effect on recidivism arising from “concentrated disadvantage,” which includes poverty, joblessness, level of welfare assistance, and family disruption. This effect may occur due to a lack of social services to support ex-offenders, thereby affecting the quality of their day-to-day living and the range of opportunities available through institutional resources. Several studies, including one study of ex-offenders in Oregon, confirmed that “those who return to disadvantaged communities recidivate more, while those who return to relatively affluent communities recidivate less, controlling for individual-level factors.”

According to the criminal justice research, employers should consider directly inquiring regarding the ex-offender’s activities while in prison to predict recidivism. When combined with consideration of the ex-offender’s performance during his or her last year in prison, including involvement in institutional training and employment opportunities, one study found that the LSI-R was a good predictor of recidivism.

Similarly, a study of jail releasees in Pennsylvania showed that the repeat incarceration rate for those who received some level of programming assistance from the jail averaged 16.5 percent while the recidivism rate for a comparable group who did not receive programming averaged 31.5 percent. Notably, white participants showed increased employment a year later, while

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374 See Kubrin and Stewart, supra note 372.
375 Id. See also, Avery Guest, “Mediate Community: The Nature of Local and Extra-Local Ties in the Metropolis,” 36 URBAN AFFAIRS REVIEW 603 (2000).
377 Kubrin and Stewart, supra note 372. See also, Clark, et al., supra note 360; Irish, supra note 360; Lanza-Kaduce et al., “A Comparative Recidivism Analysis of Releasees from Private and Public Prisons,” 45 CRIME & DELINQUENCY 28-47 (1999); Benedict and Huff-Corzine, supra note 360.
378 See Simourd, supra note 370.
employment rates for black participants in programming remained was not significantly different.\(^{380}\)

Research in New Jersey likewise demonstrated that leaving prison with at least the equivalent of a high school diploma significantly reduces recidivism.\(^{381}\) The same results were found in Maryland – simply attending school while in prison reduced the likelihood of reincarceration by 29 percent.\(^{382}\) Despite this research, the percentage of inmates reporting that they had participated in vocational programs prior to release declined from 31 percent in 1991 to 27 percent in 1997, and the number reporting participation in educational programs declined from 43 percent in 1991 to 35 percent in 1997.\(^{383}\)

Employers have reported that drug and alcohol abuse can interfere with ex-offenders’ success on the job. Consistent with this effect, numerous evaluations have found that intensive residential treatment in prison, followed by after care upon release, is associated with “reduced criminality and drug use for up to 3 years following release from prison.”\(^{384}\) Treatment effectiveness is preventing recidivism depends upon the inmates’ ratings of self-esteem, peer support and counselor competence,\(^{385}\) as well as motivation for treatment.\(^{386}\) Research shows that substance abuse treatment can reduce recidivism rates, but treatment should be tailored for offenders with

\(^{380}\) Id.


\(^{383}\) Lynch and Sabol, supra note 61, at 11.


co-occurring mental health problems, evidence-based practices are used, and offenders have access to that treatment.\textsuperscript{387}

This research establishes the wide range of characteristics among ex-offenders that accurately predict whether they will engage in more criminal behavior after release. The assessment tools used prior to release in MPRI and other reentry programs can provide this information to agencies assisting ex-offenders and even employers who would be interested in the likelihood of recidivism among applicants who are ex-offenders.

V. Hiring of Ex-Offenders by Michigan Employers

Information from agencies which assist ex-offenders find employment and the practices of employers who do hire ex-offenders provides insight into the factors which employers consider to be relevant to an applicant’s success on the job. The Michigan Prisoner Reentry Initiative (MPRI) utilizes a group of agencies to assist ex-offenders in reentering their communities, including finding employment. MPRI includes eighteen sites which assist with prisoner reentry.\textsuperscript{388} Organized by the Michigan Department of Corrections (MDOC) and funded by both the state and the JEHT Foundation, MPRI’s primary goal is “to promote public safety by increasing the success rates of prisoners transitioning from prison to the community. The vision of the MPRI is that every prisoner released from prison will have the tools needed to succeed in the community.”\textsuperscript{389}

Prior to release, every prisoner in the MDOC system who transitions through MPRI is assessed using the validated risk assessment, COMPAS, described above.\textsuperscript{390} Approximately two months prior to release, the prisoners enter the transition to the community or re-entry phase of MPRI, which includes developing plans for employment.\textsuperscript{391} Upon release, ex-offenders enter the “Staying Home Phase,” which typically includes services to support their success in the


\textsuperscript{388} A list of MPRI sites is available at http://www.michpri.com/index.php?page=mpri-sites.

\textsuperscript{389} See http://www.michpri.com/.


\textsuperscript{391} Id. at pp. 4-5.
community. One of MPRI’s goals is that “[e]very returning prisoner will have access to stable employment or services designed to help secure stable employment (i.e., transitional employment, job seeking assistance).”

A total of approximately 13,367 offenders had been released through the MPRI program as of the first quarter of 2009. MPRI reports a significant effect on recidivism as measured by parole failure or new arrest. In early 2009, the MPRI Status Report stated that the MPRI recidivism outcomes through August 2008 showed 945 fewer returns to prison, or a 26% relative rate reduction in total returns to prison when compared to 1998 baseline data.

This section summarizes the results of eleven surveys returned from the eighteen MPRI – related agencies. These MPRI-related agencies work mainly with employers who are willing to hire ex-offenders. Employers who hire ex-offenders through these agencies were also surveyed to determine what factors they consider in making hiring decisions.

**Employers’ Hiring Considerations**

General policies against hiring ex-offenders were noted by some of the MPRI-related agencies surveyed. One agency explained “In the current economy employers have either implemented or have begun adhering to strict recruiting and hiring policies due to the large pool of available candidates,” and the agency went on to state that “With the current barriers to employment caused by the downturn in the economy, the ex-offender hiring momentum has been negatively impacted.” This explanation was in response to a question regarding “other practices or polices of employers which affect their hiring of ex-offenders.”

One MPRI referral agency reported that local temporary employment agencies even maintain a general “Do Not Hire Felony List.” Several agencies noted general concerns regarding the safety of their other employees and customers. As explained by one agency: “Some employers have expressed a concern for their employee’s safety and the possible liability the organization may sustain.”

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392 Id. at p. 6.


394 MPRI Quarterly Status Report, supra note 390, at 11.
Facts about the Crime

Most agencies referenced the type of crime as a significant factor in employers’ hiring decisions. One agency stated that “The biggest concern that employers express … is the nature of the crime. The majority of our employers are quick to rule out an individual when theft was the crime of record. The second level would be a violent crime, but in all honesty, this number is still significantly smaller than that of employers who say no to theft.” Four agencies (including the previous one) stated that violent crimes act as a complete bar or at least pose “serious concern” for potential employers. One of these agencies noted that their local temporary employment agencies had restrictions on listing ex-offenders who had committed violent felonies.

At least seven agencies specifically reported employers’ reluctance to hire sex offenders. One stated that “Some employers refuse to hire sex offenders,” and another stated that “I have found many companies have a hard time with sex offenders, especially child related offenses.”

Regarding the relationship between the crime and the position being filled, one agency stated that “the overriding general concern is that the ex-offender will cause problems in the workplace.” One agency stated that a potential employer considers “the offense and how it would affect their business, other employees, risk factors.” Employers “are also concerned about the impact on their customers’ perceptions of them as a trustworthy business,” according to that same agency. That agency also stated that the hardest to employer were “any ex-offenders convicted of any type offence committed in a former workplace.”

In trying to distinguish the previous crime, one agency stated that they have been able to place ex-offenders by “explaining situational differences in crimes and work related behaviors (for example, someone who was convicted for selling marijuana does not mean they won’t show up for work or have good customer service skills).”

Two agencies gave the time since conviction as a significant factor. One agency gave the age of the person when they committed the crime and how much time was served as significant factors for employers.

Employers who hire ex-offenders through the MPRI-associated agencies also responded to a survey regarding the factors they consider in hiring ex-offenders. On a scale of 1-5, employers were asked to rate different concerns their organization may have about hiring ex-offenders, the extent to which the organization considers different factors, and the extent to which the organization has a formal policy regarding the consideration of those factors.
Of the ten concerns listed in the survey, the responding employers rated “sex offender (CSC) registry restrictions” as the most significant factor, with a ranking average of 4.38/5. Ranked on average between 3 (in some circumstances) and 4 (fairly important) were the following concerns, in this order:

Potential harm to coworkers 3.78
Lack of identification/proof of eligibility to work in the US 3.63
Potential harm to customers or other third parties 3.56
Property loss/theft 3.44
Lack of trustworthiness 3.25

These results suggest that the nature of the crime can be determinative of whether an ex-offender is hired, even among employers who tend to hire ex-offenders.

Employers were asked to more specifically rank the importance of different factors associated with applicants who are ex-offenders. On a scale of 1 to 5, the employers ranked the factors on the extent to which their organization considers the factor, and the extent to which the factor must be considered under a policy of that organization. Sex offender registration restrictions rated the highest under each of the ranking categories, with rankings of 4.13 and 3.29 respectively. Following that factor, employers also ranked “violence associated with crime” with an average rating of 4.1. Factors which were ranked between “some consideration” and “fairly important” included the following:

- connection to potential to cause property loss/theft
- level of responsibility with the position
- level of involvement in crime committed
- relationship of crime to ability, capacity or fitness to perform job duties and responsibilities.

Ranked at approximately the “some consideration level” were these factors:

- general lack of trustworthiness
- evidence of rehabilitation since conviction
• total number of crimes committed
• time since conviction
• other factors indicating less responsibility (for crime)
• lack of general work experience

Factors ranked the lowest (below some consideration on average) were “age at the time of crime,” “amount of time in prison,” “time since release from prison,” “level of offense,” “belief that crime shows unfavorable character traits,” “lack of education,” and “lack of training/skills needed.”

Employers also ranked these same factors with respect to whether they had a policy that required their consideration. The sex offender registration restrictions factor was the only factor that ranked above 3.0 on a scale of 1 to 5, and only the factors of “violence associated with crime” and “connection to potential to cause property loss/theft” ranked above 2.0. This result suggests that while these employers rely on the factors outlined above when making hiring decisions, they have not (with the exception of sex offenders) adopted these factors into formal hiring policies.

Benefits

On the positive side, numerous agencies have found that employers believe that ex-offenders bring a positive attitude to the workplace. One reported that ex-offenders “appear to appreciate being given the opportunity for employment more so than other employees, and will strive to excel on the job, perhaps more so than others.” Another agency related that “Many employers feel that ex-offenders will be reliable because of the negative consequences of failing to meet parole requirements.”

At least two agencies have found that the negative parole consequences of failing to remain employed were a benefit of hiring ex-offenders, with one of those agencies explaining that “Offenders have a strong desire to find and get to work (needs to/has to work),” that ex-offenders were “less likely to mess up knowing that it may mean back to prison,” and that “offenders often seek and work well with structure.” In addition that agency stated that “Many offenders have both hard and soft skills employers are looking for.”

Employers were asked to rank the benefits from hiring ex-offenders. The greatest benefit comes from their work ethic, followed by their ability to follow directions, training or skills from prison and work experience in prison.
Other Barriers

The lack of appropriate identification is one barrier to employment commonly identified by the agencies which assist ex-offenders in finding employment. Agencies in both Detroit and Battle Creek have provided assistance to ex-offenders who are unable to produce the necessary identification to establish their eligibility to work in the United States, required for the completion of the I-9 form.

A lack of a driver’s license or a mode of transportation was also identified by most agencies as a barrier to employment. Regarding a license, one agency stated that “Many employers make this a condition of hire.” One agency noted that as many as 90% of the ex-offenders do not have their own vehicle.

The agencies also identified work history as an important factor. One agency that provides 3 months of work experience and soft skills training to ex-offenders stated that “Employers were more receptive to hiring an individual that came to the table with a recent work history, recent proof of a good work ethic, and a recent reference from another employer.”

Employers ranked between 2 (of some concern) and 3 (in some circumstances) were the factors of lack of general work experience, lack of education, lack of training/skills, and lack of a necessary license.

VI. Conclusions

The review of case law which considers the criminal history of applicants for employment shows that employers consider issues of workplace safety to be most important. This concern arises from those relatively rare state cases in which an employer is found liable for negligent hiring after an ex-offender causes harm to a coworker or third party during the course of his or her employment. Courts and legislatures appear to use the seriousness of ex-offenders’ crimes as the best predictor of their potential for creating this type of liability in the future.

In cases where applicants have raised the issue of adverse impact, blanket bans against hiring any ex-offenders have been found to be discriminatory, where an adverse impact is shown. Instead of allowing a complete ban, the courts apply the business necessity test of whether there is a relationship between the crime and the job duties. Yet these cases often still turn on the seriousness of the offense, regardless of the nature of the job duties. More recent decisions, both before and after the El decision, have considered the job-relatedness of the conviction. Yet neither courts nor the most protective legislation typically have gone so far as to require an
individual inquiry to determine whether a particular ex-offender would be able to perform the job
duties or pose a threat in the workplace.

These cases and statutes do not adhere closely to the guidance of the criminal justice research.
That research, including the reviews of the COMPAS used by MPRI and other diagnostic tools,
rely on a long list of factors which are specific to the offender to determine the risk posed by that
person. Although some factors may be more predictive than others of recidivism and even future
violence, the research suggests that many individual factors are relevant to such a prediction.
These factors include the offender’s history prior to incarceration and their behavior while
incarcerated, in addition to the circumstances surrounding their most recent criminal offense.
Both the adverse impact case law and state protective statutes need to include and enforce a
requirement that employers consider these more individualized factors to ensure that employers
are not relying on assumptions about the applicant based only on their crime and their race or
national origin.

More research among a greater number of employers is needed to determine what factors are
being considered by employers in Michigan and elsewhere who are willing to hire ex-offenders
as a general matter. Yet the limited surveys reported here show that the nature of the crime,
particularly criminal sexual conduct, plays a significant role in an employer’s decision to hire an
ex-offender. Listing potential harm to coworkers, potential harm to customers or other third
parties, and property loss/theft as their next greatest concerns, employers surveyed indicated that
“violence associated with crime” was an important factor.

Employers also considered important the person’s potential to cause property loss/theft and their
level of involvement in crime committed. In line with the adverse impact decisions, employers
also report giving considerable weight to more job-related factors, including level of
responsibility with the position and the relationship of the crime to ability, capacity or fitness to
perform job duties and responsibilities. These employers and the agencies that assist them in
hiring ex-offenders do not report a consistent practice of considering individual characteristics of
the applicant which, according to the research, would better predict their likelihood of
recidivating or in being successful in the workplace.

The criminal justice research and the surveys reported here point to the need for courts to look
more closely at the individual ex-offenders who are negatively impacted by hiring policies that
consider applicants’ criminal record as a general bar. Beyond even the nature of the crime, the
research and the experience of the employers surveyed suggests that courts should require a more
individual inquiry to determine whether the applicants exhibit other characteristics which indicate their potential success, or lack thereof, on the job.
APPENDIX

EMPLOYER SURVEY RESULTS

The following information provides the averaged responses to the questions listed below, which were included in a survey circulated to employers who work with MPRI-associated agencies.

7. Of the potential concerns your organization may have about hiring ex-offenders (listed below), please rate the importance of each (from 1 to 5) using the following scale:

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<th>2</th>
<th>3</th>
<th>4</th>
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<tbody>
<tr>
<td>Not at all</td>
<td>Of some concern</td>
<td>In some Circumstances</td>
<td>Fairly Important</td>
<td>Very (or Critically) Important</td>
<td></td>
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<tr>
<td>a. Potential harm to customers or other third parties</td>
<td>3.56</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>b. Potential harm to coworkers</td>
<td>3.78</td>
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</tr>
<tr>
<td>c. Property loss/theft</td>
<td>3.44</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. General lack of trustworthiness</td>
<td>3.25</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. Lack of education</td>
<td>2.5</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>f. Lack of training/skills needed</td>
<td>2.44</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>g. Lack of general work experience</td>
<td>2.69</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>h. Lack of identification/proof of eligibility to work in U.S.</td>
<td>3.63</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Sex offender (CSC) registry restrictions</td>
<td>4.38</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>j. Lack of necessary license</td>
<td>2.19</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
8. Please rate the extent to which your organization has seen each of the following potential benefits, from hiring ex-offenders using the on the following scale:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not at all</td>
<td>Of some</td>
<td>In some Circumstances</td>
<td>Fairly</td>
<td>Extremely</td>
</tr>
<tr>
<td>benefit</td>
<td></td>
<td></td>
<td>Helpful</td>
<td>Beneficial</td>
</tr>
</tbody>
</table>

a. Work experience in prison  3.25  
b. Training or skills from prison  3.5  
c. Ability to follow directions  3.88  
d. Work Ethic  4.0  

9. Of the following factors that your organization may consider when deciding whether to hire a particular ex-offender, please rate the extent to which each is considered using the following scale:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not considered</td>
<td>Limited</td>
<td>Some Consideration</td>
<td>Fairly</td>
<td>Very important</td>
</tr>
<tr>
<td>at all</td>
<td>weight</td>
<td></td>
<td>Important</td>
<td></td>
</tr>
</tbody>
</table>

10. Please rate the same factors to rate the extent to which your organization has a formal policy that requires the factor to be considered when evaluating job applicants who are ex offenders.

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not related</td>
<td>Some general</td>
<td>A formal policy</td>
<td></td>
<td></td>
</tr>
<tr>
<td>to any policy</td>
<td>reference</td>
<td>clearly requires</td>
<td></td>
<td></td>
</tr>
<tr>
<td>be consider</td>
<td>in policy</td>
<td>its consideration</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>#9</td>
<td>#10</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>a. Violence associated with crime</td>
<td>4.1</td>
<td>2.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>b. Age at time of crime</td>
<td>2.75</td>
<td>1.38</td>
<td></td>
<td></td>
</tr>
<tr>
<td>c. Level of involvement in crime committed</td>
<td>3.5</td>
<td>1.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>d. Other factors indicating less responsibility</td>
<td>3.0</td>
<td>1.6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e. Amount of time in prison</td>
<td>2.88</td>
<td>1.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>f. Time since conviction</td>
<td>3.0</td>
<td>1.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>g. Time since release from prison</td>
<td>2.88</td>
<td>1.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>h. Evidence of rehabilitation since conviction</td>
<td>3.25</td>
<td>1.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>i. Sex offender (CSC) registration restrictions</td>
<td>4.13</td>
<td>3.29</td>
<td></td>
<td></td>
</tr>
<tr>
<td>j. Connection to potential to cause property loss/theft</td>
<td>3.71</td>
<td>2.13</td>
<td></td>
<td></td>
</tr>
<tr>
<td>k. Relationship of crime to ability, capacity or fitness to perform job duties and responsibilities</td>
<td>3.5</td>
<td>1.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>l. Level of offense (felony vs. misdemeanor, etc)</td>
<td>2.88</td>
<td>1.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>m. Belief that crime shows unfavorable character traits</td>
<td>2.88</td>
<td>1.38</td>
<td></td>
<td></td>
</tr>
<tr>
<td>n. Level of responsibility with the position</td>
<td>3.57</td>
<td>1.63</td>
<td></td>
<td></td>
</tr>
<tr>
<td>o. Total number of crimes committed</td>
<td>3.13</td>
<td>1.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>p. General lack of trustworthiness</td>
<td>3.25</td>
<td>1.75</td>
<td></td>
<td></td>
</tr>
<tr>
<td>q. Lack of education</td>
<td>2.13</td>
<td>1.25</td>
<td></td>
<td></td>
</tr>
<tr>
<td>r. Lack of training/skills needed</td>
<td>2.38</td>
<td>1.5</td>
<td></td>
<td></td>
</tr>
<tr>
<td>s. Lack of general work experience</td>
<td>3.0</td>
<td>1.88</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>