NEGLIGENT HIRING AND CRIMINAL REHABILITATION: EMPLOYING EX-CONVICTS, YET AVOIDING LIABILITY

Timothy L. Creed
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I. INTRODUCTION

Around noon on March 26, 2001, Kristin D. Blair, a 19-year-old first-year college student at Virginia Polytechnic Institute and State University (“Virginia Tech”), worked alone in a classroom, finishing a project before her 2:00 P.M. class. She went to the restroom, but as she opened the restroom door to return to her work, James Harris, a janitor, ambushed her. Clutching her throat, he forced her back into the restroom, where he assaulted her.

Anytime an employee harms a third party, like Blair, the employer could be directly liable to that third party for negligent hiring. Under this tort, courts can hold employers liable for harm their employees inflict on others if the employer knew or should have known of an employee’s potential risk, or if “the risk would have been discovered by a reasonable investigation.” Most states recognize a cause of action for negligent hiring. But state and federal courts have not uniformly applied negligent-hiring requirements, leaving employers unsure when they can hire ex-convicts and avoid litigation.

Imagine, for instance, three alternative scenarios in which the janitor in Blair v. Defender Servs. had three different backgrounds:

• he had a criminal background in which he had assaulted women;

• he had no criminal background; or

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1 Blair v. Defender Servs., Inc. 386 F.3d 623, 625 (4th Cir. 2004).
2 Id.
3 Id.
4 Lex K. Larson, Employment Screening 11-527 (LexisNexis 2006).
5 Id. at 10-2 n.1 (listing 36 states that recognize negligent hiring).
he had a felony conviction, but would never end up committing a similar crime.

How, in these three scenarios, should the employer’s decision to perform a criminal-background check affect liability? Assuming the employer had discovered a criminal background, how should one hypothetical candidate’s background rather than another hypothetical candidate’s affect liability? Assuming that state law required the employer to hire ex-convicts, how should the decision to hire one hypothetical candidate rather than another affect liability? Employers must grapple with these issues every time they consider hiring a potential employee.

Moreover, competing public policies spring from these issues. On the one hand, negligent hiring serves to compensate victims from the one who is thought to best bear the cost, the employer. But on the other hand, society has an incentive to reintegrate ex-convicts to help rehabilitation, thus reducing recidivism. One major way to reintegrate ex-convicts is through employment. So some states try to balance this conflict by prohibiting employers from discriminating against potential employees who have conviction records.

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8 See, e.g., County of Milwaukee v. Labor and Industry Review Commission, 407 N.W.2d 908, 914-15 (Wis. 1987) (acknowledging the purpose underpinning the Wisconsin Fair Employment Act, supra, which prohibits employers from discriminating in the hiring process based solely on conviction records is to balance the tension between society’s interest in rehabilitating ex-convicts and protecting its citizens).


10 See, e.g., N.Y. Correct. Law § 752 (McKinney 2006).
federal approach, by contrast, is to prohibit discrimination against protected classes under Title VII to the Civil Rights Act of 1964 through a disparate impact claim. But an employee can succeed under a disparate-impact suit only if an employer’s discrimination negatively affects a protected class.

This article will argue that the proper way to balance the competing public policies of protecting victims from workplace harm and reintegrating ex-convicts is for states to make clear for employers when they will be liable for negligent hiring and when they can hire ex-convicts and avoid liability. States can accomplish this in at least two ways. First, states should adopt uniform and clear requirements for negligent hiring while retaining employers’ discretion to refuse ex-convicts employment based solely on their status as ex-convicts. Or second, states should fashion legislation with similar requirements. For instance, courts should hold employers liable for negligent hiring only when they are on actual notice that they should have performed a background check and fail to do one, or when they perform a background check and the criminal record is one that directly relates to the specific duties of employment.

This approach reflects some of the requirements in the New York Correction Law that prohibits discrimination against potential employees based solely on their status as ex-convicts, except this approach allows employers to discriminate against potential employees based solely on their status as ex-convicts. Because ex-convicts are a distinct class from other protected classes under Title VII, employers should retain their discretion to discriminate against ex-convicts based on that status. But if states provide employers with concrete requirements they can follow to avoid a negligent-hiring suit, they may hire more ex-convicts.

Part II will flesh out the standards for negligent hiring and some of its thorny elements. Part III will set out the competing public policies for protecting victims of employment-related crimes and for reintegrating ex-convicts. Part IV will address the federal and state approaches to balancing these competing public policies. Part V will

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12 See N.Y. Correct. Law § 752 (McKinney 2006).
draw distinctions between ex-convicts and the traditionally protected classes. Finally, Part VI will propose a state approach that will inform employers when they may hire ex-convicts and avoid liability and under what circumstances hiring ex-convicts will lead to liability.

II. NEGLIGENT HIRING

A claim for negligent hiring requires a similar showing as a claim for ordinary negligence.\textsuperscript{13} This is the majority test for negligent hiring: “Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstances of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.”\textsuperscript{14}

These, generally, are the six elements of a negligent-hiring claim:

1) the tort-feasor was the employee of the defendant;
2) the employee was unfit for employment;
3) the employer knew or should have known that the employee was unfit;
4) the plaintiff was injured by the employee’s tortious act;
5) the employer owed a duty of care to the plaintiff; and
6) the hiring of the employee was the proximate cause of the plaintiff’s injuries.\textsuperscript{15}

Of these elements, this article will focus on the issues of duty and foreseeability, after first drawing some distinctions between negligent hiring and the related claims of respondeat superior and negligent retention.

A. Distinctions Between Negligent Hiring, Respondeat Superior, and Negligent Retention


\textsuperscript{14} Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983). See also, Southeast Apartments Management, Inc. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999) (quoting Ponticas, 331 N.W.2d at 911).

\textsuperscript{15} Id. (citing Haerle, supra note 7).
The nature of liability under negligent hiring differs from that under respondeat superior. Under respondeat superior, the employer is vicariously liable for torts the employee committed while acting within the scope of employment.\textsuperscript{16} Whereas, under negligent hiring, the employer is directly liable for torts the employee committed, even if the employee was acting outside the scope of employment.\textsuperscript{17} A plaintiff can succeed under negligent hiring if the employer knew or should have known that an employee posed a risk of harm to others. Thus, employers can be liable for employees’ intentional torts.\textsuperscript{18}

Likewise, the nature of liability under negligent hiring differs from that under negligent retention. Negligent retention is analogous to negligent hiring, but negligent retention differs in the time in which the employer was negligent. Negligent hiring focuses on the employer’s negligence in the hiring process, usually centering on whether the employer performed an adequate background check.\textsuperscript{19} Conversely, negligent retention focuses on the employer’s negligence after the hiring process, during employment.\textsuperscript{20} As under negligent hiring, though, negligent retention differs from respondeat superior because employers can be liable for negligence even though the employee was acting outside the scope of employment.\textsuperscript{21}


\textsuperscript{18}Id.

\textsuperscript{19}Se. Apartments Mgmt., Inc. v. Jackman, 513 S.E.2d 395, 397 (Va. 1999).

\textsuperscript{20}Id. at 397 (Negligent retention “is based on the principle that an employer owning leased premises is subject to liability for harm resulting from the employer’s negligence in retaining a dangerous employee who the employer knew or should have known was dangerous and likely to harm tenants.” Id.)

\textsuperscript{21}Pittard, 688 P.2d at 339 (citing La Lone v. Smith, 234 P.2d 893 (1951); 34 A.L.R.2d 372 § 9 (1954)).
B. Duty and Foreseeability

The interrelated elements of duty to third parties and foreseeability of risk are the elements on which many negligent-hiring cases turn. “[T]he duty owed is properly to be determined by whether the risk of harm from the dangerous employee to a person . . . was reasonably foreseeable as a result of the employment.”22 Thus, the employer’s duty to potential victims of employment-related harm includes the duty to hire competent people and thus a duty to perform a background check. Accordingly, the employer’s duty to perform a background check depends on whether potential employees pose a risk to others. Generally, this risk of harm must be foreseeable before courts will saddle employers with a duty to perform a background check.23

1. Duty to Hire Competent Employees

First, the employer must owe a duty of care to the plaintiff before the plaintiff can succeed in a negligent-hiring suit.24 Second, the court must determine the scope of that duty.25 Generally, an employer’s duty to a plaintiff results from a special relationship with the plaintiff arising from the employer’s business.26 “[A]n employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.”27

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24 Battista v. Cannon, 934 F. Supp. 400 (M.D. Fla. 1996); Ponticas v. K.M.S. Investments, 331 N.W.2d 907 (Minn. 1983) (holding that “an employer has the duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public”).
26 LARSON, supra note 4, at 10-23.
27 Ponticas, 331 N.W.2d at 907.
Most jurisdictions insist that employers owe this duty to any member of the public in contact with the “employment situation.” So this duty arises “where employers invite the general public onto the business premises, or require employees to visit residences or employment establishments.”

As a defense to a negligent-hiring claim, employers often successfully assert lack of this duty. This defense is successful because it presents “a two-tiered layer of defense.” First, the employer can assert that it owed no duty to the particular plaintiff. Court’s determine this by analyzing the following factors: “(1) the degree of relationship between the plaintiff and the employer; (2) whether the plaintiff was brought into the path of the tortfeasor for some purpose of the employer; and (3) the position which the state’s courts have taken in similar cases.”

Second, if the employer is found to owe a duty of care to the particular plaintiff, the employer can argue that it’s not required to perform a background check on potential employees.

This duty is intertwined with foreseeability of harm. In *Janssen v. American Hawaii Cruises, Inc.*, for example, the employer asserted a successful defense that it did not owe a duty to the particular plaintiff, an employee on a ship. The court held that even though the employee had a conviction background “involving a homosexual attack,” a sexual attack by a chef on a ship was not reasonably foreseeable. The court noted that, “[w]ithout a reasonable and proper limitation of the scope of duty of care, [the employer] would

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28 Haerle, *supra* note 7, at 1308.
29 *Id.* (citing Priest v. F.W. Woolworth Five & Ten Cent Store, 62 S.W.2d 926, 927 (Mo. Ct. App. 1933); *Coath*, 419 A.2d at 1250; Stone v. Hurst Lumber Co., 386 P.2d 910 (Utah 1963)); *See also Ponticas*, 331 N.W.2d at 907 (a landlord-tenant relationship triggers this duty).
31 *Id.*
32 *Id.*
33 *Id.*
34 *Id.*
35 731 P.2d 163 (Haw. 1987).
36 *Id.* at 165.
be confronted with an unmanageable, unbearable and totally unpredictable liability.”

2. Actual Notice and Constructive Notice

Jurisdictions differ on whether employers must have actual or constructive knowledge of an employee’s unfitness for employment. Victims of employment-related harms can sue under negligent hiring in some jurisdictions even without alleging the employer had actual knowledge of the employee’s dangerous propensities. “This places a much more powerful weapon in the hands of the plaintiff because the tort of negligent hiring can be used to impose liability on an employer for the acts of his employee even if he had no reason to suspect that the employee was dangerous.”

Most jurisdictions saddle the employer with a duty to perform a reasonable investigation on applicants. This duty depends on the “circumstances of employment.” For instance, some jurisdictions require hospitals and common carriers to conduct exhaustive background investigations during pre-employment screening. Unless the employer is put on notice, though, most jurisdictions do not require a criminal-record search.

3. Criminal Background Checks

Employers must balance a broad range of concerns that favor and discourage background checks. The lack of consensus among jurisdictions further complicates this. To insulate themselves from negligent-hiring suits, a background check seems like a reasonable safety harbor for employers who are unsure about their duty. But

37 Id. at 166 (citing Kelley v. Kokua Sales and Supply, Ltd., 532 P.2d 673, 676 (Haw. 1975)).
38 Haerle, supra note 7, at 1310.
39 LARSON, supra note 4, at 10-6.
40 Id.
41 Haerle, supra note 7, at 1310.
42 Id.
43 Id.
44 Id.
background checks alone do not always shield an employer from liability. Cases such as *Blair v. Defender Servs., Inc.* leave employers unsure how far they should probe into a potential employee’s background. Employers must balance this duty against the efficiency of digging beyond a criminal-background check. Employers do not have unlimited resources to ensure they are employing only those who pose no risk to the public or to their employees.

*Blair* illustrates the unpredictability involved in interpreting states’ laws on the scope of an employer’s duty. Interpreting Virginia state law, the United States Court of Appeals for the Fourth Circuit held that the janitor’s attack on the plaintiff should have been foreseeable by a reasonable investigation (including a criminal-background check), which would have potentially revealed a protective order against the employee in a neighboring county.

The employer was under contract with Virginia Tech for which it provided “janitorial staffing services” to perform a criminal-background check on all of its “personnel assigned to the Virginia Tech campus,” but the employer failed to perform one on this particular employee. The court conceded that a criminal-background check might not have revealed the protective order from a neighboring county. It held there was a genuine issue of material fact that the employer should have known of the employee’s violent conduct because of expert testimony that a criminal-background check would have revealed the protective order. Thus, the court held that there was a genuine issue of material fact that the employer was negligent in hiring because it should have discovered the employee’s

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45 *See* Blair v. Defender Servs. Inc., 386 F.3d 623 (4th Cir. 2004).
46 *Id.*
47 *See id.* (Widener, J., dissenting).
48 386 F.3d 623.
49 *Id.* at 629.
50 *Id.*
51 *Id.*
“violent propensities” before he was hired and posed a risk to Virginia Tech students.\textsuperscript{52}

The dissent in \textit{Blair} pointed out that as long as an employer “has asked about criminal history and been told that none exists,” and “has no reason to suspect a criminal record,” Virginia law does not require employers to perform background checks “‘in the exercise of reasonable care.’”\textsuperscript{53} Indeed, an employer would have to dig beyond an ordinary criminal-background check to discover a temporary restraining order in a neighboring county; and Virginia law does not require that.\textsuperscript{54} What is more, a contract requiring the employer to perform a criminal-background check cannot “give rise to a tort duty” the employer owes the plaintiff.\textsuperscript{55}

Moreover, the dissent pointed out that a showing that an employer failed to investigate an employee’s background is not dispositive in establishing liability.\textsuperscript{56} “Rather, the plaintiff must show that an employee’s propensity to cause injury to others was either known or should have been discovered by reasonable investigation.”\textsuperscript{57} A criminal-background check, the dissent argued, would not have revealed the emergency protective order.\textsuperscript{58} The employer would have to perform an additional investigation to discover it.\textsuperscript{59} “This additional inquiry, when a criminal background check shows no convictions, would require an investigation that goes beyond ‘the exercise of reasonable care.’”\textsuperscript{60} The dissent noted that this would not

\begin{itemize}
\item \textsuperscript{52} \textit{Id.} at 630. The court further held that a genuine issue of material fact exists that the employer was negligent in retaining the employee. \textit{Id.}
\item \textsuperscript{53} \textit{Id.} at 631 (Widener, J., dissenting) (quoting \textit{Southeast Apartments}, 513 S.E.2d at 397).
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.} at 631 (citing Richmond Metro. Auth. v. McDevitt St. Bovis, Inc., 507 S.E.2d 344, 347 (Va. 1998)).
\item \textsuperscript{56} \textit{Id.} (quoting Majorana v. Crown Cent. Petroleum Corp., 539 S.E.2d 426, 431 (Va. 2000)).
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.} at 631–32.
\item \textsuperscript{59} \textit{Id.}
\item \textsuperscript{60} \textit{Id.} at 632 (quoting \textit{Se. Apartments}, 513 S.E.2d at 397).
\end{itemize}
only require an employer to dig deeper, but “would impose an undue burden on an employer’s hiring practice.”

Conversely, other courts do not require a criminal-background check unless the employer is on notice of the need for one. In *Stevens v. Lankard*, the employee was convicted of sodomy in the second degree for “performing an act of sodomy” on a customer in a department store dressing room. The employee’s background included a conviction of sodomy in another state, and he disclosed in his interview that “he had some trouble with the law,” yet the employer conducted no criminal-background check. The court found that the previous sodomy conviction would not have surfaced in a “routine” background check. The court reasoned that “[t]o require any more exhaustive search into an employee’s background would place an unfair burden on the business community.”

Courts should hold employers liable for negligent hiring only when they are on actual notice the employee poses a risk of harm to other employees or customers. “To hold the [employer] liable . . . without some knowledge or notice of some kind that the employee was a dangerous individual would require an exploration into the field of intangibles and the adoption of some method not yet devised of determining the unknown and unusual desires of the employee.” If an employee has a criminal record and then commits a similar violation after obtaining employment, courts can usually hold that the harm was foreseeable. Further, holding employers liable when they’re not on actual notice of the employee’s dangerous tendencies makes the employer an insurer for its customers and employees.

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61 Id. at 632.
63 Id.
64 Id.
65 *Stevens*, 31 A.2d at 603.
66 Id.
67 Riddle v. Aero-Mayflower, 73 So.2d 71, 71 (Fla. 1954).
69 See e.g., *Janssen*, 731 P.2d at 167 (“To hold [the employer] liable under these facts would make it an insurer of the safety of anyone who may have become acquainted with [the employee] while he worked on
III. COMPETING PUBLIC POLICIES

A. Public Policies Supporting Negligent Hiring

The public policy supporting negligent hiring is to compensate victims harmed by employees. 70 Negligent hiring exists to compensate victims like the nine-year-old girl in Haddock v. City of New York. 71 A 55-year-old man, who worked for the City, had a criminal record including convictions for “hoboing, fighting, conspiracy to effect a prison break, assault, and breaking and entering. . . .” 72 He was also convicted of “attempted rape, robbery in the second degree and grand larceny in the first degree.” 73 Shortly after “his release on parole [he] was rearrested on charges of rape, assault and use of a dangerous instrument.” 74 Against this backdrop, during the time the employee was working at a playground, he “repeatedly raped, assaulted and sexually abused the child while threatening to kill her.” 75

To avoid tragedies like these and other risks, customers rely on employers to use employees fit for the particular duties for which they are employed. 76 To cite a separate example, customers who trust their money to banks and

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70 See, e.g., Kendall v. Gore Properties Inc., 236 F.2d 673 (D.C. Cir. 1956); Haerle, supra note 7.
72 Id.
73 Id.
74 Id.
75 Id. at 988–90. Incidentally, Haddock was a negligent-retention case because the City was required to hire the employe under the Work Relief Employment Program that resulted in ex-convicts working “in public and private nonprofit agencies, so that they might work off their public assistance benefits and also receive training for ultimate self-sufficiency. . . .” Id. at 989. But the case also illustrates the policy behind compensating victims in a negligent-hiring suit.
other places that require a particular fiduciary duty expect employers to protect them from employees who have a history of credit fraud, identity theft, larceny or embezzlement.

Another policy underlying negligent hiring is that employers have deep pockets and can thus spread the loss to their customers. But a counter argument to this policy is that employers become insurers for victims.

B. Public Policies Supporting Employing Ex-Convicts

Public policies supporting employing ex-convicts center on rehabilitation. Employment is one key way to accomplish this policy. Employment may help ex-convicts support themselves, their families, or both, and possibly avoid recidivism. But if employers stymie ex-convicts’ work opportunities, they may have time to commit more crimes, may struggle to support their families, and may commit further harm. Along with reducing recidivism, employment is often a condition of parole.

Still, others argue that society should bear this responsibility, not just employers. “The burden of recidivism and victimization should not be inflicted imprudently on the employer who aids the assimilation process, but rather requires a more delicate balance of society’s interests and responsibilities.”

Naturally, a tension crops up from these competing public policies: if employers hire ex-convicts to help rehabilitation, employers can be liable for negligent hiring when those employees repeat crimes the employer ostensibly should have foreseen. Still, employers have a stake, along with the rest of society, in reintegrating

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77 Haerle, supra note 7, at 1304–05.
79 See, e.g., Leavitt, supra note 6.
80 Haerle, supra note 7, at 1323–24.
82 See Haerle, supra note 7.
83 Id. at 1326.
ex-convicts, protecting themselves from repeat offenders, and reducing recidivism. But if an employer must bear the cost when the employee becomes a repeat offender, the employer will hesitate to employ ex-convicts, for the employer effectively becomes the insurer of victims of employment-related crimes.  

IV. Federal and Other State Approaches

A. Federal Approach

The federal approach provides qualifying employees relief under Title VII of the Civil Rights Act of 1964. Under Title VII, an applicant denied employment could claim discrimination under a disparate-impact theory. Disparate impact applies “where a claim is made that some facially neutral employment practice has a significantly disproportionate impact on a group protected by Title VII.” Thus, besides the difficulty of showing that an employer discriminated against a protected class (e.g., race, sex, etc.) because of an employer’s failure to hire an ex-convict, disparate impact provides little remedy for, say, a white male in his twenties, for he falls outside any protected class.

In contrast to disparate impact, disparate treatment “applies where a claim is made that an employer is intentionally discriminating against” people protected under Title VII. Because a criminal background is excluded in the protected classes under Title VII, however, disparate treatment provides no remedy for a potential employee’s claim of discrimination based on an arrest or conviction record.

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84 See Pittard, 688 P.2d 333.
85 Bd. of Trs. of S. Ill. Univ. v. Knight, 516 N.E.2d 991, 995 (Ill. App. Ct. 1987) (citing Domingo v. New England Fish Co. 727 F.2d 1429, 1435, modified on other grounds, 742 F.2d 520 (9th Cir. 1984)). See infra Part V.A. The traditionally protected classes include those discriminated against based on race, color, religion, sex, or national origin.  
86 Knight, 516 N.E.2d at 995 (citing Domingo v. New England Fish Company 727 F.2d 1429, 1435, modified on other grounds, 742 F.2d 520 (9th Cir. 1984)).
Typically, courts are more willing to protect potential employees with arrest records than ones with conviction records, because conviction records carry a higher likelihood of guilt. *Gregory v. Litton Systems, Inc.* is the first court to make discrimination based on arrest records a violation of Title VII. In *Green v. Missouri Pacific Railroad Co.*, the court banned across-the-board discrimination against ex-convicts as disparate impact. “Although the employment practice in question is facially neutral, an employment test or practice which operates to exclude a disproportionate percentage of blacks violates Title VII unless the employer can establish that the practice is justified as a business necessity.” The court stated that refusing to hire an ex-convict must accomplish some business goal that employers cannot accomplish through another employment practice that does not negatively affect minorities. It then reasoned that it could not “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.”

### B. State Approach Requiring Employers to Hire Ex-Convicts

Most states follow some variation on the general law set forth in Part II. But several states have anti-discrimination laws, halting employers from refusing to hire employees solely based on their status as ex-convicts. New York and Wisconsin will serve as examples of this approach.

#### 1. New York

New York offers the most comprehensive and clear statute prohibiting employers from discriminating against ex-convicts. Still,
though, employers remain liable for negligent hiring. “Many claims for negligent hiring or retention involve an individual with a criminal record, whom the plaintiff alleges was not properly screened for the job. This is a likely source of consternation to employers because ex-convicts in New York have certain protections in the workplace.”

These protections are set forth in New York’s Correction Law § 752 (1987):

No application of any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses, unless: (1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought; or (2) the issuance of the license or the granting of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

The “direct relationship” exception is defined in § 750(3) as meaning “that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.” If employers choose not to hire ex-convicts who ostensibly fall within one of the exceptions, the employer must justify this decision to the applicant.

New York’s Correction Law further provides the following eight factors for employers to consider when the potential employee has a criminal background:

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93 Larson, supra note 4, at 11-373.
94 N.Y. Correct. Law § 752 (McKinney 1987).
95 N.Y. Correct. Law § 750 (McKinney 1987).
96 N.Y. Correct. Law § 754 (McKinney 1987).
(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities necessarily related to the license or employment sought. (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities. (d) The time which has elapsed since the occurrence of the criminal offense or offenses. (e) The age of the person at the time of the occurrence of the criminal offense or offenses. (f) The seriousness of the offense or offenses. (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct. (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.97

The “direct relationship” exception and these eight factors were addressed in Ford v. Gildin.98 In 1955, the employee was found guilty of manslaughter. In 1964, the defendants, owners and managers of a residential building, hired him as a porter. During this time, he rented a basement apartment from the defendants. When the plaintiff’s mother moved into the building in 1967, she became friends with the employee. The plaintiff was born in 1974, and the employee became her godfather. From 1982 to 1987, the employee sexually abused the plaintiff. The plaintiff’s mother sued the defendant for negligent hiring. The court held that the employee’s manslaughter conviction 27 years before the sexual abuse began was not directly related to his position as a porter. The court concluded that to hold otherwise would potentially preclude everyone with a violent conviction record from employment because any crime the employee committed that “was even minimally connected to the place of his employment” would subject the employer to liability.99

97 N.Y. CORRECT. LAW § 753 (McKinney 1987).
99 Id. at 142.
Another New York court elaborated on the terms “direct relationship” and “unreasonable risk” in *Soto-Lopez v. New York City Civil Service Commission*.\(^{100}\) There, the employee’s conviction record included manslaughter. He applied for a position as a housing caretaker, which includes the following duties: “sweeping and mopping public building spaces; spreading sand and salt; washing windows; changing light bulbs; gardening; and garbage collecting in public housing projects.”\(^{101}\) The court held that because “the housing caretaker position, unlike a correction officer position, for example, would not . . . involve plaintiff in violent confrontations and obviously [would] not require plaintiff to carry arms, his fitness to perform these duties [was] not implicated.”\(^ {102}\)

In determining whether an unreasonable risk existed, the court reasoned “the defendants would be exceeding their discretion in concluding that [an] unreasonable risk existed.”\(^ {103}\) The court held that because the plaintiff had completed probation and his manslaughter conviction was about nine years old, the city’s refusing to hire him would have been unlawful.\(^ {104}\)

New York employers, then, are in a difficult situation because they are still vulnerable to negligent-hiring suits. “New York employers are placed in a quandary: They can refuse to hire someone with a criminal record and open themselves to a charge of unfair discrimination, or they can hire the ex-con and keep their fingers crossed that it will not ultimately lead to a suit for negligent hiring or retention.”\(^ {105}\) Although employers can take other measures to prevent workplace harm—e.g., they can provide proper training, orientation, and supervision to employees—evidence of which may also help their defense in a negligent-hiring suit,\(^ {106}\) if an ex-convict harms a third

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\(^{100}\) 713 F.Supp. 677 (S.D.N.Y. 1989).

\(^{101}\) Id.

\(^{102}\) Id. at 679.

\(^{103}\) Id.

\(^{104}\) Id. Ultimately, however, the plaintiff in *Soto-Lopez* lied on his application about his criminal background, and the employer justifiably refused to hire him.

\(^{105}\) LARSON, *supra* note 4, at 11-373.

party outside employers’ control anyway, they will likely face liability.

In addition to taking these precautions, if the legislature or the courts make employers aware of steps they can take to avoid a negligent-hiring suit, they will be more likely to hire ex-convicts. Because negligent-hiring suits involving ex-convicts are litigated at all shows that employers hire them now. Employers will likely hire more ex-convicts, though admittedly not as many as if employers are required to hire ex-convicts, if they know when they can hire them without facing liability. This will allow employers to retain discretion in whom they hire, yet increase the likelihood employers will hire ex-convicts.

2. Wisconsin

Wisconsin has enacted a statute similar to New York’s prohibition on discriminating against ex-convicts. Wisconsin’s Fair Employment Act (“WFEA”) prohibits discrimination based solely on conviction records, but provides for an exception if the “circumstances” surrounding the conviction “substantially relate” to the specific duties of the employment. It reads as follows: “[N]o employer, labor organization, employment agency, licensing agency or other person may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record . . . .”

Most of the thorny issues employers and courts in Wisconsin must grapple with spring from the exception that permits discrimination for an offense “the circumstances of which substantially relate to the circumstances of the particular job or licensed activity.” In County

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108 Id.
109 Id.
of Milwaukee v. Labor and Industry Review Commission,\textsuperscript{111} the employee worked as “a crisis intervention specialist” through a program at the Medical College of Wisconsin and the Milwaukee County Mental Health Complex.\textsuperscript{112} As a “crisis intervention specialist,” his duties included counseling people over the telephone who were suffering from “acute mental health related problems.”\textsuperscript{113} When he was hired, he “faced criminal charges for a felony homicide (reckless conduct) related to a nursing home patient who wandered from the facility and died from exposure” and multiple misdemeanor charges relating to neglect stemming from his former employment as an administrator of a nursing home. The trial court found the employee guilty of those charges.\textsuperscript{114} Two days later, the Milwaukee County Health Complex fired him.\textsuperscript{115} He sued, alleging the County of Milwaukee discriminated against him because of his conviction record.\textsuperscript{116}

The court reasoned that it was “the circumstances which foster criminal activity that are important, e.g., the opportunity for criminal behavior, the reaction to responsibility, or the character traits of the person.”\textsuperscript{117} The court noted that “[t]he responsibilities present in both jobs extended to a group of people similarly situated so that neglect or dereliction of duties in either job would likely have similar consequences.”\textsuperscript{118} Thus, even though the duties of an administrator were different from those of a “crisis intervention specialist” providing direct care, the court held that the employee had demonstrated “propensities and personal qualities . . . manifestly inconsistent with the expectations of responsibility associated with the job.”\textsuperscript{119} So the circumstances surrounding him as an administrator of a nursing home substantially related

\begin{itemize}
\item \textsuperscript{111} 407 N.W.2d 908 (Wis. 1987).
\item \textsuperscript{112} Id. at 910.
\item \textsuperscript{113} Id. at 829.
\item \textsuperscript{114} Id. at 910.
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id. at 810–11.
\item \textsuperscript{117} Id. at 824.
\item \textsuperscript{118} Id. at 828.
\item \textsuperscript{119} Id.
\end{itemize}
to the specific duties of a “crisis intervention specialist,” and the county of Milwaukee was permitted to discriminate based solely on his conviction record.\textsuperscript{120}

Despite New York, Wisconsin, and a few other states’ adopting statutes prohibiting discrimination against ex-convicts based solely on their conviction records, the majority of states have not yet adopted similar statutes. In fact, at least one state has thwarted this approach. In \textit{Leonard v. Corrections Cabinet},\textsuperscript{121} the court stated, “we know of no established protected class involving persons with felony records, and we decline to create one.”\textsuperscript{122}

\section{Protected Classes}

\subsection*{A. Distinction Between Criminal Backgrounds and Inherent Traits}

A fundamental difference separates traditionally protected classes from those with a criminal background.\textsuperscript{123} The Civil Rights Act of 1964 protects the traditional classes from discrimination based on “race, color, religion, sex, or national origin.”\textsuperscript{124} The consistent traits in these classes “are largely unrelated to an individual’s ability to successfully perform a job.”\textsuperscript{125} The policy underpinning Title VII is to protect those classes historically discriminated against.\textsuperscript{126} Race and sex are inherent traits that have no affect on one’s ability to perform a job or on one’s risk of harm to employers, employees, and the public,

\begin{footnotes}
\item[120] \textit{Id.}
\item[121] 828 S.W.2d 668 (Ky. Ct. App. 1992).
\item[122] \textit{Id.} at 672.
\item[123] Hruz, \textit{supra} note 110, at 822.
\item[125] Hruz, \textit{supra} note 110, at 781.
\item[126] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (“The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.”)
\end{footnotes}
whereas a criminal conviction record stems from a volitional act.\textsuperscript{127} “[T]here should be a recognized difference under the law between benign mutable traits, such as adherence to a creed, and rationally objectionable mutable traits, such as criminal behavior.”\textsuperscript{128} Although advocates of prohibiting discrimination against ex-convicts aim to encourage rehabilitation, the status of being an ex-convict is different from an immutable trait, like race or sex. Because of these distinctions, states should not extend the same protection from discrimination given to the traditionally protected classes to ex-convicts.

\textbf{B. Title VII Protection for Classes with Inherent Traits}

Federal law has not extended protection from discrimination to ex-convicts\textsuperscript{129} because the rationale underpinning the Civil Rights Act is that ex-convicts should be protected from discrimination only to the extent that the discrimination disparately affects a suspect class.\textsuperscript{130} The purpose, then, of Title VII is to protect those characteristics and as a result address criminal backgrounds only when an employer’s policy of not hiring ex-convicts disparately impacts a protected class or is pretextual and aimed at concealing discrimination.\textsuperscript{131}

\textbf{VI. PROPOSED NEGLIGENT-HIRING STANDARD}

\textbf{A. Adjustments to Negligent-Hiring Law}

To balance the competing public policies set forth in this article, both ex-convicts and society must compromise. Accordingly, if states made it clear for employers what measures they could take to avoid liability for negligent hiring, they would likely hire more ex-convicts.

\textsuperscript{127} Hruz, \textit{supra} note 110, at 820–21.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} See 42 U.S.C.A. § 2000e-2 (West 2006); Hruz, \textit{supra} note 110.
\textsuperscript{130} Hruz, \textit{supra} note 110, at 821.
\textsuperscript{131} \textit{Id.} at 821–22.
because employers would know that if they hired ex-convicts under particular circumstances, those employers would be protected from liability. Victims of employment-related harm could still seek relief when employers hired ex-convicts if the employer failed to take the proper steps. In addition, employers could still refuse to hire ex-convicts and avoid all liability.

States could accomplish this in at least two ways. First, states could uniformly make negligent-hiring standards clear for employers so they know when they will face liability for hiring an ex-convict. Second, legislatures could fashion laws similar to New York’s Correction Law, yet retain employers’ discretion to refuse employment to an ex-convict based solely on his or her status as an ex-convict, so employers will not face liability for following the law. States will exacerbate the tension if they develop laws that myopically benefit ex-convicts to the detriment of concerned employers and customers, or favor victims to the detriment of ex-convicts who need employment. For example, New York’s Correction Law benefits ex-convicts, yet leaves employers mired in a dilemma where they must risk either a discrimination claim if they choose not to hire an ex-convict or a negligent-hiring claim if they can’t satisfy one of the Correction Law’s exceptions. States should uniformly stake out a middle course where all sides bear the burdens of both reintegrating ex-convicts and protecting victims from employment-related harm.

To cite but one example of this, courts should hold employers liable for negligent hiring only when they are on actual notice of an employee’s aptitude for harm. Thus, employers would not have a duty to perform a background check unless they were on actual notice. To require an employer to search a potential employee’s background, and possibly more than a criminal background check, like in Blair v. Defender Servs., would be unduly burdensome for employers. Further, courts should hold employers liable for negligent hiring when the employee’s criminal record directly relates to the harm. This would be similar to New York’s “direct relationship” exception, the only difference being that employers would retain their discretion to refuse to hire ex-convicts.

**B. Employers’ Hiring Discretion**
Employers should retain this discretion to discriminate in hiring ex-convicts. “Hiring decisions are by definition discriminatory.” An employer should be able to consider an applicant’s background and what affects that will have on the business. “If an employer may look back at one applicant’s involvement in, for example, an extracurricular organization while attending college as a measure of that person’s merit, it is entirely inconsistent to deny that same employer consideration of the fact that another applicant was, for instance, serving prison time for an armed robbery offense at this same point in his life.” The burden should be on ex-convicts to show they’re qualified despite their background, just like everyone else who must overcome various hurdles in the hiring process.

When a statute like New York’s requires employers to hire ex-convicts, employers remain vulnerable to negligent-hiring suit. Thus, these states should either adjust negligent-hiring standards in light of raising ex-convicts to the level of a traditionally protected class, or refuse to raise ex-convicts’ status to that of a traditionally protected class.

VII. CONCLUSION

“The lack of uniformity among state and federal courts makes employers’ jobs particularly challenging, and has led many to call for a serious overhaul of negligent hiring litigation, and the development of further criminal record discrimination regulations.” States should therefore enact uniform requirements so employers know when they can hire an ex-convict and avoid liability. This approach would benefit employers, ex-convicts, victims, and society. States should hold employers liable for negligent hiring only if a potential employee’s criminal background directly relates to the specific duties of the employment. Employers would not be required to perform

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132 Id. at 833.
133 Id.
134 Id. at 837.
135 Id.
136 Leavitt, supra note 6, at 1306 (citing Stephen J. Beaver, Comment, Beyond the Exclusivity Rule: Employer’s Liability for Workplace Violence, 81 Marq. L. Rev. 103, 114–16 (1997)).
criminal-background checks unless they were on actual notice of an employee’s propensity for harm. And employers should retain their discretion to refuse to hire ex-convicts based solely on their status as ex-convicts because they lack inherent traits commensurate with the traditionally protected classes. This proposal will protect people from employment-related harm and allow employers to avoid litigation, yet employ ex-convicts.