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Negative Credentials: Fair and Effective Consideration of Criminal Records

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Negative Credentials: Fair and Effective Consideration of Criminal Records

Stacy Hickox & Mark Roehling

Abstract

The incarceration rate for groups including applicants who are protected against discrimination has had a significant effect on their potential for employment. The potential for adverse impact and disparate treatment claims by ex-offenders who are rejected under these policies will be discussed. We will also analyze the results of a survey of employers in Michigan regarding what information about ex-offender applicants are considered in making hiring decisions. These results have implications for other employers who should be establishing a business necessity or legitimate reason for the rejection of ex-offenders, and for courts who are reviewing those practices.

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I. Introduction

Employers continue to rely on criminal record information in the screening of job applicants and the hiring employees at increasing rates. This increase has been attributed to growing employer concerns about negligent hiring claims, and technological advances that have increased the ease and reduced costs associated with obtaining criminal records information. Little attention has been given to the rejection of applicants based on their criminal records, even though the approach of both employers and courts toward the reliance on criminal records in employment decisions has important implications for ex-offenders, organizations, and society at large.

The use of criminal record information to preclude ex-offenders from jobs for which they are otherwise qualified directly restricts their ability to find employment, a critical need for ex-offenders and a primary predictor of recidivism. If employers’ rejection of applicants based on a criminal record has a disparate impact on applicants of color, then this may also violate ex-offenders’ legal rights.

For organizations, the failure to use criminal record information fairly and effectively when making employment decisions may involve the inefficient or “wasteful” use of human resources, and expose the organization to litigation and legal liability. Finally, the extent to which employers use criminal record information fairly and effectively has implications for a number of societal concerns, including society’s interest in promoting criminal offender rehabilitation and avoiding recidivism, and the policy of promoting equal opportunities in employment.

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1 Alfred Blumstein and Kiminori Nakamura, “Redemption in the Presence of Widespread Criminal Background Checks,” 47 CRIMINOLOGY 327-359 (2009); Society for Human Resource Management, “Background Checking: Conducting Criminal Background Checks,” (2010) available at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalCheck s.aspx) (93% of employers surveyed conduct criminal background checks for at least some positions) (hereinafter referenced as “SHRM Survey”). These findings by SHRM, issued on January 22, 2010, were based on a random sample of approximately 3000 HR professions from SHRM members in which 433 responded. According to the sample, 65% had 500 or more employees, 28% had 100-499 employees and 7% had 1-99 employees.

2 Id. at 327.
Despite the many important implications of how criminal record information is used in employment decisions, reported cases and other anecdotal evidence suggest that many employers give inadequate or uninformed attention to how they use criminal record information. Equal Employment Opportunity Commission (EEOC) guidelines and the “best practice” advice of human resource commentators reject blanket policies that bar the hiring all ex-offenders, calling instead for a more thoughtful approach that takes into account multiple factors (e.g., nature of the job, severity of the crime, time since conviction). The inadequacy of these current guidelines is demonstrated by the EEOC’s forum on July 26, 2011, regarding the use of criminal background checks.

In addition, there is evidence that some employers continue to adopt policies that bar the hiring any ex-offenders (discussed further, below). It also appears that many employers may be failing to provide clear policies, guidelines, or training relating to the use of criminal record information in making employment decisions, and as a result, contribute to the risk that criminal record information will be used inconsistently across different protected groups.

The purpose of this article is to promote the fair and effective use of criminal record information in the making of employment decisions by exploring this issue in three ways. First, we examine the risk that an employer’s use criminal records in employment decision may unfairly disadvantaged protected groups and result in employer legal liability. Specifically, we examine the risk that the way in which employer use criminal record information may result in illegal disparate impact or disparate treatment employment discrimination. The examination addresses both relevant empirical evidence and relevant law.

Second, we respond to the need for additional empirical research investigating employers’ actual practices with regard to the use of criminal records in information, and the extent to which those practices may be problematic, by reporting and discussing the results of a new study we conducted focusing on employers in the state of Michigan. The results of the employer survey provide insight on how employers in Michigan make hiring decisions about ex-offenders, and have implications for other employers who should be establishing a business necessity for the use of criminal record information. The results of this study are consistent with a 2010 survey conducted by the Society for Human Resource Management regarding employers concerns in hiring ex-offenders. Finally, informed by the results of the new study, and drawing on the broader behavioral science and legal literatures, we provide guidance for both employers and the courts regarding the fair and effective use of use of criminal records in employment decisions.

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4 See SHRM Survey, supra note 1.
II. Empirical Evidence of Adverse Impact Resulting from the Use of Criminal Record Information

Criminal records affect the employability of many Americans. One researcher estimated that 12.8% of all American adult males had felony records as of 2004. In 2000, it was estimated that over 12 million ex-felons were available for work, representing approximately 8% of the working-age population. Based on the estimate that more than half a million offenders are released each year, this means that more than 17 million ex-felons are available for work in 2011.

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, a significant increase from 1.8% in 1991 and 1.3% in 1974. An estimated one of every fifteen persons will serve time in a prison during their lifetime.

Beyond the effect of incarceration on the population as a whole, the incarceration statistics consistently establish that employers’ consideration of criminal convictions has a disparate 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 male. Additionally, African Americans were three times more likely than Hispanics and five times more likely than whites to be in jail. It is interesting that

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9 Id.
12 BJS Prison Statistics, supra note 11.
by 2001, 139,700 African Americans were being held in state prisons based on drug offenses, compared to 57,300 white drug offenders.\textsuperscript{13}

Incarceration also has a more significant impact on persons of color over a lifetime. An African American has an 18.6% chance of going to prison over a lifetime, whereas Hispanics have a 10% chance and whites only a 3.4% likelihood of being imprisoned.\textsuperscript{14} This means that as many as 32% of all African American males will enter state or federal prison during their lifetime.\textsuperscript{15} Additional statistics show that over a lifetime, African Americans in the United States are incarcerated at 8.2 times the rate of Whites.\textsuperscript{16}

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{17} For African American females, the prevalence of imprisonment was 1.7%, for Hispanic females 0.7%, and for white females 0.3%.\textsuperscript{18} One study using the 2000 census data found that among men born between 1965 and 1969, 3.2% of white men would experience incarceration, whereas 22.4% of the black men were or had been incarcerated by 1999.\textsuperscript{19} A black male high school dropout born between 1965 and 1969 had nearly a 60% chance of serving time in prison by the end of the 1990’s.\textsuperscript{20} Another study found that on an average day in 1996, more black male high school dropouts aged 20 to 35 were in custody than in paid employment.\textsuperscript{21}

In 2000, the incarceration rate for young African American men in the U.S. was almost 10%, compared to just more than 1% for the same aged white men.\textsuperscript{22} As of 2004, 1 in 3 African American men had felony records.\textsuperscript{23} For males born in the late 1970’s, 20% of the African Americans would have served time by their mid-30’s compared to 3% of the whites of the same

\textsuperscript{14} BJS Criminal Offender Statistics, supra note 13.
\textsuperscript{15} Id.
\textsuperscript{16} Jamie Fellner, PUNISHMENT AND PREJUDICE: THE RACIAL COSTS IN THE WAR ON DRUGS 15 (Human Rights Watch 2000). See also Becky Pettit and Bruce Western, “Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration,” 69 AMER. SOC. REV. 151, 152 (2004); Debbie A. Mukamal & Paul N. Samuels, Statutory Limitations on Civil Rights of People with Criminal Records, 30 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{17} BJS Criminal Offender Statistics, supra note 14.
\textsuperscript{18} Id.
\textsuperscript{19} Pettit and Western, supra note 16, 69 AMER. SOC. REV. at 164.
\textsuperscript{20} Id. at 161.
\textsuperscript{21} Bruce Western and Becky Pettit, “Incarceration and Racial Inequality in Men’s Employment,” 54 INDUSTRIAL AND LABOR RELATIONS REV. 3 (2000).
\textsuperscript{23} Uggen, et al., supra note 5, 605 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE at 290.
For men without a college education, this difference grows to 36% for African Americans compared with 6% for whites. This data establishes that screening out applicants based on their felony records has at least the strong potential, if not the guarantee, for a substantial disparate impact on applicants of color. In addition, ex-offenders may enjoy the protection against disparate impact in the Americans with Disabilities Act, since 68% of criminal offenders in jail meet the criteria for substance abuse or dependence, and 16% have a serious mental illness. For this reason, it is important to review the standards required of employers to establish a business necessity for the use of an applicant’s criminal history as the basis for their rejection.

III. Adverse Impact in the Courts

The evolution of the disparate impact theory of employment discrimination has significant implications in cases challenging an employer’s screening based on criminal records information. Disparate impact has been addressed by the Supreme Court on numerous occasions since the passage of the Civil Rights Act of 1964. Since the Civil Rights Act of 1991 dictates that courts look back to earlier interpretations of disparate impact claims, it is important to review those standards and how they were applied to applicants and employees with criminal records. This helps to explain how employers can establish that screening applicants based a criminal record is a business necessity, and whether excluded applicants can show that an alternative employment practice would serve that same necessity.

This section will review the standards developed by the U.S. Supreme Court both before and after the 1991 amendments to Title VII of the Civil Rights Act. We will also review how lower courts have applied these various standards to claims of disparate impact by applicants and employees with a criminal record. Lastly, we will consider the impact of the Supreme Court’s 2009 decision in Ricci v. DeStefano on disparate impact claims by ex-offenders.

A. Decisions Prior to 1991 Civil Rights Act

25 Id.
26 Bruce Western, “Criminal Background Checks and Employment Among Workers with Criminal Records,” 7 CRIMINOLOGY AND PUBLIC POLICY 413, 414 (2008).
The Supreme Court established in *Griggs v. Duke Power* that an employer practice with a disparate impact must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used;" in other words, the job requirement must have "a manifest relationship to the employment in question." This standard was relied upon as early as 1972 to uphold the discharge of a hotel bellman based on his conviction for theft and receiving stolen goods. The hotel was able to show that under *Griggs*, this conviction was sufficiently related to his position, which allowed access to guests’ luggage and rooms. The hotel’s position was strengthened by its failure to apply the exclusionary policy to other hotel positions. The court relied on evidence that “a group of persons who have been convicted of serious crimes will have a higher incidence of future criminal conduct than those who have never been convicted.”

Relying on the logic of the Supreme Court in *Griggs*, a 1975 appellate court held that the Missouri Pacific Railroad’s practice of excluding any ex-offenders could “violate Title VII where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis.” The court explained that “[t]he system in question must not only foster safety and efficiency, but must be essential to that goal.” Unlike the outcome in the hotel bellman case, business necessity was not shown despite these articulated employer concerns: 1) fear of cargo theft, 2) handling company funds, 3) bonding qualifications, 4) possible impeachment of an employee as a witness, 5) possible liability for hiring persons with known violent tendencies, 6) employment disruption caused by recidivism, and 7) alleged lack of moral character of persons with convictions. The court went so far as to state that

[w]e cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.

It is interesting that the court, in a footnote, referenced the EEOC guidelines and then described the nature of the applicant’s crime, which was a nonviolent refusal to report for military duty, and noted the fact that he worked as a clerk during his imprisonment.

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30 *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519, 520 (E.D. La. 1971), aff’d without opinion, 468 F.2d 951 (5th Cir. 1972).
31 Id. at 521.
32 Id.
33 Id.
35 Id. at 1298.
36 Id.
37 Id. at 1298.
38 Id. at 1299 n. 13.
The appellate court in *Green* ordered an injunction preventing the employer from using convictions as an absolute bar to employment.\(^9\) On remand, the trial court issued that injunction, but also allowed some leeway for employers:

\[
\text{[N]othing herein shall prevent defendant from considering an applicants' prior criminal record as a factor in making individual hiring decisions so long as defendant takes into account the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.}\(^{40}\)
\]

This relief was approved by the Court of Appeals.\(^{41}\) This case illustrates that even under the fairly expansive requirements for business necessity established in *Griggs*, an employer still could avoid hiring ex-offenders by considering some of the individual circumstances surrounding the conviction as well as the job duties of the position he or she was seeking.

In 1975, the Supreme Court revisited a claim of disparate impact of performance-related screening tests.\(^{42}\) The tests could be used to make promotion decisions if those test fulfilled a "genuine business need."\(^{43}\) The Court made it clear that that "[j]ob relatedness cannot be proved through vague and unsubstantiated hearsay."\(^{44}\) One expert noted that under this decision, an employer may meet its burden of justification by demonstrating that its requirements were "job-related," but the Court placed a heavy burden on employers by barring the use of tests that were not "empirically demonstrated to be significant measures of job performance."\(^{45}\) Under this standard, employers were expected to conduct expensive, difficult validation studies to justify a test or other screening criteria that had a disparate impact, including the use of criminal record information to screen job applicants.\(^{46}\)

After this 1975 decision, the Supreme Court began its retreat from a stringent requirement to show job-relatedness of criteria that had an adverse impact. First, the disparate impact of a test on African American applicants for police officer positions was justified by the test’s "positive

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\(^9\) Id. at 1299.
\(^{10}\) Id. at 1160.
\(^{42}\) Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).
\(^{43}\) Id. at 408, 434.
\(^{44}\) Id. at 428 n. 23.
\(^{46}\) Id. at 1490.
relationship” to training-course performance by recruits.\textsuperscript{47} In upholding the employer’s use of the police officer test, the Court was satisfied with the employer’s arguments that the test was helpful in hiring individuals who make good police officers, indicating a newfound “flexibility.”\textsuperscript{48} The Court also permitted the validation of a test if it was ”appropriate” for the selection of qualified applicants, despite the Court’s earlier requirement that the test be ”necessary,” not just helpful.\textsuperscript{49} This was a movement away from the Court’s earlier position that expensive and difficult validation of all job requirements to prove their relationship to actual job performance was required whenever a requirement had an adverse impact.\textsuperscript{50}

After a brief return to a stricter burden on employers under which a prison was required to show that strength was essential for job performance of prison guards,\textsuperscript{51} the Court concluded in 1979 that an employer’s exclusion of methadone users from transportation jobs was ”job related” based on the goals of safety and efficiency.\textsuperscript{52} That Court did not require that the employer show that the challenged practice was ”required,” only that the practice ”significantly served” the employer’s business goals.\textsuperscript{53}

Even under this relatively lax standard, J.C. Penney’s was unable to defend its policy of excluding felons from its security manager positions.\textsuperscript{54} The trial court referenced the general standard that “an absolute refusal to hire persons with convictions or a number of arrests is inconsistent with Title VII.”\textsuperscript{55} Yet the court did allow for the possibility that Penney’s could show at trial that a convicted felon would be unqualified for the position.\textsuperscript{56}

The 1988 Court continued with a more lenient definition of business necessity,\textsuperscript{57} allowing an employer to defend its practices without proving scientifically the necessity of its practices through formal validation studies, if the employer could establish that its practice served “legitimate business goals.”\textsuperscript{58} Under this approach, a hiring criteria could be ”legitimate” if it was convenient or useful.\textsuperscript{59} The Court applied a more flexible standard of business necessity to

\textsuperscript{48} Spiropoulos, supra note 45, at 1491
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 1492.
\textsuperscript{52} New York City Transit Authority v. Beazer, 440 U.S. 568, 587 (1979).
\textsuperscript{53} Id.
\textsuperscript{55} Id. at 561 (citing Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971); Gregory v. Litton Systems, 316 F. Supp. 401 (C.D.Cal.1970), aff’d, 472 F.2d 631 (9th Cir. 1972)).
\textsuperscript{56} Id. See also, Craig v. Dept. of Health, Education & Welfare, 508 F. Supp. 1055, 1057 (W.D. Mo. 1981, on remand from 581 F.2d 189 (8th Cir. 1978)(SSA employee could be forced to resign after guilty plea for possession of stolen government check).
\textsuperscript{57} Spiropoulos, supra note 45, 74 N.C.L.REV. at 1498.
\textsuperscript{59} Spiropoulos, supra note 45, 74 N.C.L.Rev. at 1498.
complex jobs involving the exercise of significant discretion, whereas for less complex jobs, the Court applied the strict necessity standard.\(^{60}\)

The inspiration for the 1991 amendments to Title VII came from the Supreme Court’s decision in *Wards Cove Packing Co. v. Atonio*.\(^{61}\) Under this decision, a practice with disparate impact was not discriminatory if the practice served “in a significant way, the legitimate employment goals of the employer.”\(^{62}\) The *Wards Cove* Court explained that

> there is no requirement that the challenged practice be "essential" or
> "indispensable" to the employer's business for it to pass muster:
> this degree of scrutiny would be almost impossible for most employers to
> meet, and would result in a host of evils ….

One commentator opined that cost savings have a "manifest relationship"\(^{64}\) to any job, fulfill a "genuine business need,"\(^{65}\) and "significantly serve"\(^{66}\) the employer's business goals.\(^{67}\) Under this reasoning, an employer would not have to show that the challenged policy is absolutely necessary for the business's survival - the employer would only have to prove that the challenged practice achieves a significant cost saving.\(^{68}\)

Under *Ward's Cove*, it was easier for employers to justify using a test or practice with disparate impact. Yet courts still allowed applicants or employees to show that the employer could have used an alternative employment practice with less disparate impact. In *Bridgeport Guardians, Inc. v. City of Bridgeport*, for example, the court found discriminatory a written exam using strict rank-ordering to determine promotions to the rank of sergeant.\(^{69}\) Even though the test was justified by business necessity under *Wards Cove*, the city could have used the alternative practice of using bands of test scores rather than strict rank-ordering.\(^{70}\) At the same time, the city was not required to use video simulations instead of oral exams because the use of videos would not decrease the disparate impact and would have substantially added to the employer's costs.\(^{71}\)

A second case under *Ward's Cove* also required consideration of alternatives to a practice with disparate impact. Two professors alleging age discrimination based on their low pay were

\(^{60}\)Id. at 1525.  
^{62}*Wards Cove*, 490 U.S. at 659.  
^{63}Id. at 659 (citations omitted).  
^{64}*Beazer*, 440 U.S. at 587 n.31; *Griggs*, 401 U.S. at 432.  
^{65}*Albemarle*, 422 U.S. at 434.  
^{66}*Beazer*, 440 U.S. at 587 n.31.  
^{68}Id. at 30.  
^{69}735 F. Supp. 1126, 1130-32 (D. Conn. 1990), aff'd, 933 F.2d 1140 (2d Cir. 1991).  
^{70}Id. at 1136-37.  
^{71}Id. at 1136.
unsuccessful in establishing disparate impact based on the university's practice of paying market rates to new faculty hires. The university showed a business reason for the practice, since "the university had to pay market rates to attract and to hire good new faculty members...." Payment of market rates to all faculty members, including older faculty members, was rejected as an equally effective alternative. The court noted that "one of the factors to be considered in determining whether the alternative is equally effective is the cost the alternative imposes on the employer." At a minimum, the alternative had to be "economically feasible for the employer."

Ward's Cove also was applied to the claim of an applicant with a criminal record in EEOC v. Carolina Freight Carriers Corp., which dismissed the claim of a truck driver who was denied a full time position based on his criminal record, even though he worked as a casual worker for the company for four years. That court approved of an employer’s rejection of applicants with a conviction for any felony, or any conviction involving theft or larceny, based in part on the business losses it had suffered from theft in the past. /These cases illustrate the height of courts’ willingness to accept employers’ subjective reasons to justify its use of a hiring criteria, even one that had a disparate impact. Some of the cases under Ward’s Cove, however, continued to require that employers consider alternative screening mechanisms that would not have a disparate impact.

B. Civil Rights Act of 1991

The Civil Rights Act of 1991 was intended in part to address the difficulty of succeeding with disparate impact claims under Ward’s Cove. Under its revisions, an employer must prove that a practice with disparate impact is “job related for the position in question and consistent with business necessity…. As before, an employer’s practice with disparate impact is discriminatory despite a business necessity for it if the plaintiff establishes that an alternative employment practice exists and the employer refuses to adopt it.

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73 Id. at 772.
74 Id. at 772-73.
75 Id. at 773.
76 Id. See also Abbott v. Federal Forge, Inc., 912 F.2d 867, 870 (6th Cir. 1990)(no other hiring practice that would have less adverse effect on older workers and still serve business interests).
78 Id. at 738.
80 Id.
Despite the legislature’s intent, the meaning of the terms "business necessity" and "job related" remained unclear after the passage of the 1991 Act.\textsuperscript{81} The only legislative history that courts could rely on to interpret these concepts was one memorandum that simply repeated Section Three's statement that the terms "business necessity" and "job related" are intended to reflect the concepts "enunciated by the Supreme Court in Griggs v. Duke Power Co... and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Atonio ...\textsuperscript{82} One court has explained that the use of the phrase “consistent with business necessity” suggests that a hiring practice should be seen as “job related” if that practice was “significantly correlated with elements of work behavior that were relevant to the job.”\textsuperscript{83} As we have reviewed, however, the pre-Ward’s Cove Supreme Court cases provide limited guidance on defining business necessity and job relatedness, since their approaches were inconsistent.\textsuperscript{84}

Professor Spiropoloulos believes that the 1991 Act establishes a job performance standard “requiring the employer to prove that the practice either predicts or is correlated with successful performance of the particular job at issue,” “by scientifically validating its requirements” in accordance with the EEOC Guidelines.\textsuperscript{85} Given the additional business necessity requirement, the practice must be more than “related or convenient;” it should be required or even essential to meet the employer’s goals.\textsuperscript{86} Thus, Congress rejected the Supreme Court's attempt in Watson and Ward’s Cove to redefine the disparate impact cause of action using the intentional discrimination action as a model.\textsuperscript{87}

This approach to defending practices with disparate impact assumes that validation is possible for the jobs at issue.\textsuperscript{88} According to Professor Spiropoloulos, “this validation need not be easy, it need only be possible.”\textsuperscript{89} If a position has requirements that cannot be validated, this would call for “a different standard of business necessity for jobs with such requirements.”\textsuperscript{90} This may mean that “the strict necessity standard does not work in all cases” and another standard is needed.\textsuperscript{91} Spiropoloulos argues that by making it “so difficult and costly to defend practices with a disparate impact,” employers may either stop using the practice that has a disparate impact or

\textsuperscript{81}\textsuperscript{Barbara Lindemann & Paul Grossman, 1 EMPLOYMENT DISCRIMINATION LAW 106 (3d ed. 1996). See also Harold S. Lewis Jr., CIVIL RIGHTS AND EMPLOYMENT DISCRIMINATION LAW 4.10 (1997) (Supreme Court will have latitude in defining the parameters of the 1991 Act’s business necessity defense).}

\textsuperscript{82}\textsuperscript{Civil Rights Act of 1991 §105(b): (3)(2).}


\textsuperscript{84}\textsuperscript{Lidge, supra note 67, 58 ARK. L. REV. at 28.}

\textsuperscript{85}\textsuperscript{Spiropoloulos, supra note 45, 74 N.C.L.REV. at 1513-14.}

\textsuperscript{86}\textsuperscript{Id.}

\textsuperscript{87}\textsuperscript{Id.}

\textsuperscript{88}\textsuperscript{Id. at 1531.}

\textsuperscript{89}\textsuperscript{Id.}

\textsuperscript{90}\textsuperscript{Id. (citing Blackmun’s opinion in Watson)

\textsuperscript{91}\textsuperscript{Spiropoloulos, supra note 45, 74 N.C.L.REV. at 1531.}
hire sufficient members of affected groups, giving them a “strong incentive” to hire applicants they might have otherwise rejected.  

Professor Selmi notes that despite these validation requirements, disparate impact claims have “failed to produce tests without disparate impact, which was presumably the larger original goal.”  

Selmi observes that reemployment tests have not become “better predictors of performance,” even though testing has become more prevalent. Following this same logic, Professor Bagenstos believes that disparate impact doctrine has seen a “massive decline” recently because the vagueness of the Civil Rights Act of 1991 allows courts to “translate their hostility toward disparate impact into restrictive doctrine.” Another commentator has noted that the lack of clarity on validating tests after the 1991 Act “makes it harder both for employers to design valid tests and for applicants to successfully press claims of genuine gender discrimination.”

In 2004, one commentator stated that under the 1991 amendments, “the federal approach encourages reaction instead of pro-action.” With respect to ex-offenders, employers can discriminate against applicants based on conviction records without regard to mitigating factors, because Title VII “encourages employers to judge a book by its cover.” In addition, disparate impact analysis and the threat of negligent hiring liability does not encourage employers to judge an applicant on the basis of his or her fitness for the job.

The EEOC has attempted to provide some clarity to the 1991 amendments in its regulations on disparate impact. Those regulations state in part:

[A] criterion-related validity study should consist of empirical data demonstrating that the selection procedure is predictive of or significantly correlated with important elements of job performance….  
[A] content validity study should consist of data showing that the content of the selection procedure is representative of important aspects of performance on the job for which the candidates are to be evaluated….  
[A] construct validity study should consist of data showing that the procedure measures the degree to which candidates have identifiable characteristics which have been determined to be important in successful performance.

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92 Id. at 1543.
94 Id. at 756.
98 Id.
99 Id.
performance in the job for which the candidates are to be evaluated.\textsuperscript{100}

The EEOC Uniform Guidelines provide as follows:

A selection procedure based upon inferences about mental processes cannot be supported solely or primarily on the basis of content validity. Thus, a content strategy is not appropriate for demonstrating the validity of selection procedures which purport to measure traits or constructs, such as intelligence, aptitude, personality, commonsense, judgment, leadership, and spatial ability.\textsuperscript{101}

Since the passage of the 1991 amendments, courts have attempted to apply its changes to claims of disparate impact based on the administration of screening tests to applicants. In a New York case, the written portion of a screening examination could not be validated, despite the importance given to the ability to write an essay by surveyed education professionals surveyed, where the essay writing portion was given significant weight and the majority of the applicants would have passed the overall test if not for the essay writing portion.\textsuperscript{102}

In finding a lack of business necessity for the test, the Court of Appeals reaffirmed that employers are still required to introduce formal “validation studies” showing that standardized or objective tests accurately predict actual on-the-job performance.\textsuperscript{103} The court reiterated its position that a “validation technique for purposes of determining Title VII compliance can best be selected by a functional approach that focuses on the nature of the job.”\textsuperscript{104} The court cautioned that “the job relatedness of one particular section cannot establish the job relatedness of the entire test.”\textsuperscript{105}

Similarly, a Delaware trial court refused to validate the cut off score for an examination used in the hiring of state troopers because its predictive power for satisfactory job performance was not statistically significant.\textsuperscript{106} The state was confident that “100% of applicants selected at that cutoff would be expected to perform satisfactorily in the four dimensions of the job that comprise the PDRF Composite.”\textsuperscript{107} The court refused to validate the cut off score of 75% based on its concern about “false negatives,” even though “it was also appropriate for the [state] to bear in mind the public safety consequences of setting a cutoff score too low.”\textsuperscript{108}

\textsuperscript{100} 29 C.F.R. § 1607.5(B).
\textsuperscript{101} 29 C.F.R. § 1607.14(C).
\textsuperscript{102} \textit{Gulino v. N.Y. State Education Dept.}, 460 F.3d 361 (2d Cir. 2006)(citing \textit{Gulino II}, 96 Civ. 8414, 2003 U.S. Dist. LEXIS 27325 at *84).
\textsuperscript{103} \textit{Id}. at 386.
\textsuperscript{104} \textit{Id}. at 386 n. 25 (citing \textit{Guardians Ass’n v. Civil Serv. Comm’n of New York}, 630 F.2d 79, 93 (2d Cir. 1980)).
\textsuperscript{105} \textit{Id}. at 387.
\textsuperscript{107} \textit{Id}. at *42.
\textsuperscript{108} \textit{Id}. at *42-43.
The Delaware court concluded that the examination cut off failed to meet the requirement that “discriminatory cutoff score measures the minimum qualifications necessary for successful performance of the job in question,” under guidance from an earlier appellate court opinion that the cut off should not be set “so that the predicted rate of job success for individuals who pass is 100%.” Instead, a cut off score should be set so that those who pass have a “high likelihood of being able to do the job.” The cut off score failed to meet this requirement where the evidence showed that a very large number of applicants who scored below the 75% cutoff were highly likely to do the job.

These cases demonstrate that when the administration of an objective, allegedly job-related screening test has a disparate impact on applicants of color, employers have been required to establish the validity of that test. Not only does the employer need to establish that the test itself is job-related, but the employer must also establish that the cut-off score it has used to screen applicants is sufficiently related to the anticipated success of applicants on the job.

C. Criminal Records Disparate Impact Claims

In stark contrast to the application of the 1991 amendments to performance-related screening tests with a disparate impact, courts have been much more lenient toward employers who screen applicants based on their criminal records. No extensive showing of the conviction record’s job-relatedness has been required. No statistical correlation has been required for excluding applicants based on their past convictions for particular crimes. In addition, no applicants have been successful in showing that the employer could have used some alternative screening mechanism without a disparate impact to achieve its purposes.

The hostility toward disparate impact claims by ex-offenders in particular may stem from the notion of a blameworthy plaintiff. Beyond the general distaste for criminals, Professor Siegelman has argued that if an applicant is somehow responsible for his or her exclusion under a hiring criteria, then disparate impact protection should not apply. He argues that disparities in pass rates by race or gender which are attributable to the applicants’ personal characteristics, but are not inherent, should not provide the basis for a disparate impact claim since that applicant could “overcome the effects of an employment requirement.” Applicants who fail to make efforts to prepare or train for a test that are both feasible and reasonable should be seen as “inflicting injuries on themselves.” This approach is supported by opinions that “too much protection can lead protected-class workers to curtail their own investments in human capital.”

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109 Id. at *39 (citing Lanning v. SEPTA, 181 F.3d 478, 489 (3d Cir. 1999)).
110 Id. at *89 (citing Lanning v. SEPTA, 308 F.3d 286, 292 (3d Cir. 2002)).
112 Id. at 520.
113 Id.
114 Id. at 525.
This same approach may underlie resistance to provide disparate impact protection for ex-offenders, since many would assume that they are responsible for their own criminal record, and should have avoided criminal behavior so that they would not be adversely affected by an employer’s policies against hiring ex-offenders.

In rare circumstances, an applicant or current employee is able to show that the refusal to hire or discharge based on a criminal record fails the job-relatedness test. For example, a Pennsylvania trial court applied the 1991 Amendments in the case of an employee of ten years who was discharged after her employer discovered that she had been convicted six years earlier for interfering with the custody of a child (her grandchild). This court noted that even though an employer cannot have a blanket policy of refusing employment to persons with recent criminal records, such a policy might not violate Title VII “if the criminal conviction involved conduct which demonstrates a person’s lack of qualification for the job.” In a second follow-up opinion, the court granted summary judgment for the employee because the employer’s argument that the conviction was related to her job qualifications was “weak at best,” given her positive employment history.

More often, the courts engage in a limited analysis of the job-relatedness of applicants’ criminal records, even if that screening mechanism has a disparate impact. In a second Pennsylvania decision, for example, Roderick Foxworth was denied employment with the Pennsylvania State Police after admitting commission of a theft when he was eighteen. Even though his criminal record had been expunged, the state did not discriminate when it rejected him based on this information because the adverse employment action was based on his criminal conduct, and not on his criminal record. The court concluded that the state’s automatic disqualification based on past criminal behavior served “important purposes: ensuring both public safety and that police officers do not disregard, nor are perceived as disregarding, the law.”

Outside of the law enforcement realm, courts have often deferred to an employer’s discretion in considering criminal records, even under the 1991 amendments to Title VII. For example, one Pennsylvania court dismissed a car sales representative’s claim based on his employer’s consideration of his criminal record. Because the representatives were responsible for

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116 Id. at *7.
119 Id.
depositing monies for the employer, and had the ability to see customers’ confidential financial information, the court concluded that “their criminal background clearly had a major role in their suitability for employment.”

The most extensive review of an employer’s practice of screening based on criminal records since the 1991 amendments came in El v. SEPTA. SEPTA, the mass transit authority in Philadelphia, excluded certain applicants based on convictions for violent crimes. Douglas 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 in part based on these characteristics of the paratransit driver position:

1. drivers were in very close contact with passengers
2. drivers often required to be alone with passengers, and
3. paratransit passengers were vulnerable because they typically had physical and/or mental disabilities.

SEPTA also relied on its conclusions that disabled people are disproportionately targeted by sexual and violent criminals. These specific job duties justified an absolute ban on hiring paratransit driver applicants who had committed certain offenses, even though SEPTA’s own practice did not automatically preclude an ex-offender applicant for a fixed route position. Applicants for a fixed route position were reviewed on a case-by-case basis to determine whether any criminal conviction was “sufficient to find that candidate unsuitable for the position for which he or she has applied.”

SEPTA provided some evidence of job-relatedness based on the propensities of ex-offender applicants to recidivate. An expert in the El 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 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.’”

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122 Id. at *6-7.
123 El v. SEPTA, 479 F.3d 232, 247 (3d Cir. 2007).
124 Id.
125 Id. at 235-36.
126 Id. at 235.
127 Id. at 235-36.
128 Id.
130 Id.
131 Id.
Despite this general evidence, SEPTA admitted the extreme difficulty of predicting with any accuracy which criminals will recidivate. 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. 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.”

SEPTA’s expert 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.” 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-free in the community for only ten years. 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. 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.”

Even though the court upheld the policy based on the expert testimony that justified it, the court 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.” The court suggested that SEPTA should “explain how it 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.”

The El court was one of the first federal courts to suggest that individual assessment for ex-offenders 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

132 Id.
133 Id. at 245.
134 Id.
135 Id. at 246.
136 Id.
137 Id.
138 Id.
139 479 F.3d at 247-48 (citing Dothard, 433 U.S. at 331).
140 Id. at 248 (citing Griggs, Albemarle, and Dothard).
the first time.\textsuperscript{141} 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{142} Despite these concerns, the \textit{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 \textit{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{143} 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{144} SEPTA’s policy was upheld based on expert testimony that the policy accurately screened out applicants who were expected to commit acts of violence against SEPTA’s passengers.\textsuperscript{145}

The \textit{El} court only briefly addressed the issue of an alternative employment practice that might have less of a disparate impact. While recognizing this potential means to challenge the employer’s business necessity justification for excluding applicants of color, the appellate court simply stated that “[t]he District Court found no evidence in the record indicating that any alternative policy would have less of a disparate impact.”\textsuperscript{146} The district court did not require a showing that there was no alternative selection criteria which would not have a disparate impact, but did note that there was no evidence that individual consideration under SEPTA’s policy for fixed run drivers would have had any less disparate impact on ex-offenders of color.\textsuperscript{147}

\textit{Application of El}

The \textit{El} court at least discussed the need for some validation of an employer’s reliance on criminal records to exclude applicants of color. Decisions since \textit{El}, however, have not placed a heavy burden on employers to justify the exclusion of ex-offenders. The particular duties of the position being filled were enough to support the dismissal of the claim of a law firm employee who was discharged because of his thirty year old record as a sex offender.\textsuperscript{148} In contrast to the decision which reinstated the exterminating company employee, there was an “adequate business necessity” for the dismissal of the law firm employee since opportunities for his misconduct

\textsuperscript{141} Id. at 246 n. 15. 
\textsuperscript{142} Id.  
\textsuperscript{143} Id. at 243. 
\textsuperscript{144} Id. at 245 n. 12. 
\textsuperscript{145} Id. 
\textsuperscript{146} Id. at 249. 
\textsuperscript{147} 418 F. Supp. 2d at 672. 
\textsuperscript{148} Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028 (W.D. Mo. 2008).
existed in an unguarded office workplace. The court distinguished a Washington case which protected the employment of employees with comparatively minor offenses, such as drug offenses and sex offenses of limited seriousness, where the employer kept the employee constantly in the company of others, and a security guard was on the premises.150

In addition, the law firm was not required to “overlook significant potential dangers, at least to employee morale.”151 The court explained that potential to cause harm to coworkers and possible effect on morale established the job-relatedness of the conviction, “whether or not it would be good public policy to encourage the employment of serious sex offenders after decades of presumably good behavior.”152

The El court’s reasoning was also referenced in a decision upholding the discharge of an employee with a conviction for domestic violence.153 The court explained that if the plaintiff had raised a claim of disparate impact, Kmart the employer would have been able to establish a business necessity under El because it distinguished “between applicants that pose an unacceptable level of risk and those that do not.”154

The decision in El was relied upon in a case involving the adverse impact of a state policy requiring that state troopers disclose the nature of their illness when requesting sick leave.155 Employees alleged that this policy could result in revelation of information about employees’ disabilities, contrary to the Americans with Disabilities Act’s (ADA) prohibition on medical inquiries. The court rejected the state’s argument that the policy was a business necessity and essential to the state’s trooper operations under Section 12112(d)(4)(A) of the ADA by enabling supervisors to plan adequate shift coverage and to ensure fitness for duty upon a trooper’s return to work.

This court relied in part on the El decision in finding that business convenience is insufficient to qualify as a business necessity.156 Generally, shift coverage and fitness for duty qualified as business necessities, but the court concluded that the reporting rule did not serve those business necessities.157 Revealing the nature of the employee’s illness was “inadequate to enable

149 Id. at 1031.
150 Id. at 1031 n. 4.
151 Id. at 1031.
152 Id.
154 Id.
156 Id. at 12. The court also relied on the holding in Conroy v. N.Y. State Dep’t of Corr. Servs., 333 F.3d 88, 95 (2d Cir. 2003), that “the examination or inquiry must be a reasonably effective method of achieving the employer’s goal.”
157 Id. at 19.
supervisors to form a reasoned judgment about the potential length of the member’s illness.” 158 Instead, the employee or his health care provider were “best poised” to predict an accurate date when he could return to work, which was achieved by requiring a doctor’s certificate for longer absences and requiring that an employee update his supervisor regarding when he might be available to return to work. 159

Regarding the fitness for duty necessity, the court looked to the reasoning in another claim that challenged a requirement that employees report the reason for their sick leave, which was found to be overbroad because it was not tailored to reflect the job-related duties of employees. 160 The sick leave policy must serve “the asserted business necessity when the employer chooses to make the inquiry.” 161 Allowing supervisors to detect latent injuries that could impair members’ job performance did not justify the inquiry that could violate the ADA, where the employer did not inquire about such conditions among employees who did not request sick leave, and the employer could not show that all employees who use sick leave pose such risks. 162 In addition, the employer could assess fitness for duty in other ways. 163

The court also concluded that the inquiry was not narrowly tailored to the business necessity because it required reporting of disabilities by employees who were in fact fit for duty, while other employees who may have been unfit were not required to report the same information. 164 The employer could more accurately assess an employee’s condition at a later time, such as upon return to work, when the employee and his or her supervisor could evaluate the extent to which prior health conditions might cause job impairment. 165 Lastly, the revelation of the person’s disability only required a general statement, which would not reveal the effect of the condition on the employee’s ability to return to work. 166 Thus, the court concluded that the requirement to reveal one’s disability was “simultaneously overbroad and underinclusive.” 167 It is important to note that this extensive consideration of the business necessity required to justify the employer’s practice did not arise in a claim by ex-offenders.

These cases demonstrate that since the El decision, other courts have only engaged in a limited review of an employer’s practice of excluding ex-offender applicants. Yet at the same time, other employer practices, such as inquiring about an employee’s medical condition, have received closer scrutiny and have not been shown to have a business necessity. Under the ADA, courts have required that the inquiry be closely tailored to meet the employer’s needs, such as

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158 Id.
159 Id.
160 Id. (citing Conroy, 333 F.3d at 94).
161 2008 U.S. Dist. LEXIS 76816 at *30 (citing Fountain v. New York Department of Correctional Services, 190 F. Supp. 2d 335, 337 (N.D.N.Y. 2002)).
162 Id. at *30.
163 Id.
164 Id. at *32.
165 Id.
166 Id. at *39.
167 Id.
ensuring an employee’s ability to return to work. An inquiry that does not directly meet that need or which is overly intrusive does not meet the business necessity requirement.

D. Effect of Ricci

The Supreme Court has provided additional guidance on establishing a business necessity for a practice that has a disparate impact in its 2009 decision in Ricci v. DeStefano.168 The City of New Haven had administered an examination to decide which firefighters should be promoted to the lieutenant and captain ranks.169 Based on the results of the examination, a group of white firefighters were more likely to be promoted than minority candidates.170 Because the city was concerned that the minority candidates would bring a claim of adverse impact, it disregarded the test results.171 The white and Hispanic firefighters who would have been promoted based on the examination results then filed suit against the city for reverse discrimination.172

The Ricci Court held that an employer can only adopt an affirmative action plan that considers membership in some protected class in hiring or promotion decisions if there is “strong basis in evidence” that such an action is necessary to remedy past discrimination.173 To justify disregarding the examination results, the Court held that the city only would have been justified in disregarding the examination results if the examination was not job related and consistent with business necessity, or if there was an equally valid selection method that did not have the same adverse impact.174

The promotion examination administered by the City of New Haven had been developed for the city based on a job analysis of each of the positions, resulting in a test of the firefighters’ job-related knowledge.175 Written and oral questions were drawn from source materials.176 The developer of the test performed job analyses to identify the tasks, knowledge, skills, and abilities that are essential for the lieutenant and captain positions.177 It interviewed incumbent captains and lieutenants and their supervisors, and observed other on-duty officers.178

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168 129 S. Ct. 2658.
169 Id. at 2664.
170 Id.
171 Id.
172 Id.
173 Id. at 2676.
174 Id. at 2678.
175 Id.
176 Id.
177 Id. at 2678-79.
178 Id.
The test developer then wrote job-analysis questionnaires and administered them to most of the incumbent battalion chiefs, captains, and lieutenants in the Department. At every stage of the job analyses, minority firefighters were oversampled to ensure that the results would not unintentionally favor white candidates. The written tests questions were developed based on this job analysis. The oral examinations concentrated on job skills and abilities, which were developed using the job-analysis information, used hypothetical situations to test incident-command skills, firefighting tactics, interpersonal skills, leadership, and management ability, among other things. Based on this extensive support for the validity of the test, the Court concluded that firefighters who were adversely impacted by the reliance on this examination would find it difficult, if not impossible, to show that the city lacked a business necessity for using this examination.

The *Ricci* Court discusses possible alternative selection processes which would not have an adverse impact. The *Ricci* majority rejected three possibilities—a different mix of oral and written tests; changing the "rule of three" to determine who was interviewed on the basis of test results; and using an assessment center. There was no evidence that changing the ratio of oral to written scores in computing an overall score would be "an equally valid way to determine whether candidates possess the proper mix of job knowledge and situational skills to earn promotions." Second, the rule of three could not be interpreted to allow "banding" of scores (rounding all scores to the nearest whole number) because that type of banding is prohibited by the CRA of 1991. Finally, using assessment centers instead of the test was not supported as a valid alternative since there were, at most, "a few stray (and contradictory)" remarks regarding this alternative.

Even though *Ricci* is in fact an affirmative action decision, it helps clarify the Court’s standard for defending a disparate impact claim. Professor Appling has noted how difficult it will be for employees to challenge an employer practice that has a disparate impact under the *Ricci* decision, since the employees bringing that claim were unable to establish discrimination despite

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179 *Id.*
180 *Id.*
181 *Id.*
182 *Id.*
183 *Id.* at 2679.
184 *Id.* at 2670.
185 *Id.* at 2679-80.
186 *Id.*
187 *Id.* at 2680.
the test’s disparate impact and “testimony about alternative procedures.” Yet Appling also noted that an employer may not be protected in using a screening mechanism “if the employee can prove that the employer was aware of, and refused to use, an alternative test that would have had a less disparate impact and which has both a relation to job performance and satisfies the business necessity test.” At the same time, Ricci still clearly places the burden on plaintiff “to prove that there was a pragmatic and clearly better alternative.”

Application of Ricci

Since the Supreme Court’s decision in Ricci, several courts have relied on its analysis in reviewing applicants’ disparate impact claims. Overall, one trial court has opined that the Ricci Court allows employers to establish business necessity based on evidence that the employer’s hiring criteria was “relevant” to the duties of the position being filled. These courts’ interpretations of Ricci can help us to understand how the practices of employers who exclude applicants based on their criminal records might be reviewed under the Ricci approach to adverse impact.

In one claim against New York City, the court stated outright that the city had taken “significantly fewer steps than New Haven took in validating its examination.” Under Ricci, the design of employment examinations requires “consultation with experts and careful consideration of accepted testing standards.” Basically, employers must “reliably test the relevant knowledge, skills and abilities that will determine which applicants will best perform their specific public duties.”

New York City failed to ensure that passage of its examination would actually result in the hiring of better firefighters. The New York court applied the validation criteria set up by the Court of Appeals for the Second Circuit, which had established (before Ricci) a five-part test to determine the content validity of an employment test:

1. the test-makers must have conducted a suitable job analysis;
2. they must have used reasonable competence in constructing the test itself;

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190 Id.
191 Id.
192 Easterling, supra note 83, 2011 U.S. Dist. LEXIS 48123 at *41-42.
194 Id.
195 Id.
196 Id.
(3) the content of the test must be related to the content of the job;

(4) the content of the test must be representative of the content of the job; and

(5) there must be a scoring system that usefully selects from among the applicants those who can better perform the job.\(^{197}\)

The court concluded that under this approach, New York City failed to show a valid business justification for its reliance on the examination, which was “unable to select from among the applicants those who can better perform the job.”\(^{198}\) The city did conduct a “comprehensive” job analysis, by determining the tasks and abilities most relevant to the job of firefighter, the relative importance of these tasks and abilities, matching up clusters of tasks with the abilities needed to perform them, and creating a test to evaluate the identified abilities in the proper proportions.\(^{199}\) A focus group of ten firefighters reviewed the list of tasks compiled by incumbents and the Job Analysis Questionnaire that had been completed by 195 incumbent firefighters who ranked the importance of 196 listed tasks.\(^{200}\) A panel of twelve firefighters then linked “the task clusters to the abilities,” including abilities like written and oral expression and inductive reasoning.\(^{201}\) Yet the city’s report “did not explain how or why particular tasks were matched with particular abilities.”\(^{202}\)

The examination was invalid in part because the city could not establish a relationship between any of the abilities sought and the job tasks on which they were based.\(^{203}\) Secondly, the city failed to establish through content validation a relationship between the exam and the “abstract, unobservable mental constructs” they sought.\(^{204}\) The extensive task list based on panels and job questionnaires with incumbent firefighters was not connected to the abilities measured by the examination.\(^{205}\)

The city also failed to perform “any sample testing to ensure its examinations adequately and reliably tested the nine identified abilities.”\(^{206}\) At least some of the cognitive abilities needed for the job of entry-level firefighter were not accurately tested by the examination in question,\(^{207}\) so that “the purported intent of the test design (to measure and weight nine distinct cognitive ability domains) was not successful.”\(^{208}\) Instead, the cognitive abilities intended to be tested on the

\(^{197}\) 731 F. Supp. 2d at 306 (citing Guardians, 630 F.2d at 93).

\(^{198}\) 637 F. Supp. 2d at 93 (quoting Guardians, 630 F.2d at 95).

\(^{199}\) Id. at 101.

\(^{200}\) Id.

\(^{201}\) Id.

\(^{202}\) Id.

\(^{203}\) Id. at 115.

\(^{204}\) 731 F. Supp. 2d at 309-10.

\(^{205}\) Id. at 305.

\(^{206}\) Id. (citing Guardians, 630 F.2d at 96).

\(^{207}\) Id.

\(^{208}\) Id. at 117.
examinations “were not the most important cognitive abilities for the job of firefighter,” and “non-cognitive abilities,” such as mechanical ability, were “more important to the job than cognitive abilities.”

Lastly, the court concluded the cut off score used with the New York firefighter test was not shown to be related to job performance so as to be “reasonable and consistent with normal expectations of acceptable proficiency within the work force.” The City failed to present any evidence that its chosen cutoff scores bear any relationship to the necessary qualifications for the job of entry-level firefighter. New York City did not present any evidence that its use of rank-ordering was job-related, especially where “insignificant differences in candidates' scores on the written examinations could result in sizable differences in their ranking.” Thus, New York City failed to demonstrate a sufficient relationship between the tasks of a firefighter and the abilities it intended to test on its examinations, and the court granted summary judgment for the applicants who challenged the city’s use of the examinations. Eventually the city was permanently enjoined from using the disputed test. This case demonstrates the willingness of lower courts to require substantial proof to justify the use of an examination that causes disparate impact.

Another screening test was found to serve a business necessity, despite its disparate impact on applicants for firefighter positions in Buffalo. The city conducted a job analysis, including preparation of a “task rating list” describing the different duties based on its own and other cities’ job specifications as well as task rating lists from previous job analyses. This list was submitted to a committee for further suggestions on the tasks to be included and then the list was send as a survey to all full-time paid incumbent fire personnel in all fire departments in New York State to rate such things as the frequency they perform the listed tasks, the importance of those tasks, the amount of time they spend on those tasks, and when they needed to perform those tasks. The city also prepared a survey of the skills, knowledges, abilities, and personal characteristics for the positions to send to job incumbents in Buffalo and 13 other jurisdictions nationwide.

209 Id. at 119. See also, Easterling supra note 82, 2011 U.S. Dist. LEXIS 48123 at *46-47, 56 (1.5 mile run test not a business necessity where corrections officers being tested were not expected to run that distance).
210 Id. at 123 (quoting 29 C.F.R. § 1607.5(H)).
211 Id. at 125; 731 F. Supp. 2d at 314.
212 Id. at 129.
213 Id.
216 Id. at *34-39.
217 Id. at *37.
218 Id. at *8-9, 36, 41-42.
The city received less than a 10% response rate to the surveys, which was “insufficient data to determine whether tasks needed for the fire lieutenant job in Buffalo required the same knowledge, skills, and abilities as in other jurisdictions.”\(^{219}\) Despite this low response rate, the city was able to rely on several “validity generalization” studies that showed that tasks for similar positions required the same knowledge, skills, and abilities regardless of where they are performed.\(^{220}\) This information led to the creation of the examination questions, after the city’s Fire Advisory Committee was consulted to set an appropriate cutoff value for determining the tasks to be included on the Exam.\(^{221}\)

Despite some concerns regarding assumptions about the commonality of job duties, the court found that the city’s validation techniques were sufficient to protect the city in the claim of disparate impact. Its validation approach was the appropriate method to assess the questions for the Lieutenant’s Exam, since the city did conduct a job analysis, including an analysis of the important work behavior(s) required for successful performance and their relative importance and any work product(s) that resulted, as suggested by the EEOC guidelines.\(^{222}\) The city had “substantial evidence” to support its job analysis given its expert’s review of the job specifications for the various job titles, a comparison of this information to job specifications obtained from other jurisdictions, and a review of test plans and other job information obtained from 14 other large urban fire departments in other parts of the country.\(^{223}\)

The examination was also valid since it was based on a “methodical selection of the tasks critical to job performance, and the knowledge, skills, and abilities needed to perform those tasks” by a panel of experts drawn from all disciplines in the fire service.\(^{224}\) The city also showed a “substantial correlation between lieutenant positions in different jurisdictions, which was confirmed by [a] review and comparison of test plans and other job information obtained from several large urban fire departments in other parts of the country.”\(^{225}\)

Validity of the examination also was supported because “the behavior(s) demonstrated in the selection procedure are a representative sample of the behavior(s) of the job in question or that the selection procedure provides a representative sample of the work product of the job.”\(^{226}\) The city’s use of the exam was supported by its development of “a method to rate the criticality of a task according to its importance, frequency of performance, and consequence of error; consulted with the Fire Advisory Committee to set an appropriate cutoff value for determining the tasks to be included on the Exam; and conducted a statistical analysis to determine which of the tasks should be grouped together to develop the questions for the fire-related subtests.”\(^{227}\) This

\(^{219}\) Id. at 43.

\(^{220}\) Id. at *10, 21-22, 45.

\(^{221}\) Id. at *10, 51.

\(^{222}\) Id. at *39 (citing 29 C.F.R. §1607.14(C)(2)).

\(^{223}\) Id. at *43.

\(^{224}\) Id. at *48.

\(^{225}\) Id. at *49.

\(^{226}\) Id. at *39 (citing 29 C.F.R. § 1607.14(C)(4) and Guardians, 630 F.2d at 99).

\(^{227}\) Id.
decision illustrates the depth of analysis afforded to testing by employers which has a disparate impact under the guidance from Ricci.

Since the Ricci decision, a third court has applied a rather stringent requirement of showing business necessity by tying the hiring criteria to actual job duties. A fire department in New Jersey was unable to justify its residency requirement which had a disparate impact on African American applicants. First, residency did not necessarily promote the goal of familiarity with the geographic area, since firefighters could easily learn the geography after hire. Secondly, the department failed to show how often firefighters are required to come in while off duty, which was also offered as a justification for the residency requirement. A desire for firefighters who spoke Spanish likewise did not justify the residency requirement, since even though 69% of the residents were Hispanic, not all Hispanics speak Spanish. Overall, the retention of firefighters who moved out of the area after hire also showed a lack of business necessity.

Just as in Ricci, this fire department also tried to justify the residency requirement based on previous litigation concerning the hiring of Hispanic applicants. Even though avoiding litigation could in theory be a business concern, the department could not show that avoidance of litigation under a previous settlement agreement was related to the job performance of its firefighters. Following this reasoning, an employer that rejects applicants based on their criminal record to avoid future liability for negligent hiring would need to show that such litigation would be related to the ex-offender’s performance of their job duties.

Several post-Ricci decisions demonstrate the importance of employers’ consideration of other non-discriminatory means of selection. In the firefighter case described above, the court stressed that the department could ask directly about bilingual capacity rather than relying on the residency requirement, which would be “more narrowly tailored to the job-related function of having some firefighters with Spanish-language skills.”

Alternate selection criteria was an importance consideration in a claim by minority business owners who challenged the Small Business Administration’s (SBA) criteria for Small Business Investment Company Debenture License that required five years of experience in venture capital. The owners suggested that the SBA give similar credit for experience commercial banking and local development fields, which minority applicants were more likely to possess.

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229 Id. at 522.
230 Id. at 523.
231 Id. at 524.
232 Id. at 523.
233 Id. at 524.
234 Id.
235 Id. at 525.
and the court denied summary judgment for the SBA in part because it never considered this or any other alternative to the venture capital experience requirement, which had an adverse impact.\textsuperscript{237} Relying on similar reasoning, a jury verdict in favor of plaintiffs alleging disparate impact was upheld, in part because the plaintiff’s expert had demonstrated that a different weighting scheme for the promotion examination used in the promotional process would have had less or no disparate impact.\textsuperscript{238}

These cases demonstrate the extent to which employers are required to justify practices with an adverse impact of criteria other than a criminal record. Job-relatedness is not only required, but employers must engage in extensive study and analysis to establish that the criteria is sufficiently job-related to justify its impact on a protected group. This same type of rigorous proof of business necessity has not yet been required in claims of disparate impact by ex-offenders. Yet both courts and employers should approach hiring decisions that affect ex-offenders of color with this same rigor, ensuring that applicants are denied employment based on a criminal record only if that record is significantly related to the duties of the position.

\section*{IV. Disparate Treatment Claims by Ex-Offenders}

Ex-offenders have attempted to challenge hiring decisions which on their face are based on a criminal record, but may in fact be based on their race or national origin. The success of these challenges depends, as with most discrimination claims, on the existence of evidence that the employer made hiring decisions with some intent to discriminate, rather than simply rejecting applicants based on their criminal record.

\subsection*{A. Relevant Empirical Evidence}

It has been suggested that the stereotype of African Americans as criminals is “deeply embedded” in the white culture.\textsuperscript{239} Consistent with that suggestion, available empirical evidence indicates that at least some employers scrutinize African American ex-offender more closely than White ex-offenders. A study of applicant testers in Milwaukee, Wisconsin demonstrates

\textsuperscript{237} Id.
employers’ differential treatment of white and African American ex-offender job applicants. The study showed a “large and significant effect of a criminal record,” where 34% of the white applicants without a criminal record received a call back, whereas only 17% of the white applicants with a record were called back.

Among African American applicants in this study, African Americans without a record were called back 14% of the time, whereas African Americans with a criminal record were only called back 5% of the time. Thus, the effect of a criminal for these African American applicants was nearly 3:1, a 40% greater effect than for white applicants. The researcher tentatively concluded that “[a] criminal record can thus confirm negative stereotypes against blacks, overriding the many positive indicators of applicant quality presented by the testers.”

In contrast to white applicants who were benefitted by personal interaction with the employer, African American testers with a criminal record who had the chance to interact with the employer were even more adversely affected by their criminal record than those who did not interact. The researcher concluded that even the bright, friendly demeanor of the testers was “immaterial relative to the profound stigma associated with race and criminal involvement.”

Finally, in a study that examined employers’ willingness to hire an applicant who had committed a drug felony, 50% of the white applicants with a drug offense were called, compared to 14.7% of the black drug offenders. This research shows that at least some employers have the inclination to treat applicants with criminal records differently, depending on their race.

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241 Id. at 641. See also Pager, Devah, “The Mark of a Criminal Record,” 108 AM. J. OF SOCIOLOGY 937, 955 (2003).
242 Pager, supra note 240, 108 AM. J. OF SOCIOLOGY at 958.
243 Id. at 959.
244 Pager, supra note 239, MARKED: RACE, CRIME AND FINDING WORK IN AN ERA OF MASS INCARCERATION at 71.
B. Courts’ Consideration of Ex-Offender Disparate Treatment Claims

Some have observed that “some employers may ... attempt to use an applicant’s criminal record as a mere pretext for racial discrimination.”248 This observation is supported by the research outlined above. Yet many courts are willing to assume the legitimacy of a discharge or refusal to hire based on a criminal conviction, without any showing that the conviction is related to the person’s ability to perform.249 Some courts will even find that an ex-offender cannot establish a prima facie case of discrimination because their conviction record conflicts with an employer’s “no conviction” policy.250 Even arrests without conviction have been assumed sufficient to establish a legitimate reason for discharge.251

A criminal record may be sufficient to prevent an applicant from even establishing a prima facie claim of discrimination. For example, a director of admissions was unable to establish a prima facie claim of disparate treatment based on his discharge for a conviction for larceny.252 He could not establish his qualifications for the job because of its responsibilities, which included supervision of others, developing a departmental budget, compliance with company policies and legal standards, and collecting student application fees.253 The employer was also concerned that the conviction would have a negative effect on its academic accreditation.254 The court also considered the fact that his conviction was very recent, whereas the conviction of the comparable white employee was 9 years earlier, outside the employer’s policy of considering convictions within the past 7 years.255

Even if an applicant can establish a prima facie claim employers can fairly easily establish a legitimate business reason for their consideration of criminal behavior, even if the court does not assume the legitimacy of a “no conviction” policy. For example, a police department established a legitimate, nondiscriminatory reason for not hiring an African American applicant with a criminal record, where the applicant’s criminal conduct and his reputation as a gang member and drug dealer rendered him unqualified for the position.256 The court noted “[t]he

251 Chism v. Curtner, 619 F.3d 979, 984 (8th Cir. 2010).
253 Id. at *27.
254 Id. at *28.
255 Id. at *29.
The responsibility of carrying a gun and protecting City residents is a serious and often dangerous job.\textsuperscript{257} The difficulty of establishing disparate treatment based on an adverse action based on criminal behavior is illustrated by the claim of an African American sawmill employee who was discharged based on a conviction for drug possession, even though a white employee convicted of armed false imprisonment was retained.\textsuperscript{258} The trial court had sufficient reason to find after the trial that discharging the African American employee after his conviction was justified, based on the employer’s conclusion that his drug possession crime was “more dangerous to workers” than the weapons crime.\textsuperscript{259} The court relied on testimony that the sawmill employees used hazardous equipment, and the employer’s policy against drug use.\textsuperscript{260}

Like the sawmill employee, an African American employee could not sustain her disparate treatment claim, even though she was discharged based on her criminal conviction and a white employee was retained, where the white employee was convicted of possession of marijuana, while the African American was discharged based on her conviction for possession of a stolen government check prior to her employment.\textsuperscript{261} The court explained that “the white male employee had no record of dishonesty, a subject on which this agency was particularly sensitive,” so his continued employment in the file room and as a driver was “clearly distinguishable” from the discharge of the African American employee.\textsuperscript{262}

Another African American employee who was discharged after being convicted for money laundering could not establish disparate treatment even though two other white employees with criminal convictions were not discharged.\textsuperscript{263} One of those convictions occurred ten years before the person was hired, and the other conviction was for driving under the influence, which the court found to be a “vastly different” offense.\textsuperscript{264}

Using this same reasoning, the claim of an employee discharged based on a domestic violence conviction was denied, even though a white coworker was not discharged despite filing a false police report.\textsuperscript{265} The court explained that the two employees were not comparable because the African American employee’s conviction involved violent behavior, whereas the white employee’s did not.\textsuperscript{266} The same logic was applied in the claim of an African American employee...
firefighter who was discharged based on several arrests, even though other white employees were not discharged after being arrested. The court reasoned that their arrests occurred when another chief was in charge. In addition, the policy listing a criminal conviction as a reason for discharge was non-exhaustive and included a general requirement of good conduct.

The employee’s past history of criminal behavior also may help defeat a claim of disparate treatment. For example, an African American employee who was discharged based on his conviction record including lewd assault on a child was not similarly situated to another white employee who was convicted for the same offense, where the African American employee had three additional arrests for other assaults and one for driving under the influence.

In this same case, the employer was also able to show a legitimate business reason for the discharge based on the nature of the crimes committed, the number of criminal incidents, and the fact that two of them had occurred in the past six months. This was deemed a legitimate reason for dismissal when compared to the retention of the white employee whose conviction for one nonviolent offense had occurred 19 years earlier. It was also legitimate for the school to consider the media attention given to the African American employee’s criminal activities. These courts seem very willing to defer to an employer’s analysis of which type of crime or other circumstances surrounding the crime itself are sufficient to establish a legitimate business reason for relying on the criminal record of an applicant or employee.

A consistently applied policy on the hiring of ex-offenders can often be enough for an employer to establish a legitimate business reason. For example, an employer was justified in rejecting the application of a woman with several theft-related convictions. The court held that a jury would have to conclude that a policy regarding theft-related convictions was in place, where the employer had disqualified numerous other applicants based on such convictions, and no current employees had such a conviction. The court was willing to accept without further justification the employer’s position that a theft-related conviction made her and other applicants unqualified for any position with the company. The employer was not required to explain why the no-conviction hiring criteria was related to any position in its organization.

These cases and empirical studies illustrate the need for a more vigorous approach by the courts, and more care among employers, to ensure that a criminal record is not used as a subterfuge for discrimination. If an employer has not articulated the reasons for rejecting applicants based on a

267 Chism v. Curtner, 619 F.3d 979 (8th Cir. 2010).
268 Id. at 984.
269 Id.
270 Silvera v. Orange Co. School Board, 244 F.3d 1253, 1257-59 (11th Cir. 2001).
271 Id. at 1259-60.
272 Id.
273 Id. at 1262.
275 Id. at 936-37.
276 Id. at 938.
criminal record, then a court reviewing that reliance should probe further into whether the employer was in fact relying on some discriminatory intent in rejecting an ex-offender.


Generally research shows that employers are highly averse to hiring ex-offenders. In a Los Angeles study, only 9% of the employers using criminal justice methods for background checks were willing to hire ex-offenders, whereas 18% of the employers using private background checks were willing.

Research indicates that some employers see a criminal record as an indication that the applicant is “untrustworthy” or would be a “problematic employee.” Consequently, employers may reject ex-offender applicants “based on a perceived increased propensity to break rules, steal, or harm customers.” In a survey of employers in four cities, only 38.4% of the employers indicated that they probably would or definitely would hire an applicant with a criminal record. 19.5% said they definitely would not, and 42.1% said probably not.

It is interesting that among those who said they would definitely not hire an ex-offender, only 56.3% always perform criminal background checks, and 32.2% never do. Among those who probably would not hire an ex-offender, 52.7% of those employers never perform a check and only 29.8% always do.

Employers with an aversion to hiring ex-offenders appear to be more likely to perform background checks. For employers that were legally required to perform background checks, one study found that such checks were negatively related to their hiring of ex-offenders. Yet for employers who were not required to perform background checks, the relationship between performing checks and hiring ex-offenders was not statistically significant, but was a positive

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280 Id. at 210.
281 Id. at 214.
282 Holzer, supra note 277.
283 Stoll & Bushway, supra note 278, 7 CRIMINOLOGY & PUBLIC POLICY at 391.
relationship. Among employers who said that their willingness to hire ex-offenders depended on the crime, this relationship was positive and statistically significant.

Researchers concluded that some employers may perform background checks to gain additional information about ex-offender applicants, rather than only using the check to exclude those applicants. This relationship was shown by the fact that employers who indicated a willingness to hire ex-offenders depending on the crime committed were more likely to perform background checks than employers who were unwilling to hire ex-offenders at all.

The survey conducted by SHRM in late 2009 also provides some insight into why employers consider criminal records among applicants. The following percentages of responding employers indicated the following reasons for conducting criminal background checks on job candidates:

- To ensure a safe work environment for employees: 61%
- To reduce legal liability for negligent hiring: 55%
- To reduce/prevent theft & embezzlement, other criminal activity: 39%
- To comply with applicable state law: 20%
- To assess overall trustworthiness: 12%
- Other reasons: 4%

Generally it is recognized that to the extent that the past can predict the future, a criminal conviction “conveys some information about the likelihood of future illegal, dangerous or debilitating forms of behavior.” Yet only limited research has been conducted to determine exactly which factors regarding a criminal record are most significant for hiring employers. Generally, the theory of social stigma suggests that ex-offenders are rejected as applicants because their criminal records “signal that they cannot be trusted.”

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284 Id.
285 Id. at 395.
286 Id. at 392.
287 Id.
288 SHRM Study, supra note 1.
289 Id.
290 Pager, supra note 238, at 38.
291 Becky Pettit and Christopher J. Lyons, “Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration , by Race, Class and Criminal Involvement,” in Shawn Bushway,
More specifically, less recent studies have shown that earnings losses among ex-offenders are greatest for those in occupations with high incomes or jobs requiring significant trust. Workers committing “breaches of trust” experienced income loss even if they were not sentenced to prison time. In one of the first studies of this kind in 1976, a survey of employers found that the nature of the offense and the surrounding circumstances are examined closely by employers considering hiring ex-offenders, but 82% of those employers did not consider the nature of the offense to be a major determining factor. For the 36 employers who had a formal policy on the hiring of ex-offenders, all considered the nature of the offense.

Some researchers have found that employers may not hire ex-offenders to handle valuable merchandise and cash, and may hesitate to hire them if the position requires interaction with customers. In one study, job duties including customer contact and handling children were statistically related to the tendency to hire ex-offenders, whereas the duties of handling cash and handling expensive merchandise were not statistically significant in relation to the hiring of ex-offenders. Another expert suggests that employers may worry about ex-offenders’ interactions with coworkers as well as criminal justice authorities which can disrupt the workplace.

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293 Waldfogel, supra n. 289, 29 J. OF HUMAN RESOURCES at 75.


295 Id. at 221.


297 Holzer, et al., supra note 296, at 140-41.

A more specific study from the applicant perspective found that “employers are strongly averse to hiring ex-offenders charged with violent offenses.”\(^{299}\) They appear to be less adverse to hiring applicants with property or drug-related offenses.\(^{300}\) Another study found, in contrast, that ex-offenders who had a record of a violent offense were more likely to be employed, while offenders convicted of property crimes were less likely to be employed, although the researchers recognized that other personal characteristics may have caused this outcome.\(^{301}\)

The Ohio study also compared employment among ex-offenders based on the type of crime they had last committed. Not surprisingly, the ex-offenders who had committed the most serious felonies (homicide, rape, etc.) were the least likely to be employed following their release.\(^{302}\) Those convicted of drug offenses were the most likely to be employed following their incarceration.\(^{303}\) Burglars were more likely to remain unemployed than drug offenders.\(^{304}\)

The significance of the type of crime committed was also confirmed by researcher Devah Pager, who asked employers how likely they would be to hire an applicant who had committed a drug felony compared to an applicant who was convicted of a property crime like burglary.\(^{305}\) While only 49% of the employers were “somewhat likely” or “very likely” to hire an applicant with a criminal record in general, 62% were willing to consider hiring the applicant with a drug felony.\(^{306}\) If the applicant participated in a drug treatment program rather than going to prison, this willingness to hire jumped to 73%.\(^{307}\) In contrast to drug offenders, only 31% of the employers surveyed were at least somewhat likely to consider the applicant who had committed a property crime, and they were even less likely to consider that applicant if the job involved handling cash.\(^{308}\) Only 23.6% were at least somewhat likely to consider an applicant who had committed a violent crime.\(^{309}\)

\(^{299}\) Holzer, et al., supra note 296, at 128.
\(^{300}\) Id.
\(^{303}\) Id. at 276.
\(^{304}\) Id. at 288.
\(^{305}\) Pager, supra note 240, at 123.
\(^{306}\) Id.
\(^{307}\) Id. at 125.
\(^{308}\) Id. at 123-24.
\(^{309}\) Id.
The significance of the type of crime committed was also highlighted in the survey conducted by the Society for Human Resource Management (SHRM) in late 2009.\textsuperscript{310} This survey showed that among 312 employers responding to a survey of SHRM members, the following results from a criminal background check would have the reported level of influence on the indicated percentage of employers:\textsuperscript{311}

<table>
<thead>
<tr>
<th>Criminal Information</th>
<th>Very Influential</th>
<th>Somewhat Influential</th>
<th>Not Very Influential</th>
</tr>
</thead>
<tbody>
<tr>
<td>Convicted violent felony</td>
<td>95%</td>
<td>5%</td>
<td>0%</td>
</tr>
<tr>
<td>Convicted non-violent felony</td>
<td>74%</td>
<td>24%</td>
<td>2%</td>
</tr>
<tr>
<td>Convicted violent misdemeanor</td>
<td>58%</td>
<td>35%</td>
<td>6%</td>
</tr>
<tr>
<td>Convicted non-violent misdemeanor</td>
<td>22%</td>
<td>51%</td>
<td>24%</td>
</tr>
<tr>
<td>Severity of the criminal activity</td>
<td>81%</td>
<td>16%</td>
<td>1%</td>
</tr>
<tr>
<td>Number of convictions</td>
<td>75%</td>
<td>20%</td>
<td>3%</td>
</tr>
<tr>
<td>Relevance of criminal activity to position</td>
<td>73%</td>
<td>20%</td>
<td>4%</td>
</tr>
<tr>
<td>Length of time since criminal activity</td>
<td>56%</td>
<td>39%</td>
<td>3%</td>
</tr>
<tr>
<td>Age of candidate when criminal activity occurred</td>
<td>31%</td>
<td>50%</td>
<td>10%</td>
</tr>
</tbody>
</table>

Consideration of ex-offender applicants varies across different industries. Manufacturers were found to be relatively less adverse to hiring ex-offenders, whereas more reluctance was found in finance, insurance, real estate and the service sectors.\textsuperscript{312}

The specific duties of the position being filled can also have an impact on how employers view a criminal record. Generally, positions with customer contact were relatively less likely to consider ex-offenders, whereas positions requiring writing were less averse than average.\textsuperscript{313}

\begin{flushright}
\textsuperscript{310} SHRM Study, supra note 1.  \\
\textsuperscript{311} \textit{id.}  \\
\textsuperscript{312} Holzer, et al., supra note 279, IMPRISONING AMERICA at 217-19.  \\
\textsuperscript{313} \textit{id. at} 218-19.
\end{flushright}
Employers where employees have relatively less customer contact, such as construction and mass transportation, and organizations with a large percentage of unskilled jobs, are more likely to hire ex-offenders.\textsuperscript{314} Other experts have opined that trustworthiness may be more important in positions where an employee cannot be monitoring closely, or where significant customer or handling of cash is required.\textsuperscript{315}

One survey of municipal employers found that those which did not conduct background checks for every employee still conducted checks for positions that were of a sensitive nature, involved public safety, involved handling money or had other significant fiduciary responsibilities, had access to confidential data, or worked with vulnerable adults.\textsuperscript{316} This researcher recommended that “hiring decision makers can use background checks designed to screen out applicants who would be unsuitable for certain positions, because they have demonstrated, through criminal behavior, that they are untrustworthy, violent, or otherwise unacceptable.”\textsuperscript{317}

In contrast to the case law for disparate impact and disparate treatment claims, this research suggests that at least some employers distinguish between applicants with a criminal record. The specific circumstances and the nature of the crime may be considered by potential employers. Employers sometimes also consider the duties of the position and the opportunity for reoffending. This research suggests that it is possible and perhaps even a general practice of at least some employers to look beyond the existence of a criminal record to determine whether the applicant could still perform successfully in a particular position.

\section*{VI. Results of New Study of Michigan Employers’ Criminal Records Policies and Practices}

Protection from discrimination \textit{claims} calls for support of a business necessity or a legitimate business reason to justify rejection of ex-offenders. EEOC guidelines require, and courts have suggested, that the criteria used by an employer must allow them to differentiate between applicants whose criminal records indicate that they pose only a minimal risk and those who pose a higher level of risk.\textsuperscript{318} This need for justification raises the question of how an employer can and should do this. A survey among Michigan employers gathered information from potential employers to explore the concerns, potential benefits, and specific employer policies associated with hiring ex-offenders.\textsuperscript{319} Examining the extent to which having a criminal record

\begin{footnotesize} 
\begin{itemize}
\item \textsuperscript{314} Stoll & Bushway, supra note 278, 7 CRIMINOLOGY & PUBLIC POLICY at 388.
\item \textsuperscript{315} Holzer, et al, supra note 279, IMPRISONING AMERICA at 207.
\item \textsuperscript{317} Id.
\item \textsuperscript{318}El v. SEPTA, supra note 123, 479 F.3d at 245 n. 12.
\item \textsuperscript{319} Mindi N. Thompson and Devon L. Cummings, “Enhancing the Career Development of Individuals Who Have Criminal Records,” 58 CAREER DEVELOPMENT QUARTERLY 209, 214 (2010).
\end{itemize}
\end{footnotesize}
influences employers’ hiring attitudes and decision-making processes, the factors employers consider important in assessing ex-offenders, would provide useful information that could be communicated to ex-offenders and policy makers.320

Responding to that need, a survey assessing current Michigan employer attitudes, policies, and practices with regard to the use of criminal record information was developed and sent to a diverse group of approximately 2,900 Michigan employers. The results are based on survey responses from 72 employers, including a wide range of private sector employers (54% of the total; e.g., hospitals, research laboratory, manufacturers, landscaper, security firms, rehabilitation services) and public sectors employers (e.g., public schools, county governments, city governments, public universities). Given issues regarding the response rate and the representativeness of the respondent group, the study is best viewed as exploratory in nature.

The responses to the survey provide information about how employers assess applicants with a criminal record, and establish that it is possible for employers to establish a business necessity or legitimate business reason for relying on a criminal record. But to do so, these employers have looked beyond the conviction itself to determine whether the particular crime is related to the job being filled, and whether other information about the applicant might show that the criminal record is not a clear indicator of their lack of qualification for the position.

A. Reluctance of Employers to Hire Job Applicants with Criminal Records

The survey first asked in general about employers’ willingness to hire applicants with a criminal record. Twenty-four percent of the responding employers (n=17) indicated that they were “not at all” willing to consider ex-offenders for employment, and only 8% (n=6) indicated that they were “often willing” to do so. Despite this reluctance, 58% of the employers responding to our survey were willing at least “in some circumstances” to hire ex-offenders. In addition, employers noted some specific benefits from hiring ex-offenders, including over 40% noting the benefits of a good work ethic and the ability to follow directions.

The survey then asked about the particular factors that would establish that an employer would have legitimate concerns about hiring an applicant with a criminal record. A list of potential concerns employers might have about hiring ex-offenders was identified based on a review of the academic and practitioner literature, and survey respondents were asked to rate the importance of each concern to their organization using a five point scale (1=not at all concern, 5=very critically important). The importance ratings were analyzed by employer group, those who indicated they are unwilling to consider ex-offenders and those who are willing. The relevant findings are summarized in Table 1.

**Table 1: Importance of Employer Concerns Regarding the Hiring of Ex-Offenders**

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320 Ic.
<table>
<thead>
<tr>
<th>Employer Concern</th>
<th>Unwilling to Consider Ex-Offenders (Mean Rating)</th>
<th>Willing to Consider Ex-Offenders (Mean Rating)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Potential harm to customers or other third parties</td>
<td>4.80</td>
<td>4.44</td>
</tr>
<tr>
<td>Sex offender (CSC) registry restrictions</td>
<td>4.79</td>
<td>4.51</td>
</tr>
<tr>
<td>Lack of necessary license</td>
<td>4.62</td>
<td>3.60*</td>
</tr>
<tr>
<td>Potential harm to coworkers</td>
<td>4.60</td>
<td>4.30</td>
</tr>
<tr>
<td>Property loss/theft</td>
<td>4.53</td>
<td>3.98</td>
</tr>
<tr>
<td>General lack of trustworthiness</td>
<td>4.50</td>
<td>3.54*</td>
</tr>
<tr>
<td>Lack of identification/proof of eligibility to work in U.S.</td>
<td>3.86</td>
<td>3.76</td>
</tr>
<tr>
<td>Lack of training/skills</td>
<td>3.50</td>
<td>3.00</td>
</tr>
<tr>
<td>Lack of education</td>
<td>3.43</td>
<td>2.85</td>
</tr>
<tr>
<td>Lack of general work experience</td>
<td>3.29</td>
<td>2.73</td>
</tr>
</tbody>
</table>

Compared to employers who were willing to consider ex-offenders, employers who were unwilling to consider hiring ex-offenders placed greater importance on each of the ten identified concerns. The greatest mean difference between the two groups is found with regard to the concern that ex-offenders lack the ability to obtain necessary licenses and the concern about their presumed general lack of trustworthiness.321

**B. Factors Considered in Deciding Whether to Hire Particular Ex-Offenders**

Third, the survey asked responding employers about the factors that they actually consider in making hiring decisions among applicants with a criminal record. A list of specific factors employers might take into account in deciding whether to hire a particular ex-offender (versus concerns about hiring ex-offenders in general) was identified based on a review of the academic and practitioner literature.

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321 Mean differences for items assessing these two concerns were statistically significant, \( p < 0.05 \).
Survey respondents were asked to rate the extent to which their organization consider each factor deciding whether to hire a particular ex-offender using a five point scale (1=not considered at all concern, 5=very important). The relevant findings based on the responses of those employers that indicated at least some willingness to consider ex-offenders are summarized in Table 2.

**Table 2: Extent to which the Employer Considers Specific Factors in Deciding Whether to Hire a Particular Ex-Offender**

<table>
<thead>
<tr>
<th>Specific Factors</th>
<th>Rating</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violence associated with crime</td>
<td>4.85</td>
</tr>
<tr>
<td>Sex offender (CSC) registration restrictions</td>
<td>4.69</td>
</tr>
<tr>
<td>Level of offense (felony, misdemeanor)</td>
<td>4.60</td>
</tr>
<tr>
<td>Relationship of crime to ability, capacity or fitness to perform job duties and responsibilities</td>
<td>4.58</td>
</tr>
<tr>
<td>Total number of crimes committed by the individual</td>
<td>4.40</td>
</tr>
<tr>
<td>Connection to potential to cause property loss/theft</td>
<td>4.33</td>
</tr>
<tr>
<td>Time since conviction</td>
<td>4.30</td>
</tr>
<tr>
<td>Evidence of rehabilitation since conviction</td>
<td>4.16</td>
</tr>
<tr>
<td>Level of responsibility with position</td>
<td>3.94</td>
</tr>
<tr>
<td>Time since release from prison</td>
<td>3.92</td>
</tr>
<tr>
<td>General lack of trustworthiness</td>
<td>3.87</td>
</tr>
<tr>
<td>Age at time of committing the crime(s)</td>
<td>3.75</td>
</tr>
<tr>
<td>Level of involvement in crime committed (e.g., aiding and abetting)</td>
<td>3.67</td>
</tr>
<tr>
<td>Amount of time in prison</td>
<td>3.56</td>
</tr>
<tr>
<td>Lack of training/skills needed</td>
<td>3.50</td>
</tr>
<tr>
<td>Lack of education</td>
<td>3.42</td>
</tr>
<tr>
<td>Belief that crime shows unfavorable character traits</td>
<td>3.37</td>
</tr>
</tbody>
</table>
This rating of factors actually considered in individual hiring decisions is consistent with employer responses regarding concerns in hiring ex-offenders, such as concerns about workplace safety and theft.

The rating of these factors as more important than lack of training or education is somewhat surprising, given the research showing that as many as 80% of offenders do not have a high school diploma. However, this relative lack of concern regarding qualifications may be explained in part by a general tendency to hire ex-offenders into entry level positions.

Some survey respondents provided a more detailed explanation of their consideration of applicants with a criminal record. Some explanations demonstrate a thoughtful and job-related approach. One furniture company stated that it considered the following factors in reviewing applications from ex-offenders:

- nature & gravity of offense
- time since conviction
- work history
- job-relatedness of offense
- rehabilitation effort
- is there pending felony
- specific job duties

A manufacturing firm explained that “When looking at ex-offenders, our main criteria is to look at the offense and its relation to the position in which they are applying with the exception of violence.” A state agency explained that in reviewing a background check, it considers these factors:

- type of conviction
- nature of offense
- date of conviction

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A “whole person” approach was described by two employers. A manufacturing firm explained that “[t]he offense is a piece of information about the person that we use along with education, work history, experience and references to assess if they are the most suitable person for the position.” Similarly, a college stated that “[w]e look at anything that comes up on a case by case basis. Keeps the safety of our faculty, staff, and students as the first priority.”

These comments demonstrate that for some employers, individual consideration of applicants with a criminal record is part of their general hiring process.

The survey also explores whether employers have formal policies regarding the review of applicants who have a criminal record. For the each of the factors considered by employers, listed above in Table 2, employers were asked to rate the extent to which their organization has a formal policy that requires the factor to be considered when evaluating job applicants who are ex offenders; ratings were based on a five point scale (1=not related to any policy, 3=some general reference to the consideration in the employer’s policy, 5=a formal policy clearly requires its consideration. The relevant findings are summarized in Table 3. The middle column indicates the average rating for the item using the above scale. The far right column report the percent of responding employers who have a formal policy that clearly requires consideration of the factor in question.

Table 3: Extent to which Responding Employers Having a Policy Addressing the Specific Factors Used in Deciding Whether to Hire a Particular Ex-Offender

<table>
<thead>
<tr>
<th>Specific Factors</th>
<th>Mean Rating</th>
<th>% With a Formal Policy Requiring Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Level of offense</td>
<td>3.7</td>
<td>55.4</td>
</tr>
<tr>
<td>Violence associated with crime</td>
<td>3.5</td>
<td>48.2</td>
</tr>
<tr>
<td>Sex offender (CSC) registration restrictions</td>
<td>3.5</td>
<td>50.9</td>
</tr>
<tr>
<td>Relationship of crime to ability, capacity or fitness to perform job duties and responsibilities</td>
<td>3.3</td>
<td>36.4</td>
</tr>
</tbody>
</table>
Overall, with a few exceptions, there was significant convergence in the extent to which factors identified as being considered by employers in deciding whether to hire a particular ex-offender (Table 2) were addressed (or not addressed) by formal employer policies (Table 3). That is, the findings indicate that employers most often had policies regarding those factors that they reported as using most often in the hiring of particular ex-offenders.

However, the survey findings also indicate that despite the benefits of providing decision makers clear guidance, many employers reported considering the factors related to the crime committed without having a formal policy about the consideration of those factors. Most notably, despite the importance that EEOC Guidelines and case law place on time since release from prison and evidence of rehabilitation, less than 15% of the responding employers had formal policies requiring consideration of either factor.

The effect of employers’ failure to adopt formal policies regarding the consideration of a criminal record in the hiring process is unclear. On the one hand, a lack of a formal policy may benefit ex-offenders who have other qualities that would be attractive to an employer, such as relevant work experience. If no formal policy bars consideration of their application, then they may have a relatively better chance at being considered. Adoption of a formal policy on the
consideration of criminal records may also help to protect employers against adverse impact claims, since the policy would hopefully reflect the actual requirements and circumstances of that employer’s positions.

Conversely, a lack of a formal policy could work to the disadvantage of applicants of color with a criminal record. Without a formal policy, employers are free to place varying weight on the criminal history across different applicants. As with any decision where considerable discretion is involved, this variability may open the door to discrimination against applicants of color.

C. Further Insights from the Survey

The survey asked employers about any potential benefits to them from hiring ex-offenders. Table 4 includes responses to this question: “Please rate the extent to which your organization has seen each of the following potential benefits from hiring ex-offenders,” with respondents using a 1-5 scale, 1 being “Not at all beneficial”, 2 being “Of some benefit”, 3 being “in some circumstances,” 4 being “fairly helpful” and 5 “extremely beneficial.” The second column reports the percentage of employers who indicated that the characteristics listed were at least “of some benefit.” The remaining columns report the mean rating for each of the characteristics for two employer groups, those employers who indicated they were unwilling to hire ex-offenders and those willing to hire ex-offenders. The mean ratings of 1.0, the lowest possible rating on the five-point scale, means that none of the employers in the “unwilling to hire” group viewed the hiring ex-offenders as involving any of the listed benefits.\textsuperscript{323} Combined, the results reported in Table 1 and those reported in Table 4 indicate that employers who are willing to consider hiring ex-offenders see both fewer potential negatives and more positive benefits associated with hiring ex-offenders.

Table 4: Potential Employer Benefits from Hiring Ex-Offenders

<table>
<thead>
<tr>
<th>Positive Characteristic of Ex-Offender</th>
<th>Of Some Benefit or More</th>
<th>Mean Rating Among Unwilling Employers</th>
<th>Mean Rating Among Willing Employers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Work experience in prison</td>
<td>24.5%</td>
<td>1.0</td>
<td>1.49</td>
</tr>
<tr>
<td>Training or skills from prison</td>
<td>25.5%</td>
<td>1.0</td>
<td>1.51</td>
</tr>
<tr>
<td>Ability to follow directions</td>
<td>40.4%</td>
<td>1.0</td>
<td>2.22*</td>
</tr>
<tr>
<td>Work Ethic</td>
<td>41.7%</td>
<td>1.0</td>
<td>2.26*</td>
</tr>
</tbody>
</table>

\textsuperscript{323} Mean differences for items assessing the “ability to follow directions” and “work ethic” potential benefits were statistically significant, p < .05.
Several open-ended questions provided survey respondents an opportunity to offer unstructured comments. The analysis of those open-ended comments lead to additional exploratory findings regarding employer attitudes, policies, and practices. First, 28 of the 72 (38.9%) responding employers surveyed gave legal restrictions as a reason for not hiring ex-offenders, in response to the open-ended question. These responses are consistent with the observations of an expert at the EEOC’s July 2011 hearings, outlining the “confusing hodgepodge” of state and local restrictions on the hiring of ex-offenders.\footnote{Testimony of Barry A. Hartstein, Shareholder, Littler Mendelson, P.C., available at http://www.eeoc.gov/eeoc/meetings/7-26-11/index.cfm.}

One surprising finding regarding the statutory restrictions arose from the comments of several survey respondents that overstated the state restrictions on the hiring of ex-offenders. These two comments are typical of the responses received from long term care facilities:

- “State regulated - no felons can work in long term care”
- “Nursing Home regulation prohibits hiring those with criminal history”

In reality, state law only requires a waiting period before long term care facilities can hire many applicants with felony convictions.\footnote{Mich. Comp. Laws §§ 333.20173a, 333.21073b, 330.1134a.}

Similarly, some schools responded that they did not or could not hire any ex-offenders. While state law prohibits the hiring of sex offenders by schools,\footnote{Mich. Comp. Laws § 380.1230.} any other felons can be hired by a school district with the approval of the school board.\footnote{Mich. Comp. Laws § 380.1230 et. seq.; Mich. Admin. Code R. 390.1201.} These comments exemplify the approach of schools that responded to the survey:

- “Michigan School Employee Safety Legislation prohibits us from employing people with certain convictions without specific approval of our Board of Education. We tend not to present these candidates to our Board.”
- “We generally do not consider individuals with felony violations due to MI's requirements to take to Board of Education and large number of other applicants without criminal backgrounds deemed more appropriate.”
- “State law strictly prohibits us from hiring ex-offenders”
It is clear from the surveys that if the employer believed that hiring an ex-offender was prohibited by law, the employer did not engage in any further consideration of the applicant or determine whether the applicant’s particular crime committed showed an inability to perform the job duties of the particular position being filled. Although additional research is needed, it appears that employer lack of knowledge of the relevant law may be a significant contributing factor in decisions not to consider hiring ex-offenders.

The survey responses also gave some insight into how applicants with a criminal record should present themselves during the hiring process. Without a specific question on this topic, 29.2% of the survey respondents noted the importance of the forthright disclosure of convictions on an application when it is requested. Even if the employer would otherwise consider hiring an ex-offender, the “dishonesty” shown by not revealing a conviction when requested was seen as a definite bar to employment. In addition, without a question prompting the advice, 18.1% of the responding employers advised that on applications and in interviews applicants should provide additional information to explain the circumstances of their criminal offense. These responses indicate that at least for employers who are generally willing to hire an ex-offender, honesty and any extenuating circumstances connected to the criminal activity may provide the ex-offender with additional consideration during the hiring process.

VI. Guidance for Promoting the Fair and Effective Use of Criminal Record Information

A substantial body of research, including the new Michigan survey findings outlined above, provides consistent and strong evidence that the way in which many employers use criminal records information poses a significant threat of disparate impact and disparate treatment discrimination. This section provides guidance for addressing that risk by promoting the fair and effective use of criminal record information in employment settings. The guidance takes into account the empirical findings that have been reviewed and reported, relevant case law and EEOC guidelines, and well established principles from the field of human resource management.

A. Carefully Structure Practices Related to Employer Use of Criminal Record Information.

The research and case law demonstrate the significant risk that the use of criminal record information may result in unfair and/or illegal discrimination. Therefore, it is highly recommended – if not critical – that employers adopt a highly structured approach to considering criminal records of applicants. Research on employer practices demonstrates that bias in employment decisions (e.g., hiring, promotion) is mostly likely manifested when employment
practices are informal, unstructured, and rely on relatively subjective judgments. Thus, bias is suppressed by adding greater “structure” to employment practices.

The “structuring” of specific employment practices involves adding characteristics that: 1) focus decision-makers on information that is job or organizationally relevant, 2) promotes consistency in how decisions are made, and/or 3) increase accountability. Elements of structure associated with common employment practices such as hiring and promotion decisions include: 1) explicit criteria based on a job or organization analysis; 2) established processes to be followed for all candidates/employees; 3) evaluation tools or guidelines that focus decision makers on established criteria and record their assessments, 4) training for decision-makers, and 5) providing routine oversight.

Increased structure reduces the manifestation of unintentional or implicit biases by ensuring that criteria used in employment decisions are relevant to the job or organizational fit. Reliance on relevant criteria focuses decision makers on relevant information, ensures that applicants or employees are treated consistently, and increases accountability. The greater accountability associated with increased structure of employment decisions also deters more overt or intentional forms of discrimination.

Important elements of structure with regard to use of criminal records information in particular include:

- Conducting a job analysis of jobs, or job categories, to determine the job relatedness of specific conviction information. This can include state or federal requirements for certain safety-sensitive positions and duties or a working environment that provide employees with a specific opportunity to engage in criminal behavior.

- Determining whether the nature of the crime makes is relevant because the criminal conduct could be repeated in the job setting, with consideration of other personal characteristics among applicants that might make the criminal history less relevant

- Developing policies on how different criminal records will affect hiring decisions for different jobs.

• Providing decision makers specific written guidelines for identifying what constitutes and disqualifying criminal record for relevant jobs or job categories.

• Providing decision makers training regarding relevant law and the application of established policies and execution of established procedures.

• Establishing a mechanism for oversight of the use of criminal records information. Oversight should typically include assigning a person or office to monitor and evaluate the use of criminal records information. Are established guidelines being consistently followed throughout the organization? Is there evidence that the application of established guidelines in resulting in an adverse impact? If so, are there steps that can be taken, including the possible use of alternative selection tools (e.g., integrity tests) that would address the adverse impact?

By taking these steps, employers can reduce the likelihood that discrimination will occur, and be more confident that claims of disparate impact or disparate treatment will not be successful, because the employer will be able to establish a business necessity or a legitimate reason for its consideration of applicants’ criminal records during the hiring process.

B. Principles that Should be Incorporated into a Structured Approach

There are three “guiding principles” that should be incorporated into a highly structured approach to using criminal records information. First, employment should be denied based on an applicant’s criminal record only if there is a reasonable basis for concluding the conviction is job-related and doing so is consistent with a “business necessity.” Job analysis results indicating that convictions of the kind in question are relevant to the job would provide strong evidence of job-relatedness. Except in extraordinary circumstances, an employer’s absolute bar on hiring ex-offenders for any position violates this guiding principle. In most circumstances, adherence to this principle requires an individualized approach to evaluating whether a conviction is sufficiently job-related to warrant denial of employment.

Employers should not screen applicants at the application stage based on a criminal record. This recommendation has been the basis for the “ban the box” efforts in numerous states and cities, to remove questions about criminal record from applications.331 Similarly, in the July 2011 EEOC hearing on this issue, experts recommended that employers not reject an applicant based only on an indication of a criminal record on their application, without the chance for an interview.332


Based on EEOC guidelines and case law, the following factors should be taken in account when an individualized approach is called for:

- Nature or gravity of the offense or offenses
- Bearing, if any, of the offense(s) on any specific responsibilities of the job or position
- The time that has elapsed since the offense
- Age of the applicant or employee at the time of the offense
- Any evidence of rehabilitation

An employer’s consideration of the time since conviction is particularly important given the results of recent studies on the “redemption” of ex-offenders. This research has confirmed earlier studies regarding the reduced expectation of recidivism after the passage of time since one’s conviction. This research led experts at the EEOC hearings in July 2011 to recommend that criminal records more than seven years old should be deemed irrelevant in the hiring process.

Consideration of these factors will require asking applicants about the circumstances surrounding the crime as well as information about their behavior since the time of the offense. The SHRM survey indicated that only 63% of the employers allow applicants the opportunity to explain the results of their criminal background check that might have an adverse effect on an employment decision. 25% of the employers only allowed an explanation after the hiring decision had been made, and 12% did not allow any explanation at any time. So for many employers, this will require a change of current practice of rejecting ex-offenders at the paper application stage.

Second, due process concerns should be addressed. Due process is a fundamental legal and psychological concern. Building due process into a structured approach to using criminal records information should include, at a minimum:

336 SHRM Study, supra note 1.
337 Id.
• Giving applicants notice of the intent to obtain information regarding their criminal record and getting their consent.
• Giving applicants a copy of criminal record information and allowing them an opportunity to correct any inaccuracies prior to rejecting the applicant.

Third, privacy concerns should be addressed. At all stages of the hiring and employment process, access to criminal records data should be limited to those people who have a valid need to know, and who have been trained on how that information should influence the employer’s decisions. This will prevent the person’s criminal record from inappropriately influencing the treatment they receive during the hiring process as well as in the workplace if they are hired.

C. Guidance and Recommendations for EEOC and Courts

Employers should adopt the principles described above to provide fair consideration to applicants with criminal records. Adoption of these principles should also protect employers from liability for claims of disparate impact or treatment. But for employers who do not adopt these principles, EEOC investigators and courts hearing claims of discrimination brought by ex-offenders should require that employers adopt these principles.

In the litigation of disparate impact claims by applicants who do not have a criminal record, we have seen how a court will require in depth validation of a test or other hiring criteria which excludes a disproportionate number of members of a protected class. Since the Supreme Court’s decision in Ricci, courts have continued to require substantial validation of such exclusionary criteria. But in disparate impact claims brought by ex-offenders, the evidence required to establish business necessity has been much less rigorous and individualized. Instead, evidence of general concerns about customer or coworker safety has been sufficient to justify the exclusion of ex-offenders of color from the workplace.

Employers should be required to validate their reliance on criminal records when rejecting applicants of color. This means that employers should establish a direct relationship between the criminal behavior and the potential for that applicant to cause harm in the workplace, or some other inability to perform the duties of the position. Consideration of the circumstances surrounding the crime, as well as the conduct of the applicant since that act, would help to establish the necessity of using that criminal record as a basis for the hiring decision. In addition, consideration of these additional factors can be considered as an alternative selection method which could have less of a disparate impact on applicants of color, while still meeting the employers need to determine the actual quality of applicants.

Employers may also benefit from education on their consideration of individual factors regarding applicants with criminal records. One expert at the EEOC’s July 2011 hearings observed that “there has been a lot of misinformation and/or misunderstandings by various employers” regarding hiring applicants with a criminal record.338 Such education may be sufficient to

encourage more individualized consideration of ex-offender applicants, at least among employers who would like to avoid costly discrimination litigation.

Even with employer education, some claims by ex-offenders may continue to be made in court. In the past, courts reviewing both disparate impact claims and disparate treatment claims by ex-offenders have only required minimal evidence from employers to support their reliance on a criminal record to justify the rejection of an applicant who is a member of a protected class. Instead, courts should require that employers present concrete evidence that establishes the legitimacy of relying on criminal records to reject minority applicants. If such evidence is not required, employers will be allowed to continue to use offender status as a subterfuge for refusing to hire applicants of color.

The survey of Michigan employers who consider hiring applicants with criminal convictions shows that it is possible for employers to establish a business necessity or a legitimate business reason for considering the criminal records of applicants. But these employers go far beyond just asking whether the applicant has a conviction. Instead, these employers consider the nature of the crime(s) committed and how those criminal acts relate to the job being filled. In addition, many employers consider other personal characteristics of the ex-offender applicant to determine whether the negative characteristics associated with the criminal act have either been corrected or are disproved by the applicant’s more recent behavior. Such an approach will still protect employers against potential liability for harmful acts by their employees, but will give ex-offenders an opportunity for success in the workplace. Such a second chance may very well prevent future criminal acts by applicants because as employees, they can become productive members of society.