Use of Criminal Records in Hiring Decisions: What Employers Should Do

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American employers' use of criminal records in the hiring process can cause discrimination against minority applicants due to the disproportionate rate of their prison incarceration and ex-offender status in the United States. The law increasingly requires employer assessment of individualized factors and deferred inquiry into criminal records in the hiring process in order to avoid discrimination and provide otherwise qualified ex-offenders with the chance at the best preventative to recidivism: a job. Employers should adopt EEOC best practices whenever criminal records are used in the hiring process and support better employment opportunities for ex-offenders as both a legal and ethical obligation.

Keywords: discrimination, hiring, ex-offender, criminal records, best practices, recidivism

INTRODUCTION

Employers' use of criminal records to screen in hiring may be justified and even necessary. However, employers' unconditional refusals to hire ex-offenders have caused adverse socio-economic impacts that unduly affect individuals and their families, communities, and the entire country. This is because the U.S. has the highest number of inmates of any country and the highest incarceration rate in the industrial world. As of 2016, the US Bureau of Justice estimates that the prisons and jails in the U.S. incarcerate a population in excess of 2.1 million individuals or approximately 655 per 100,000 Americans. (Bureau of Justice Statistics, 2016). This enormous incarcerated population is also disproportionally minority, male, and poor. Fifty-six percent are black or Hispanic. Over I in 3 are black. (Saba, 2019). After serving time, over 600,000 ex-offenders are released back into society each year, resulting in a growing population, now in excess of 70 million Americans, with a criminal record. (NELP, 2019). Two thirds of those released are rearrested within three years. Many of those are reincarcerated. The national recidivism rate for ex-offenders 3 years out of prison has been measured at 43%. (Santitoro, 2015). While studies report that the No. 1 prevention against recidivism is a job, (Saba, 2019) the stigma of a criminal history, especially when discovered early in the hiring process, can foreclose any realistic employment opportunity, as employers fearing additional cost and legal risk from hiring an ex-offender, refuse to hire individuals with criminal records.

Because the population of ex-offenders is disproportionally minority, a decision or policy not to hire because of a criminal record can result in adverse impact race discrimination, which Title VII of the Civil Rights Act of 1964 forbids, and the Equal Employment Commission will challenge. To caution against impact discrimination when hiring decisions are made, a guidance issued by the Equal Opportunity Commission (EEOC, 2012), directs employers to defer inquiry into criminal histories during the hiring process, and consider individualized factors to reduce employers' refusal to hire otherwise qualified applicants, simply because they have a criminal history. Likewise, most states and over 150 localities

have moved to adopt measures designed to give ex-offenders a fair chance of being hired to avoid discrimination and recidivism. (Avery, 2019).

This article will review the Federal, State and local laws that comprise the legal landscape of hiring ex-offenders, and how employers can make sound decisions using best practices that benefit the firm, employees, and society. Part II will consider employers' concerns, and the rise of background checks. Part III will examine existing Federal, State and local law designed to avoid discrimination and focusing the hiring decision on qualifications. Finally, Part IV will discuss current hiring best practices and ethical considerations for the employer.

EMPLOYER CONCERNS THAT DRIVE BACKGROUND CHECKS

A survey conducted in 2009 showed 92% of employers use criminal background checks for at least some of their hires. (SHRM, 2010). Increased sources and ease of access parallel the extensive use by employers. (Mullings, 2016) (10) The rapid growth of the background checking industry, problems with inaccuracy of records, and associated abuses, led to the passage of Fair Credit Reporting Act. (FCRA, 1970). The FCRA requires applicants to consent to a background check and affords them the right to review the report and correct incorrect information. However, the FCRA allows employers to condition hiring on the applicant's prior consent, making the consent requirement an illusory limitation. Although the FCRA generally excludes arrests and civil judgements 7 years and older, critics find the law really does nothing to discourage or limit employers from using even very old conviction records as a hiring screen. (Alexander, 2017)

Employers must comply with the various federal, state, and local laws that automatically disqualify certain ex-offenders for positions in specific industries, creating a legitimate non-discriminatory reason for doing background checks for those jobs. (EEOC, 2012) Fearing an ex offender could re-offend on the job, drives concerns including theft, fraud, and property loss. Another is workplace violence and civil liability for negligent hiring and retention, although those concerns may be unjustified. Several commentators have noted the absence of evidence or any study showing that employees with criminal records are more likely to exhibit bad behavior, commit a higher proportion of workplace crimes, or are causally linked to increased workplace violence, than employees without criminal records (Weissert, 2016).

LAW GOVERNING USE OF CRIMINAL RECORDS IN HIRING

Federal Civil Rights Act

Title VII of the Civil Rights Act of 1964 forbids employment discrimination based on race, color, religion, sex or national origin. Although an applicant's ex offender status is not itself a forbidden basis for an adverse employment decision, taking that status into account may trigger a civil rights violation.

The U.S. Supreme Court has recognized two approaches to show discrimination under Title VII: "Disparate Treatment" occurs when an employer intentionally uses a forbidden basis to make an adverse hiring decision. This would be shown where, for example, an employer in filling an employment position decides to hire a white male with a criminal record but refuses to hire an otherwise equally qualified black male with the same record for the same job.

"Disparate Impact" is the result of employers' use of an employment criterion, that has little or no direct relationship to the successful performance of a position, yet causes an adverse statistical screening impact against a protected class or classes. Given the disproportional make up of ex-offenders, the hiring requirement of no criminal record could result in a comparative statistical disadvantage in hiring applicants of protected classifications, such as race and national origin. (*Griggs v. Duke Power*, 1971). As an example, an employer's hiring policy or decision to deny all applicants with any criminal record from employment in any of employer's jobs, would likely cause a disproportionate number of denials of black and other minority candidates.

This is why, since 1970's the Federal Courts have held that a conviction history and certainly an arrest history, without more, cannot lawfully present an absolute bar to employment. (*Green v. Missouri Pac. R. Co*. 1975). Such hiring practices have resulted in a number of decisions finding unlawful impact discrimination by employers. (Saba, 2019).

EEOC Guidance

In 2012, the EEOC issued an Enforcement Guidance to better educate employers about the risk of discrimination when using criminal records to screen in employment decisions. The Guidance also features a list of best practices for employers when using criminal records, and to encourage employers to limit their use in employment decisions.

In order to avoid an impact discrimination case when using criminal records as a job criteria or screen in the hiring or retention decision making process, the Guidance directs employers to review their hiring policies that use criminal records to see if they have caused discriminatory impact and, if so, to consider their elimination. Given any use or criminal records is likely to cause some degree of impact, employers are directed to examine whether the conviction would be predictive of poor job performance ("job related"), and whether a decision to exclude the applicant is an imperative to the employer's business ("business necessity"). Proof of these provides the employer an affirmative defense to an impact claim. Employers who intend to assert the defense as policy for an established position are directed to use their historic job performance data, and follow the EEOC's previously issued Uniform Guidelines on Employee Selection Procedures in order to validate the criminal record screen in question, based on the specific position for which is being applied. (EEOC, 1978)

Alternatively, employers can show relatedness and necessity of a criminal records screen on a cases by case basis using a twostep process. First, the employer must consider the applicant's criminal record and the job sought by applying three key factors established in *Green v Missouri Pacific Railroad* (1975) that the EEOC believes best to show relevance of the past criminal conduct to the job and the necessity of exclusion. These are: (1) the nature and gravity of the crime, (2) the time passed since the criminal conduct or release, and (3) the nature of the job sought. So, for example, applying the *Green* Factors, a 10-year-old nonviolent felony drug possession conviction would not likely be sufficiently job related nor would exclusion be a business necessity in consideration for a lawn's keeper or warehouse worker position. Conversely a 3-year-old violent felony conviction as regards a position for a door to door salesperson or healthcare worker that requires or involves close contact with the public or vulnerable persons would be job related for which exclusion would be necessary.

The second step in the process involves an individualized assessment of the applicant if the three Green factors have resulted in a decision not to hire. The applicant is informed of this and given an opportunity to provide additional information that will demonstrate their individualized criminal history isn't job related nor exclusion for it a business necessity.

Such additional information could exist outside the criminal record itself and may constitute a mitigating circumstance that reduce an employer's risk. Examples could include an older conviction age, evidence of rehabilitation including successful post-conviction performance on like jobs without incident, a long and consistent employment history, positive character references, fitness evidence for the job in question, and bonded status if the job requires one. On the other hand, evidence to the opposite of these examples might underscore employers' concerns and justify exclusion.

State and Local "Ban the Box" and "Fair Chance" Laws

One of the many questions traditionally asked on an employment application to screen out applicants has been: "Have you ever been convicted of a crime". The question may have nothing to do with qualifications for the job. Yet checking the box "yes" could well mean the end of further consideration.

While Federal efforts focus on combatting ex offender job discrimination because it impacts a disproportional race and ethnic population and so results in racial and national origin discrimination in hiring, forbidden by Title VII, state and local government have adopted a different strategy with a primary purpose of improving employment opportunities for all ex-offenders. (Lucas, 2019).

Beginning with the advocacy and work of the San Francisco based civil rights group "All of us or None" 35 states and 150 localities have adopted "ban the box" and "fair chance" laws that remove the conviction history question from job applications, and/or defer inquiry until later in the hiring process. Taken together, these measures now govern over 258 million people. (Avery, 2019). However, protection is uneven, as the laws differ significantly in key respects. Most only extend to public employers, with just 13 states and 18 cities extending coverage to private employers as well. There is also variance in what aspects of a criminal record employers can consider, when during the hiring process employers can consider the criminal record, and whether the law adopts a standard for limiting consideration of the record. (Avery, 2019).

Many of these state and local laws go beyond simple bans of the criminal record query on an application, to give ex-offenders a "fair chance" by incorporating EEOC guidance considerations used in the individualized assessment showing mitigation of risk and rehabilitation. One frequent feature is the requirement that query or background checks be deferred in the hiring process until after the individual has had the opportunity to establish qualifications for the job and a qualified offer of employment has been made. This is done on the belief that the deferral will enhance hiring based on qualifications and deter undue effects of a criminal record. Such offer could not be withdrawn unless the conviction record directly related to the duties and responsibilities of the position.

In addition, to supplement the FCRA's rule excluding the reporting of arrests and civil judgments seven years and older, and consistent with the EEOC guidance and the Green decision which direct reduced consideration for older convictions, are state "7-year lookback" laws that exclude seven year and older criminal convictions from background checks and credit reports. Nine states and the District of Columbia have these laws. (Good Egg, 2020)

Finally, a few state fair chance statues have been drawn to go even further to require that employers prove unreasonable risk or inability to perform the job before a criminal record can be used to disqualify an ex-offender. These state measures will be revisited in the discussion below.

Results From Employer Compliance

Do the laws that attempt to cause employers to limit use criminal records in the hiring process really work? Or do they actually cause harm to ex-offenders' employment chances?

While few studies have yet been conducted, EEOC guidance, and in particular the state "ban the box"/ "fair chance" laws, appear to have improved rates of hiring of ex-offenders, and sometimes remarkably. One 2011 study of administrative ban the box and fair chance measures implemented in Durham North Carolina for public employment positions showed a 700 percent increase in e-offender hiring's with 96% of applicants with criminal records ultimately hired. A Minnesota study of similar laws in place there didn't show the increase in ex offender hires but did show a reduction in minority discrimination. And a 2014 study of San Francisco's fair chance law showed most employers had accepted the laws prescriptions and changed their hiring practices to comply. (Alexander, 2017).

Still, critics particularly of ban the box measures have asserted two major contentions against them: (1) that they do not work to increase employment opportunities for ex-offenders, and are an ineffective waste of time and expense for employers because they only delay the negative hiring decision and (2) that they actually do harm to employment opportunities to racial minorities because hiding criminal records early on in the hiring may result in employers' practice of assuming all minority applicants have a criminal record. (Flake, 2019).

However, a 2019 experimental comparative study of the effects of using and not using ban the box in hiring conducted in Chicago and Dallas has found evidence clearly refuting both contentions. The study showed that in Chicago, where ban the box was applied, applicants were 27% more likely to a call back. Further, there was an increase in callbacks across all races, with black applicants having received the largest increase. (Flake, 2019). So, though more research should be conducted, it appears that the laws in place have produced encouraging results.

DISCUSSION

Employers Should Adopt Best Practices in Hiring

Although it has been challenged by one state on technical grounds (Texas v. EEOC, 2019), the EEOC Guidance's "Best Practices" still provides good direction for employers' who use criminal records information when making employment hiring and retention decisions. Employers should:

- Eliminate policies or practices that are already excluding people from employment based on any criminal record. Such policies are generally suspected to cause disparate impact discrimination.
- Train managers, hiring officials, and decisionmakers about Title VII and its prohibition on employment discrimination. Training should include identifying both treatment and more subtle impact forms of discrimination.
- Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct. To avoid undue screening and for consistency with the *Green* Factors:
    - Identify essential job requirements and the actual circumstances under which the jobs are performed.
    - Determine the specific offenses that may demonstrate unfitness for performing such jobs.
        - Identify the criminal offenses based on all available evidence.
    - Determine the duration of exclusions for criminal conduct based on all available evidence.
        - Include an individualized assessment.
    - Record the justification for the policy and procedures.
    - Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII. This specific training should include professional application of materials with scenario-based examples the employer can anticipate encountering in the hiring process.
- When asking questions about criminal records during the hiring process, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

Because employers must comply with any applicable state and local Ban the box/fair chance measure designed to increase employment opportunities for ex-offenders, best practices should include policies and training to do so as well. Employers should also be vigilant in monitoring these laws, given their rapidly expanding adoption and broadening constraints. And by adopting best practices in hiring, employers will reduce exposure to civil rights and employment law actions, get the best qualified candidate for the job, and still be able to screen out dangerous and damaging prospects.

Employers Should Monitor and Support Continuing Improvements in the Law

Beyond observance of the law discussed, employers and counsel should keep up with new measures that have increased ex-offender employment opportunities. An example is the newly enacted "Fair Chance Act of 2019". This federal law, patterned after state and local ban the box and fair chance laws, forbids all federal employers and their private sector government contractors from inquiry into criminal records during the hiring process until a conditional job offer has been made. Expansion of state and local ban the box and fair chance legislation, to other private employers should also be favored by employers.

Support should be voiced for new laws to correct other issues: erroneous criminal records and expungement of records of offenses that pose little or no relationship to job performance or risk to the employer or others. Such "clean slate" measures improve chances for employment for some ex-offenders.

One proposal is the "Record Expungement Designed to Enhance Employment Act" (REDEEM ACT, 2019). If passed, the law would allow for the expungement of Federal nonviolent criminal offenses, many of which are convictions for nonviolent drug offenses. This proposed measure is consistent with state laws trending toward decriminalization and legalization of marijuana and other controlled substances. (NCSL, 2019).

Consideration could be given for a federal statue, consistent with the EEOC guidance, and similar to progressive state statues in New York and Wisconsin, that make it an unfair hiring practice for employers to discriminate against ex-offenders when their hiring excludes them, without a showing of unreasonable risk nor concern for the ability to do the job in question, because of the criminal record. As with current Federal civil rights laws, the new statute could be agency enforced and provide a private cause of action for ex-offenders wrongfully denied employment. A federal law of this nature would simplify compliance for multistate employers and provide uniform ex-offender protection. (Mullings, 2016)

If concerned about the risk of negligent hiring or retention tort exposure, employers should lobby for measures that establish reasonable damage limitations or create outright immunities in cases arising from an ex-offender hiring made while complying with laws protecting ex-offenders. Several states have passed such measures as part of their ban the box and fair chance laws to encourage employers to observe those inquiry limitations. (Wolfe, 2015).

In addition, employers should advocate for measures targeted directly toward comprehensive reformation of the current criminal justice system that reduce the incidence and periods of incarceration and provide early release for certain nonviolent offenses. Support should be given for reforms such as the newly enacted "First Step Act of 2018" to address recidivism and future proposals focused on offender rehabilitation through education and vocational training programs, both during and after incarceration, all of which could lead to improved ex-offender employability.

Finally, employers who use criminal records in the hiring process have another role to play. They should willingly participate in further empirical studies to improve the effectiveness of existing law and those proposed.

Employers Should Also Consider Ethical Implications

Because employers with a job to fill hold the most important key to breaking the vicious circle of ex-offender recidivism, their hiring policies impact many stakeholders besides the employer and the ex-offender who applies, making the legal obligation to provide a fair chance, a moral one as well. (Petersen, 2015). By providing otherwise qualified ex-offenders a fair chance to compete for employment and get a job, rehabilitation can be achieved with socio-economic and emotional benefits accrued to the newly united families and dependents of ex-offenders. The community at large gains from lower unemployment and reduced crime, which studies document as substantial. While the effects on America's economy and social welfare system caused by hiring discrimination against ex-offenders has yet to be officially measured, studies have estimated the resulting ex-offender unemployment rate as high as 40% and the loss to the economy of 65 billion dollars per year, both of which could be avoided. (Saba, 2019). And society also avoids a serious contributor to racial and ethnic discrimination if jobs to ex-offenders are not denied simply because a criminal record exists.

CONCLUSION

Employers' use of criminal records in hiring decisions can result in impact discrimination against minority applicants due to their disproportionate representation in the US prison population. The Federal civil rights laws, the EEOC guidance and the state and local Ban the Box and Fair Chance laws provide the legal landscape for employers to consider criminal records while still giving the ex-offender, who is otherwise qualified, a chance at a job and to avoid recidivism. Employers should adopt best practices and

consider going beyond what's legally required and support new measures to improve ex-offender employability.

REFERENCES

Alexander, M. (2017). Erasing the Mark of Cain: An Empirical Analysis of the Effects of Ban-The-Box Legislation on the Employment Outcomes of People of Color with Criminal Records. *Fordham Urb. L. J.*, *44*, 1153-1215.

Avery, B. (2019, July 1). *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*. Retrieved from https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/

Bureau of Justice Statistics. (n.d.). *Key Statistics: Total Correctional Population.* Retrieved from https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487

Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-2 et. sec. (2020).

Equal Opportunity Employment Commission. (2012). *Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment decisions under Title VII of the Civil Rights Act of 1964*. Retrieved from https://www.eeoc.gov/laws/guidance/arrest_conviction.cfmhttps://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Equal Opportunity Employment Commission. (1978). *Uniform Guidelines on Employee Selection Procedures, 29 CFR Sec. 1607*. Retrieved from https://www.govinfo.gov/content/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1607.xml

Fair Chance Act of 2019. (2020). *H.R. 1076-116th Congress*. Retrieved from https://www.govtrack.us/congress/bills/116hr1076

Fair Credit Reporting Act, 15 U.S.C. Sec. 1681 et. sec., Pub. L. 91-508, 84 Stat. 1114-2. (1970).

First Step Act of 2018, Pub. L. No. 115-391, S. 756. (2018). Retrieved from https://www.congress.gov/bill/115th-congress/senate-bill/756/text

Flake, D.F. (2019). Do Ban-The-Box Laws Really work? *Iowa L. Rev.*, *104*, 1079-1127.

Green v. Missouri Pac. R. Co. *523 F. 2d. 1290* (8th Cir. 1975).

Griggs v. Duke Power *401 U.S. 424*. (1971).

Good Egg, Understanding the 7 Year Lookback Rule in Background Checks. (n.d.). Retrieved from https://www.goodegg.io/blog/understanding-the-7-year-lookback-rule

Lucas, S. (2019). What Employers Must Know About Hiring Employees with a Criminal Record. *The Balance Careers.* Retrieved from https://www.thebalancecareers.com/hiring-convicted-felons-4129127

Mullings, S.J. (2016). Employment of Ex-Offenders: The Time has Come for a True Antidiscrimination Statute. *Syracuse L. Rev.*, *64*, 261-295.

National Conference of State Legislatures. (2019, October 17). *Marijuana Overview*. Retrieved from https://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx

National Employment Law Project. (2019). *Ensuring People with Convictions Have a Fair Chance to Work.* Retrieved from https://www.nelp.org/campaign/ensuring-fair-chance-to-work/

Petersen, I. (2015). Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks. *Tex. L. Rev.*, *94*, 175-203.

REDEEM Act. GovTrack.us. (2020). H.R. 2410-116th Congress. Retrieved from https://www.govtrack.us/congress/bills/116hr/2410

Saba, C.A. (2019). A Roadmap for Comprehensive Criminal Justice Reform to Employ Ex-Offenders: Beyond Title VII and Ban the Box. *Am. Crim. L. Rev.*, *56*, 547-569.

Santitoro, R. (2015). Banning the Box in Missouri: A Statewide Step in the Right Direction. *Rutgers J.L. and Pub Pol'y*, *13*, 215-241.

Schmitt, J., & Warner, K. (2010*)*. Ex-Offenders and the Labor Market. *Ctr. For Econ &Pol'y Res.* Retrieved from https://www.cepr.net/documents/publications/ex-offenders-2010-11.pdf

Soc'y for Human Res. Mgmt. (2010, January 22). *Background Checking: Conducting Criminal Background Checks, slide 3*. Retrieved from https://www.slideshare.net/shrm/background-check-criminal?from=share

Texas v EEOC *933 F. 3d. 433*. (5th Cir. 2019).

U.S. Dept. Justice, Faith Based Community Initiatives. (n.d.). *Prisoners and Prisoner Re-Entry*. Retrieved from https://www.justice.gov/archive/fbci/progmenu_reentry.html

Weissert, E.P. (2016). Get out of Jail Free: Preventing Employment Discrimination Against People with Criminal Records Using Ban the Box Laws. *U. Pa. L. Rev*., *164*, 1529-1554.

Wolfe, R. (2015). The Safest Port in the Storm: A Case for a Ban the Box Law in South Carolina. *Charleston L. Rev*., *9*, 503-543.