



Criminal Background Checks in the American Employment Process

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Abstract

This article examines the important and controversial topic of criminal background checks in employment. The topic of criminal background checks in employment is indeed an important as well as controversial and difficult one in the world of business today, as this hiring practice addresses core values in society. Yet these values can conflict. One societal value is the belief that if a criminal ex-offender has paid his or her “debt to society”; then opportunities, such as employment, should be made available to such a person, just like everyone else. Business owners and managers today, however, are concerned about having an efficient, effective, and ethical workforce. Thus, they are confronted with this dilemma of conflicting values and duties as well as the responsibility of doing the “right thing” in utilising criminal background checks in the hiring process.

This article will first provide certain background information pertinent to the subject of criminal background checks in employment, particularly criminal conviction and incarceration rates for minorities, as well as discuss the prevalence of background checks in employment from an American perspective. The authors also examine the legal and practical implications of background checks; and finally draw conclusions for management from the aforementioned analysis.

Key words: Background checks, criminals, incarceration, employment, Statutory Requirements

1. INTRODUCTION

Criminal background checks in employment, as with many employment law topics, have many levels to examine. Legislation and legislative efforts – commonly called “ban the box” acts (with the “box” referring to the box where a job applicant checks off his or her criminal history)

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should be examined as well as statutes which require criminal background checks in employment. Furthermore, researchers and practitioners should comprehend the “disparate impact” theory of the Civil Rights Act and be cognizant of how this legal doctrine can be used to hold an employer liable for employment discrimination for having a criminal background check as part of the hiring process. Experts should also comprehend and then explain the legal guidelines emanating from the U.S. Equal Employment Opportunity Commission (EEOC) regarding the use of criminal background checks in employment. Particular attention should also be paid to the tort of negligence in the employment context, specifically the tort of negligent hiring, which is another legal concern for employers in the United States. In this article, starting with incarceration and recidivism rates, the authors provide fundamental legal knowledge about employment practices in the United States, so employers can effectively deal with this difficult subject matter in a legal, moral, and practical manner.

A. Incarceration Rates

Over the past two decades, there has been a significant increase in the number of people in the United States who have had contact with the criminal justice system (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012). As a result, there also has been a concomitant major increase in the number of people who have criminal records and who are still in their working years (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012). To illustrate, in 1991, only 1.8% of the adult population had served time in prison (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). In 2001, that percentage increased to 2.7% (1 in 37 adults); and by the end of 2007, 3.2% of all U.S. adults (1 in 31) were constrained under some form of correctional supervision or incarceration (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). The EEOC points out that “arrest and incarceration rates are particularly high for African American and Hispanic men” (EEOC, Enforcement Guidance, 2012, p. 3). In 2001, 1 of every 17 white men (5.9%) will be expected to go to prison at some point in his lifetime (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). However, the rates for black men were 1 in 3 men, or 32.2%; and for Hispanic men the rates were 1 in 6, or 17.2% (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012). Accordingly, the difference in rates for men expected to go to prison in their lifetimes between blacks, Hispanics, and



whites is very dramatic indeed. Furthermore, as recently as 2010, black men were imprisoned at a rate seven times higher than white men and almost three times higher than Hispanic men (Thurm, 2013; EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). And according to the Bureau of Justice Statistics, if incarceration rates do not decrease, approximately 6.6% of all individuals born in the United States in the year 2001 will serve some sort of time incarcerated in their lifetimes (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). The arrest and incarceration rates for African American and Hispanic men are particularly revealing. The aforementioned populations are arrested at a rate that is 2 to 3 times more than their proportion of the general population (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). Moreover, if one was not to consider increases in incarceration rates and “merely” assumed that current rates would remain unchanged, 1 in 17 white men would be expected to serve time in prison in their lifetimes as compared to 1 in 6 Hispanic men and compared to 1 in 3 black men who will serve prison time in their lifetimes (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013). Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 1) notes that one in 12 African American men are in prison compared to only 1 in 87 white men. It should also be pointed out that, according to one legal commentator: “Most arrests that appear on criminal background checks are for minor crimes and non-criminal offenses such as curfew and loitering violations, vagrancy, and disorderly conduct (EEOC, Meeting of July 26, 2011, Written Testimony of Adam Klein, 2013, p. 1). Concepcin (2012, p. 238) concurs and points to a 2010 study which indicated that of the over 13 million arrests for 2010 (except traffic violations) only 4.2% were for violent crimes and 12.5% for property crimes. Concepcin (2012, p. 238) adds that “while only a fraction of these arrests result in convictions, the arrests will appear on a routine criminal background check.”

The latest arrest figures, published in January of 2014, are findings published in the journal *Crime & Delinquency* (McCleod, 2014). The findings, based on research conducted by several universities, and which did not include minor traffic offenses, show that by the time they reached 23 years of age, black males had an arrest rate of 49%, compared to 44% of Hispanic males, and 38% for white males. The percentages for girls and women were about the same among whites, Hispanics, and blacks (McCleod, 2014). Furthermore, by the time they reached 18 years of age, 30% of black and 26% of Hispanic males had been arrested, compared to 22% of white males (McCleod, 2014). One commentator, in studying the aforementioned data, attributed the increase in arrest rates to the greater presence of police

officers in schools (deemed the “school-to-prison pipeline”) as well as the fact that crimes such as domestic violence are reported more frequently today (McCleod, 2014, p. 5A).

Moreover, “African Americans are as much as 15 times more likely than whites to be arrested for low-level offenses. While less than 20% of arrests of African Americans for these offenses result in convictions, they will show up in a ‘routine’ criminal background check” (EEOC, Meeting of July 26, 2011, Written Testimony of Adam Klein, 2013, p. 1). Furthermore, criminal records, though readily available, may be incomplete, difficult to interpret, and/or inaccurate. As such, “many of those flagged in these data bases have never been convicted of a crime – in fact, one-third of felony arrests never lead to conviction. Worse still, criminal records can contain inaccuracies that are routinely reflected in criminal background checks. One study of the F.B.I.’s database found that out of 10,000 hits, 5.5% were falsely attributed to individuals who had not been convicted of a crime. State records likely contain similar inaccuracies because there is no standardised process for reporting arrests and disposition at the state and local level” (EEOC, Meeting of July 26, 2011, Written Testimony of Adam Klein, 2013). Conceptin (2012) adds that

“criminal history records are notoriously inaccurate and may include errors sufficiently serious to warrant denial of employment” (p. 246).

B. Recidivism Rates

The “revolving door” in the criminal justice system emerges as a major societal problem; and one directly related to the employment of ex-offenders. Based on studies, Foreman (EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013) indicates that more than 7000,000 people annually leave federal and state prisons and return to society; and this number is more than four times the number of people who returned home from prison in the last two decades. The number of people with criminal histories that seek to re-enter the workforce is also substantially increasing. To illustrate, in 2008, approximately 12,500 citizens returned from prison to the communities of Michigan. Within two years, nearly half of them will return to prison (EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013). A principal factor in such high recidivism is a lack of employment opportunities. Conceptin (2012) emphasises that “... research has shown that employment is one of the strongest predictors of desistance from crime. Additionally, certain characteristics of employment are more effective in reducing recidivism than others. For example, research has shown that better quality jobs and higher wages reduce the likelihood of recidivism” (p. 248). It may not be a lack of adequate qualifications, but



rather the social stigma surrounding a felony conviction that prevents many ex-prisoners from obtaining a job; and then the lack of a job can use them to offend again. In most cases, prison sentences are a way to repay a “debt to society,” but the stigma of a criminal conviction often follows a person long after that “debt” is supposed to have been “settled,” and the ex-offender has returned to the community. To illustrate, Concepcin (2012, p. 238) points to a study which indicates that the presence of a criminal record reduces the likelihood of a “call-back” or employment offer by 50%. Foreman (EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013, p. 1) consequently warns that “unless there is meaningful rehabilitation and concerted effort to reintegrate these individuals back into all aspects of society, there is a significant chance that those released will be back in prison within three years. The reasons for this ‘revolving prison door’ are... (that) most ex-offenders, upon being released, have little money, minimal training or education, and limited job opportunities.” They thus will find it difficult to obtain employment. Concepcin (2012) notes too that a record of past criminal conduct will have decreasing value over time in predicting similar future behaviour:

“The risk of recidivism has been shown to decrease with time clean” (p. 245).

C. Prevalence of Criminal Background Checks in Employment

Employment data on the use of criminal background checks is also very revealing. Regarding the prevalence of criminal checks in employment, a survey by the Society of Human Resource Management indicated that some 92% of employers use criminal background checks for some or all job openings (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; Thurm, 2013). Harwin (2012, p.2) relates that “nearly three quarters of employment applications inquire into an applicant’s criminal background, and nearly half of employers routinely follow up with background checks.” Conceptin (2012, p. 237) adds that in the retail industry 94.3% of retailers used criminal conviction checks as a screening measure during the hiring process.” For example, Wal-Mart, the largest private employer in the U.S., conducts criminal background record checks on all job applicants in its U.S. stores (EEOC, Meeting of July 26, 2011, Written Testimony of Adam Klein, 2013). Foreman (EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013, p. 1) points to a Los Angeles study that indicated that over 40% of employers will reject a job applicant with a criminal record irrespective of the nature of the offense and any other individualised factors. Harwin (2012, pp. 2-3) points to a study that indicated that more than 60% of employers refuse to hire ex-offenders.

Moreover, more than 90% of employers will reject applicants who report a history of violent crime (Harwin, 2012, p. 4). Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 3) adds that “some private employers have adopted sweeping policies against employing people with criminal records, including those who were arrested and never convicted.” Yet the EEOC emphasises that criminal record databases can be incomplete and/or inaccurate (EEOC, Enforcement Guidance, 2012). To illustrate, Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 4) notes that about nine million criminal background checks are conducted by the FBI each year, mainly for employment purposes, but, according to the Attorney General, nearly 50% of the FBI records are incomplete or inaccurate.”

Employers can, of course, search all these criminal databases themselves or do a basic Internet search; however, employers typically use third-party background screening businesses, in particular, consumer reporting agencies (EEOC, Enforcement Guidance, 2012). The access employers have to the criminal records of applicants and employees have been facilitated by a federal statute – the Fair Credit Reporting Act (FCRA). The FCRA, though primarily a consumer protection law, in part permits a consumer reporting agency to supply a consumer report (typically referred to as a “credit report”) about an individual to an employer for the purposes of evaluating a person for employment, retention, reassignment, or promotion. The report can contain criminal records, including arrests (with a seven year time limit from the date of the report) and convictions (with no time limits) (Concepcion, 2012, pp. 234-35). Criminal records and the EEOC notes can be obtained by employers from court records, law enforcement and corrections agency records, registries or “watch lists” (for example, of sex offenders or people with outstanding warrants, state criminal law record repositories, and the Interstate Identification Index (which is the FBI’s comprehensive record of federal, state, and international criminal justice records) (EEOC, Enforcement Guidance, 2012).

II. The Legal Environment

The legal environment pertaining to the use of criminal background checks in employment is a multi-faceted one as it encompasses four major, and at times conflicting, areas: 1) legislation – federal, state, and local – mandating criminal background checks for certain positions; 2) legislation and legislative efforts – federal, state, and local – prohibiting and restricting the use of such criminal checks, popularly called “ban the box” legislation; 3) Title VII of the Civil Rights Act and in particular the “disparate impact” theory of civil rights law as well as attendant case law interpreting disparate im-



pact in the context of criminal background checks; 3) regulatory guidelines regarding criminal law inquiries in employment promulgated by the Equal Employment Opportunity Commission as well as recent legal actions instituted by the EEOC alleging discriminatory use of criminal background checks; and 4) the common law tort of negligence and specifically the doctrine of negligent hiring. All these legal aspects of the topic are examined, explicated, and illustrated.

A. Statutory Requirements of Criminal Background Checks

1. Federal

To complicate matters legally, not only for employers but also for federal agencies, including the Equal Employment Opportunity Commission, there are many statutes that require employers to do criminal background checks and which can preclude employment. For example, the U.S. Patriot Act of 2001 requires truck drivers with commercial licenses to undergo criminal background checks in order to be eligible for a hazardous materials endorsement, which is a necessary requirement for many trucking jobs.

The federal laws and regulations place strict requirements on employers to utilise criminal background checks and to preclude from employment certain types of offenders. The employer's reliance on these laws should be sufficient to demonstrate the defense of "business necessity" in those situations where an "adverse impact" on a protected group is shown (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, Statement of Rae T. Vann, General Counsel, Equal Employment Advisory Counsel, 2013). Nevertheless, the Equal Employment Opportunity Commission warns that, although compliance with a federal law or regulation requiring criminal background checks is a defense to Title VII liability, employers, including government agencies, still may be liable if their policies and practices go beyond the mandates of federal requirements (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013; EEOC, Enforcement Guidance, 2012).

2. State and Local

In addition to federal requirements, certain state and local governments have laws that mandate criminal background checks in employment. Furthermore, these laws can disqualify an applicant from employment for certain positions based on specific types of crimes. These laws pertain "especially (to) those employers hiring in heavily regulated organisations like nursing homes, hospitals, child care facilities (and) schools....State laws mandating

employment background checks have been on the rise, especially in light of the random violence we have seen in the schools” (Preston, Employee Screen IQ Blog, *Stuck in the Middle*, 2013, p.1). Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 2) similarly indicates that many state licensing laws, for example, to acquire a license to be a cosmetologist or a barber or hair stylist can be denied due to a previous criminal conviction, regardless of how long ago the crime occurred. The EEOC notes that “most states regulate occupations that involve responsibility for vulnerable citizens such as the elderly and children” and that fifty states and the District of Columbia require criminal history background checks for several occupations, such as nurses, elder care-givers, day-care providers, residential care-giver providers, school teaches as well as other non-teaching school employees (EEOC, Enforcement Guidance, 2012, p. 32, note 165). The EEOC provides an example – Hawaii, where the state’s Department of Human Services can deny an applicant a license to operate a child-care facility if the applicant or any prospective employee has been convicted of a crime (other than a minor traffic offense) or has been confirmed to have abused or neglected a child or threatened harm to a child, and the Department finds that the criminal history or child abuse record of the applicant or prospective employee poses a risk to the health, safety, and well-being of children (EEOC, Enforcement Guidance, 2012, p. 32, note 165). Harwin (2012, p. 2) similarly relates that “criminal convictions of whatever kind and whatever vintage serve as an automatic bar to employment in professions as diverse as barbering, plumbing, bartending, and ambulance driving.” Consequently, says Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 2), “...a crime committed at age 18 can ostensibly deny a former offender the ability to be a licensed barber or stylist when he or she is 65 years old.”

Employers offering custodial or care giving services to children, elderly or otherwise needy individuals must be aware of their mandated responsibilities to conduct background checks on their employees. Another example is the Wisconsin’s Caregiver Law (2014), which requires background and criminal history checks of certain personnel who are responsible for the care, safety and security of children and adults. Those subject to such criminal background checks include employees and contractors every four years. However, not all convictions result in disqualification from the caregiving profession in Wisconsin, and only those related to the job function can disqualify the worker such as assault, battery, homicide, and abuse or neglect crimes (Department of Health Services Publication P00274, 2011). To further illustrate, the Nebraska State College System adopted a policy of “ongoing” criminal background checks on its employees every five years



to conform to its insurer's requirements or lose the "Sexual Abuse and Molestation" coverage. If a criminal offense is found in the background report it will not automatically result in termination. Instead the college administration will take into consideration concerning the offense's relevance to the employee's job function, the elapsed time since the conviction, and the severity and number of offenses. One of the driving public purposes behind is to keep students and visitors safe (Conrad, 2014).

However, regarding state and local laws and regulations that require or permit criminal background checks in employment, the EEOC emphasises that these laws are preempted by the federal law Title VII. "Therefore, if an employer's exclusionary policy or practice is not job-related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII disparate impact liability" (EEOC, Office of the Legal Counsel, Testimony on Arrests and Convictions, 2013, p. 4). Moreover, in support of the EEOC's position, one federal court, in *Waldon v. Cincinnati Public Schools* (2013), held that an Ohio state law requiring a criminal background check of current school employees raised a potential Title VII discrimination claim pursuant to the disparate impact theory of civil rights law. One legal commentator described the Waldon case and the concomitant lack of a legal "safe harbour" for employers who comply with state and local laws in the hiring process as follows: "This leaves many employers in a pickle" (Preston, Employee Screen IQ Blog. Stuck in the Middle, 2013, p.1)!

B. Statutory Restrictions on Criminal Background Checks

The Civil Rights Act, it must be stressed, is a federal, that is, national law. Since the U.S. is a federal system, it accordingly must be noted that almost all states in the U.S. have some type of anti-discrimination law – law which may provide more protection to an aggrieved employee than the federal law does. The Equal Employment Opportunity Commission accordingly notes that "several state laws limit the use of arrest and conviction records by prospective employers. These range from laws and rules prohibiting the employer from asking the applicant any questions about arrest records to those restricting the employer's use of conviction data in making an employment decision" (EEOC, Pre-Employment Inquiries and Arrest & Conviction, 2013, p. 1).

The use (and alleged discriminatory abuse) of criminal background checks in employment has engendered a lobbying effort to convince legislators on the federal, state, and local level to remove criminal inquiries from hiring at least in the initial stages of the hiring process. This effort has been called the "ban the box" campaign (Sturgill, 2012). This campaign is a national

initiative operating on all levels of government to remove the criminal history inquiry, that is, the pertinent “box,” from employer job applications (Legal Services for Prisoners with Children, 2013). The “ban the box” legal effort was created to make criminal background checks by employers more fair for ex-offender job applicants (The Mayor’s Office of Reintegration Services for Ex-Offenders, 2013). In plain terms, the “box” which is being referenced is the box next to the responses – either “yes” or “no” – in which a job applicant is asked if he or she has ever been arrested for or been convicted of a crime – felony or misdemeanor. The “ban the box” movement is designed to prevent applicants from being automatically barred from employment opportunities. The law also intends to enable and persuade employers to focus more on the individual applicant’s knowledge and skills and the person’s suitability for a particular job or position. Sturgill (2013, p. 504) relates that “the main purpose of the movement, which recognises the link between recidivism and the obstacles that ex-offenders face while searching for employment, is to reduce re-arrest public safety by narrowing the scope under which ex-offenders’ criminal histories can be considered during the hiring process.” During the job application process, an otherwise very qualified job applicant could be automatically disqualified from consideration, even though his or her conviction may not be related to the job or position which the applicant is seeking to obtain. This automatic initial disqualification is what the proponents of “ban the box” laws are seeking to prevent. As such, several states and many counties and municipalities have “banned the box,” reforming hiring policies to eliminate questions about job applicants’ criminal histories from mainly public-employment applications. In the past 4 years, “ban the box” state legislation has been established in 12 states (Prince 2013). Most laws are only applied to public sector employment; and only a few prevent the private sector employers from asking these types of questions on job applications. On May 2, 2013, Maryland passed legislation removing this type of barrier to employees, and thus joined the 10 other states of California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Mexico, New York, Pennsylvania, and Wisconsin (Haase 2013). These individual state legislative acts often contain varying degrees of prohibitions that employers should consider when drafting employment applications and conducting job interviews. Some of the more interesting examples of these state laws are identified below; but the vast majority of U.S. job applicants remain unprotected from these types of pre-employment questions.



C. Civil Rights Act – Title VII and the Disparate Impact Theory

The Civil Rights Act of 1964 is the most important civil rights law in the United States. This statute prohibits discrimination by employers, labour organisations, and employment agencies on the basis of race, colour, sex, religion, and national origin. The scope of the statute is very broad, for example, regarding employment, encompassing hiring, apprenticeships, promotion, training, transfer, compensation, and discharge, as well as any other “terms and conditions” and “privileges” of employment. The Act applies to both the public and private sectors, including state and local governments and their subdivisions, agencies, and departments. An employer subject to this Act is one that has 15 or more employees for each working day in each of the more calendar weeks in the current or preceding calendar year. One of the major purposes of the Act is to eliminate job discrimination (Muffler, Cavico, and Mujtaba, 2010). The focal point of this article is Title VII of the Civil Rights Act, which prohibits discrimination in employment. Initially, it is important to point out that Title VII does not categorically prohibit the use of criminal background checks or records in employment as a basis for making hiring and other employment decisions (EEOC, 2013, Pre-Employment Inquiries and Arrest & Conviction). The Equal Employment Opportunity Commission notes that criminal background checks and records as an employment screen may be lawful, legitimate, and even mandated in certain cases by statutes (EEOC, 2013, Facts About Race/Color Discrimination). However, as will be clearly seen in this article, employers who do engage in criminal background checks and who do use criminal records in making employment determinations must comply with the non-discrimination requirements of Title VII of the Civil Rights Act, and must be very heedful of the disparate impact theory of employment law. The disparate impact theory, also called the adverse impact theory, holds that even if an employment policy or practice is neutral on its face and evenly applied to all job applicants and employees, if the policy or practice has a disparate, that is, disproportionate impact on a protected group, such as minorities, it may violate the civil rights law unless the employer can demonstrate a legitimate business reason for the policy or practice.

D. Equal Employment Opportunity Commission

Civil rights laws are enforced in the United States primarily by the federal government regulatory agency – the Equal Employment Opportunity Commission (EEOC). Congress has delegated to the EEOC the power to interpret, administer, and enforce Title VII of the Civil Rights Act of 1964. The EEOC is permitted to bring a lawsuit on behalf of an aggrieved employee, or the aggrieved employee may bring a suit himself or herself for legal or

equitable relief. However, Stoter (2008) points out that Congress only empowered the EEOC to institute a lawsuit against employers who engaged in a “pattern or practice” of discrimination; and as a result, the private cause of action allowed in Title VII became an instrumental component in employment anti-discrimination law and practice. Individual actions can be filed by workers, but only after they conform to strict pre-suit procedures which include filing their initial administrative complaint with the EEOC and “706” corresponding state agency.

The Civil Rights Act allows any person who is aggrieved by a violation of the statute to institute a civil action in any court of competent jurisdiction for any and all legal redress which will effectuate the purposes of the statute. However, a plaintiff must first fulfil certain administrative prerequisites (Lynch, 2006). When the EEOC finds “reasonable cause” the agency grants the aggrieved party a “right-to-sue” letter which allows the employee to proceed to the federal courts (Lynch, 2006). Moreover, it should be noted that normally individuals who feel they have been discriminated against in the workplace have 180 days to file a complaint with the EEOC and their state’s corresponding “706 agency,” which is the individual state’s administrative agency charged with investigating allegations of discrimination in the workplace, such as the State of Florida’s Commission on Human Relations or the Texas Workforce Commission. Thereafter, aggrieved parties have 90 days to file their lawsuit when their “right to sue” letter is received. Failing to follow these pre-suit procedures can result in a dismissal of the future federal court action as well as separate specific state antidiscrimination lawsuits (Olivarez v. University of Texas at Austin, 2009). In certain circumstances, these strict deadlines can be satisfied by either a work sharing agreement between the EEOC and local 706 agency, or “relation back” theories of tagging along additional discrimination claims after the filing of the lawsuit, such as was the case in *Ivey v. District of Columbia* (2008). Specifically, in the context of criminal background checks, the EEOC is now litigating against two major companies, Dollar General Corporation and the German automaker, BMW. The essence of the lawsuits is that the use of criminal background checks at an initial stage of the hiring process violates the disparate (or adverse) impact theory of civil rights law. The disparate impact theory holds that a neutral employment policy or practice, that is, one that applies equally to all employees (or job applicants) may nonetheless be illegal pursuant to civil rights law if the policy or practice has a disparate, that is, disproportionate, effect on a protected group, for example, black applicants in the two aforementioned cases. Yet the employer does have a defense to a disparate impact case, to wit: the employer must demonstrate that its policy or practice which causes the disparate impact is



justified by business necessity. Although the two preceding lawsuits have not been resolved as of the writing of this article, the policy pronouncements from the EEOC as well as the fact of the lawsuits themselves, of course, clearly indicate that the federal agency construes any initial exclusion of applicants because of their criminal backgrounds as problematic. Rather, the agency wants employers to take a more broad and “holistic” approach to hiring, thereby factoring in not only the criminal backgrounds of the applicants, but also such other important factors such as the nature and time of the offense and its relationship to the job in question. More and more precise legal guidance will ensue from the result of the EEOC’s lawsuits as well as the expected appeals to the federal court system. Yet one point is abundantly clear; and that is employers are being placed “between a rock and a hard place” since, as mentioned, many laws require criminal background checks and the employer is also confronted with the common law tort of negligent hiring.

E. The Tort of Negligent Hiring

Negligent hiring lawsuits are legal actions filed against an organisation by an employee that claims an organisation failed to conduct thorough background checks before hiring someone with a criminal record. The concern for negligent hiring lawsuits motivates employers to conduct thorough background checks, including investigating criminal records of applicants. These background checks are done to prevent negligent hiring lawsuits. Negligent hiring lawsuits are tort actions, premised on the common law tort of negligence, brought by individuals against employers if harmful actions are committed by the employee against fellow employees or others when a proper background check was not performed by the employer. That is, in the specific case of criminality, the ex-offender employee would not have been hired or placed in a certain position if a reasonable background check had been performed and the employer would have discovered the criminal record (EEOC, Meeting of November 20, 2008 – Employment Discrimination Faced by Individuals with Arrest and Conviction Records, Statement of Rae T. Vann, General Counsel, Equal Employment Advisory Counsel, 2013; Privacy Rights Clearinghouse, 2013; EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013).

III. Implications for Stakeholders

The lawsuits by the EEOC demonstrate that the agency is increasing its scrutiny of criminal background checks (as well as credit checks), both of which are widely used in employment to screen job applicants. The EEOC’s

recent use of the disparate impact theory to bring the aforementioned lawsuits clearly illustrates that employers must be very mindful of the unintended effects of their neutral hiring policies and practices, such as criminal background checks and requirements, on minorities.

Some state and local governments have regulated how an employer can use criminal background checks during the hiring process. Where there is some type “ban the box” law in effect, the initial employment application process typically would not permit an initial inquiry into an applicant’s criminal justice history. The essence of “ban the box” legislation gives applicants, who are ex-offenders, more of a level-playing-field when applying for employment by prohibiting peremptory disqualification by means of the “box” and thereby forcing employers to take an individualised case-by-case examination of an applicant’s qualifications and suitability for specific jobs or positions.

There are many stakeholders that will be directly or indirectly affected by employers using criminal background checks in employment. Family, friends, employees, employers, government and the legal system, schools, churches, interest groups, local communities, and society as a whole will be affected in one way or another. These stakeholders have competing interests and values. The challenge is to devise a fair and workable criminal background check policy that balances the public interest and the need of the ex-offender to be rehabilitated fully into the local community and society with the interest of the employer and its stakeholders to minimise the possible risks and costs of employing people with criminal histories. This section of the article, therefore, will discuss the implications of the employers using criminal background checks in employment on certain key stakeholders.

Proponents of “ban the box” initiative argue that it is a promising and constructive policy innovation that increases the important goal of effectuating the former offender’s re-entry into the community and society. Deemphasising at least initially past criminal convictions should help reduce job discrimination against ex-offenders. The “ban the box” campaign thus represents a major step toward “regularising” the status of ex-offenders in the hiring process. It is morally wrong to deny applicants with a criminal record the proverbial “second chance” to become part of the general labour force by means of an automatic exclusion as per the “box.”

There are critics of “ban the box” type legislation who argue from the perspective of the job applicant or employee. These critics contend that such legislation, though well-intended, may actually impede job opportunities for ex-offenders, particularly minorities (Riley, 2013). One critic, writing in the *Wall Street Journal*, points to a 2006 study in the *Journal of Law and Economics*, entitled “Perceived Criminality, Criminal Background Checks,



and Racial Hiring Practices of Employers,” which found that employers who investigate the criminal backgrounds of job applicants are in general more likely to hire African-Americans (Riley, 2013, p. A11). The reason is presumed to be that employers who can check for criminal backgrounds will be less likely to discriminate on the basis of race when hiring people (Riley, 2013).

A. Employers

Why would employers do criminal background checks if they are not legally required to do so? Employers do have certain legitimate concerns. They want to be sure that people hired or promoted are suitable for certain positions; and criminal background checks can be critical in determining the suitability of a person for a position. Employers do not want people convicted of financial crimes handling money or people with violent histories being in contact with customers, clients, or other employees. Employers are rightfully concerned with legal liability premised on the tort of negligent hiring. Safety and security at the workplace are thus legitimate issues for employers. Judge Robert W. Titus, writing the opinion in the federal district court case of EEOC v. Freeman (2013), succinctly stated the employer’s rationales for criminal background checks, to wit: “For many employers, conducting a criminal history or credit background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence, or who appear to be untrustworthy and unreliable....Careful and appropriate use of criminal history information is an important, and in many cases essential, part of the employment process of employers throughout the United States...Even the EEOC conducts criminal background investigations as a condition of employment for all employees, and conducts credit background checks on approximately 90% of its positions” (pp. 2, 4).

From the employer’s perspective, one can argue that the employer has a legal and moral obligation to the owners of the firm and the employees of the company, as well as other stakeholders, to hire the best person for the specific position; and if the employer feels that a person with a “checkered past” will not provide the quality of work the employer requires, the employer can turn him or her away. The “box,” however, on an initial application form, may also be seen as “crutch,” and thus may be too facile a tool to expedite the hiring process of many applicants and even, perhaps, “help” a hiring manager go against his or her own benign feelings by summarily turning the ex-offender away.

B. Government

Providing a second chance for ex-offenders will certainly boost labour force participation as well as presumably increase the number of more appreciative and thus more productive employees. Prohibiting criminal background checks as automatic initial exclusions to employment will also ease the burden for the government, which naturally uses taxpayer dollars to finance expenses associated with ex-offenders, especially unemployed ex-offenders. The government will benefit from increased employment of ex-offenders, as there will be less financial strain on government to finance ex-offenders, who may be back in prison due in part to a lack of a job, or if they are out or in prison but unemployed and thus consuming state welfare resources. Saltzburg (EEOC, Meeting of July 26, 2011, Written Testimony of Stephen Saltzburg, 2013, p. 1) underscores the preceding point by noting the “substantial economic burden current incarceration rates impose on taxpayers – over \$56 billion a year” as well as the fact that “incarceration carries long lasting economic and social repercussions for ex-offenders, families, and communities.”

C. Interest Groups

In addition to the proponents of the “ban the box” movement, many interest groups are involved in debate over the use of criminal background checks in employment. One important and active interest group so involved is the NAACP. An attorney for the NAACP (Thurm, 2013) praised the EEOC guidelines and recent lawsuits, saying that people are trying to work and be productive citizens but are being prevented from being hired due to convictions, which may be old, and when these applicants pose little danger. The NAACP attorney, moreover, said that the issue of criminal background checks is a particularly important issue for the organisation because blacks are convicted of crimes more often than whites (Thurm, 2013).

D. Society

Society on a whole stands to benefit from more individualised examination of candidates for jobs and positions as employment will be increased. People with suitable qualifications for certain positions will be, and will not be, hired. In the latter case, society must be protected, and thus some positions will still be subject to the criminal history disqualification, such as positions involving public safety like police and firefighters, positions with financial responsibilities and having access to confidential information, and those jobs which require working with children. Overall, however, there should be more employment and productivity within the labour force. Greater employment of ex-offenders will reduce recidivism and thus will help contrib-



ute to lowering crime rates. By eliminating automatic exclusions, society will be reinforcing an oft-stated principle of giving ex-offenders the “second chance” they deserve for “paying their debt” to society and rehabilitating themselves.

Accordingly, Foreman (EEOC, Meeting of November 20, 2008, Statement of Michael L. Foreman, 2013, p. 1) emphasises that “rehabilitation and re-integration through meaningful employment is one way to restrict the flow of ex-offenders leaving and re-entering society through the jailhouse doors. Data show that those returning to society who are able to establish a stable family and working environment are less likely to return to jail. The social effects of having a job cannot be understated. A person with strong, entrenched family relations and a solid career has established ties to the community and within society, and is therefore much less likely to re-offend.” Of course, all re-entry programs involve some risk of failure, but they also offer a great deal of hope to every ex-offender who seeks to reenter the workforce and thus become integrated into the normal work-a-day world of the community. As such, there will be one less potential recidivist consuming expensive criminal justice, corrections, and societal resources. The individual ex-offender will benefit and society as a whole will benefit too. There are certainly many ramifications on affected stakeholders by the use of criminal background checks in employment. Several key stakeholders are impacted by this hiring practice; and these stakeholders have at times conflicting interests and values. The objective is to seek to balance these interests and values in a legal, ethical, and practical manner.

IV. Summary

This article has sought to present a fair and balanced examination of the important though perplexing topic of criminal background checks in employment. The consequences of criminal background checks on all the affected stakeholders were discussed.

As was underscored in this article, employers now find themselves between the proverbial “rock and a hard place” when it comes to criminal background checks in employment. There are in existence a patchwork of conflicting statutes governing this area of employment practice. Some statutes forbid criminal background checks to a certain degree; whereas other statutes require such inquiries; and in the latter case if the statutes are merely state and local ones compliance with the statute will not immunise the employer from liability pursuant to federal civil rights law. Furthermore, if employers hire ex-offenders they might be sued for negligent hiring if the employee harms other employees, customers, or clients; the employer might become victimised by theft; and the employer might be subject to

negative attacks from its employees, the local community, or even the general society based on perceptions of the morality of hiring a former criminal. These attacks can harm the company's image and by extension its profitability. On the other hand, if the employer does not hire the ex-offender, the employer might come under attack for immorally not giving a "second chance" to a person who has "paid his debt to society." Moreover, the employer may be subject to a discrimination legal action by the Equal Employment Opportunity Commission based on the disparate impact theory for illegally screening out applicants based on their criminal records. Any of the above approaches can engender negative consequences for the employer, which today is plainly in a legal, ethical, and practical quandary. Accordingly, the authors hope that this article has brought some clarity to this perplexing area of employment law; and thus has helped employers and managers avoid this legal dilemma by using criminal background checks during the hiring process in a fair, just, and efficacious manner.

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