ADVERSE EMPLOYMENT CONSEQUENCES TRIGGERED BY CRIMINAL CONVICTIONS: RECENT CASES INTERPRET STATE STATUTES PROHIBITING DISCRIMINATION

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I. INTRODUCTION

In a scene from the movie *Good Will Hunting*,[1] an M.I.T. mathematics professor mistakenly reprimands Will, the brilliant young janitor played by Matt Damon, for writing on the blackboard where he is actually solving an impossibly difficult equation. After the professor realizes that Will has solved the problem rather than defaced the board, he tracks down Will's supervisor in order to locate Will. The supervisor responds that Will obtained his job through his "P.O.," an abbreviation for probation officer. The professor pauses over this revelation; perhaps this colloquialism represents a phenomenon seen more frequently within Will's socioeconomic class than in the upper echelons of the academic world. The culture clash and class gap is apparent between the two characters—the professor initially seems not to have had the same exposure to the vagaries of the criminal justice system and its lingering requirements on ex-offenders, such as the need to maintain contact with a probation officer. Will knows what those requirements and restrictions are, and how they hover over his daily life, seemingly limiting his freedom, choices, and opportunities for the future. An orphan who has been abused in multiple foster homes, Will portrays the sort of psychologically troubled youth who continually shoots himself in the foot each time he starts to walk

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1. GOOD WILL HUNTING (Miramax Films 1997).

normally again. The professor catches on fast and assists Will in dealing with his legal problems, partly because he hopes to cultivate Will's talent. Perhaps one subtle message in the film is that society and potential employers are willing to overlook the past offenses of individuals who have something extraordinary to offer, such as brains, beauty, writing, acting, or athletic ability. The ordinary person with a criminal record, however, is unlikely to be as fortunate as the mathematical genius portrayed in *Good Will Hunting*; rather, he is more likely to carry the stigma of a criminal conviction like a proverbial scarlet letter[2] and encounter a myriad of barriers to employment.

This Article surveys recent adverse employment action cases based on employees' criminal convictions. The various formulations of anti-discrimination legislation adopted by Hawaii, Wisconsin, Pennsylvania, and New York are analyzed and compared.[3] The

2. *See* Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CAL. L. REV. 1191, 1200 (2006) (analogizing having a criminal record to wearing a "digital scarlet letter"); Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 617–22 (discussing the stigma of conviction as a negative credential, and noting that unemployment rates for ex-offenders range from 25–40%, almost two-thirds of those incarcerated will be charged with new crimes after release, and the incarceration rate for young black men is at 28% and this percentage rises to over 60% for those young black men who are high school dropouts).

3. This Article primarily focuses on employment issues in the private sector and does not deal with employment license restrictions for those with criminal convictions, or the many other collateral consequences of conviction such as loss of the right to vote, serve on a jury or in the armed forces, hold federal office or employment, work for a labor union or pension plan, participate in federal contracts or programs, or receive benefits under various federal programs (such as Social Security, public housing, or educational loans). Nor does this Article deal with privacy issues relating to criminal offender record systems. For a discussion of employment licensing issues, see Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. SOC'Y 18, 22–24, 85 (2005) (focusing on occupational restrictions and recommending treatment of those with criminal records as a suspect class due to their lack of political power and the history of prejudice and discrimination in law based upon criminal records); Brian K. Pinaire, Milton J. Heumann, & Jennifer Lerman, *Barred from the Bar: The Process, Politics, and Policy Implications of Discipline for Attorney Felony Offenders*, 13 VA. J. SOC. POL'Y & L. 290, 292, 328–29 (2006) (discussing state statutory restrictions on former felony offenders in a range of trades and professions including barbers, nurses, and attorneys, and noting the American Bar Association's assessment that the "crazy-quilt" of state and federal laws impedes re-entry of offenders). For a discussion of laws imposing collateral consequences on those with criminal records, see OFFICE OF THE PARDON ATTORNEY, U.S. DEP'T OF JUSTICE, FEDERAL STATUTES IMPOSING COLLATERAL CONSEQUENCES UPON CONVICTION

ability of employers to use post-hoc discovery of criminal convictions to justify prior adverse employment actions is discussed, drawing examples from Wisconsin, Minnesota, and Oklahoma. Recently promulgated city and county ordinances prohibiting discrimination are described, as is the limited scope of protection available under existing federal law. The Article concludes that existing protections are both inconsistent and, in many cases, insufficient, and suggests that existing federal laws be amended to bring people with criminal histories more directly within the scope of their coverage.

II. THE IMPACT OF CRIMINAL CONVICTIONS ON EMPLOYMENT: HYPOTHETICAL SCENARIOS AND PUBLIC POLICY CONCERNS

When is a person's history relevant to the present? Should solidly performing, productive workers be discharged based on crimes from the past that were committed prior to employment? If a crime is committed during the period of employment, should that crime be treated any differently than one committed prior to the period of employment, and how should crimes committed after discharge impact remedies in an employment discrimination or wrongful termination lawsuit? What happens when an individual has a record of a prior criminal conviction that is not discovered until after the hiring process? Should this after-acquired information trigger adverse employment consequences including termination? A confounding variable in these cases is whether the employee falsified an employment application to conceal the conviction. In many instances, such falsification alone leads to termination because employers will not countenance application fraud. Finally, what if an employee is terminated and evidence of a prior criminal conviction is revealed during discovery in a

(2002), *available at* http://www.usdoj.gov/pardon/collateral_consequences.pdf. For an excellent discussion of the labyrinth of collateral sanctions as well as their impact on education, employment, and the "social safety net," see Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006). *See also* Pager, *supra* note 2, at 620–21 (discussing the routine legal discrimination ex-offenders suffer, including loss of access to jobs, housing, educational loans, welfare benefits, and political participation). For a discussion of some of the issues arising with respect to privacy and criminal records systems in Massachusetts, see THE BOSTON FOUNDATION, CORI: BALANCING INDIVIDUAL RIGHTS AND PUBLIC ACCESS: CHALLENGES OF THE CRIMINAL OFFENDER RECORD SYSTEM AND OPPORTUNITIES FOR REFORM (2005), *available at* http://www.tbf.org/uploadedFiles/CORI%20Report.pdf. *See also* Geiger, *supra* note 2, at 1198–200 (discussing problems ex-offenders encounter with employment and housing due to availability of criminal records to the general public via the internet).

subsequent employment discrimination or wrongful termination lawsuit? How should this newly discovered evidence affect an employer's liability or a former employee's remedy?

If an employer discovers an applicant's conviction *before* hiring, there is an opportunity to assess the relationship between the conviction and the potential position, i.e., to consider whether the conviction is reasonably related or sufficiently relevant to the applicant's ability to do the job such that it disqualifies him from employment. When an employee commits a crime *during* the term of employment, employers may have human resource policies in place that dictate suspension or termination if the crime is serious enough to warrant discipline or discharge. Some employers may shun the commission of any illegality by their employees, no matter how small the infraction, fearing negative publicity and loss of reputation or goodwill. Criminal activity violates the rules of society, and employers may want to distance themselves from employees who break those rules. If a crime is committed while on the job—for example, the employee is convicted of driving under the influence during the course of employment, working under the influence, or committing an act of violence—the employer is exposed to numerous legal risks. Employers must weigh potential liability in tort to other employees, customers, or third parties who are injured by their employees under theories of negligent hiring or retention.[4] Monetary and public policy concerns are likely to dictate an employee's suspension pending successful completion of a rehabilitation or employee-assistance program, or in many instances, an employee's immediate termination.

The issue of how employers treat ex-offenders is of far-reaching concern because as many as one in five individuals in America have a criminal history.[5] The trend in national policy toward being "tough on crime," as well as the focus on the "war on drugs," have led to an increase in the number of criminal convictions, as well as in the collateral consequences that negatively impact access to federal welfare benefits, educational programs, certain types of

4. *See* John E. Matejkovic & Margaret E. Matejkovic, *Whom to Hire: Rampant Misrepresentations of Credentials Mandate the Prudent Employer Make Informed Hiring Decisions*, 39 CREIGHTON L. REV. 827 (2006) (noting the prevalence of false credentials and recommending that employers check references and investigate the backgrounds of applicants at the time of hire); Seth B. Barnett, Note, *Negligent Retention: Does the Imposition of Liability on Employers for Employee Violence Contradict the Public Policy of Providing Ex-Felons With Employment Opportunities?*, 37 SUFFOLK U. L. REV. 1067, 1070–80 (2004) (discussing the theory of negligent retention and employers' duties to various stakeholders, as well as the issue of ex-offender employment).

5. Geiger, *supra* note 2, at 1193.

employment, and public housing.[6] If one of the goals of our legal system is to rehabilitate those who break the law, and employment contributes to rehabilitation and discourages criminal recidivism, then work for those with criminal convictions has a value to society that exceeds the wages those employees earn.[7] The public policy issues involved are significant and require a balancing of the various interests at stake. The financial and legal well-being of employers must be weighed against the safety of other employees and customers, the actual employability of criminal offenders as well as their best interests, and the welfare of all members of society. Compliance with employment anti-discrimination statutes that provide protection for prior and current criminal offenders should be one important consideration of employers. Employers should develop lawful and logical internal policies regarding pre-employment, current employment, and post-employment evidence of records of arrests and criminal convictions.

III. A SURVEY OF RECENT CASES APPLYING PERTINENT STATE STATUTES

Several states have promulgated statutes addressing employment discrimination with respect to those with criminal records.[8] Many of these statutes are of limited scope, however, frequently only applying to public employers or containing other

6. *See* Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. REV. L. & SOC. CHANGE 585, 595–96 (2006).

7. *See* MINN. STAT. § 364.01 (2006) ("The opportunity [for criminal offenders] to secure employment . . . is essential to rehabilitation and the resumption of the responsibilities of citizenship."); Leroy D. Clark, *A Civil Rights Task: Removing Barriers to Employment of Ex-Convicts*, 38 U.S.F. L. REV. 193, 200–01 (1993) (noting that unemployment is strongly correlated with recidivism); Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, CORRECTIONS MGMT. Q., Fall 2001, at 1, 2 ("Almost all of the classic criminological theories have hypothesized a negative relationship between some aspect of employment and . . . recidivism."); Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 981–82 (2006) (discussing the importance of meaningful employment for those criminal offenders who have paid their debt to society in order to avoid recidivism); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 STAN. L. REV. 1597, 1611 & n.79 (2004) (discussing research indicating that work reduces recidivism of ex-offenders).

8. *See infra* Part III.A–F.

restrictions.[9] Among the states with more comprehensive legislation broadly protecting ex-offenders against employment discrimination by both public and private employers are Hawaii, Wisconsin, Pennsylvania, and New York.[10] Even among these four states, the range of protection is dramatic: Wisconsin, for example, has enacted comprehensive, employee-favorable legislation that prohibits discrimination unless a conviction record "substantially relate[s] to the circumstances of the particular job,"[11] a high standard for employers to meet; at the other extreme is Pennsylvania, whose anemic anti-discrimination statute permits employers to discriminate if the applicant's conviction merely "relate[s] to" the position.[12] Legislation in New York and Hawaii falls somewhere in between.

A. Hawaii: The Equal Protection Clause's "Rational Basis" Test Is Not the Standard Under Hawaiian Law

A recent case from Hawaii illustrates the complex legal and public policy issues that inhere in cases where employers discover prior criminal convictions during the term of employment.[13] In *Wright v. Home Depot U.S.A., Inc.,* the Supreme Court of Hawaii vacated a lower court judgment dismissing a former employee's claim that his discharge violated the state's law against discrimination.[14] In 1996, Jon Wright pled guilty to and was convicted of using the controlled substance methamphetamine.[15] He received a suspended sentence and two years of probation.[16] In April 2001, approximately five years after his conviction, Wright was hired by Home Depot in Maui where he passed a drug test prior to employment.[17] Apparently, at the time of hire, Wright did not disclose his conviction, and Home Depot did not check his criminal

9. *See infra* Part III.E.

10. HAW. REV. STAT. § 378-1 to -6 (1993 & Supp. 2006); WIS. STAT. §§ 111.325–111.335 (2003); 18 PA. CONS. STAT. ANN. § 9125 (West 2000); N.Y. CORRECT. LAW §§ 750–55 (McKinney 2003) (amended in 2007).

11. WIS. STAT. § 111.335(1)(c)(1) (2003).

12. 18 PA. CONS. STAT. ANN. § 9125(b) (West 2000).

13. *See* Wright v. Home Depot U.S.A., Inc., 142 P.3d 265 (Haw. 2006); *see also High Court Reinstates Employee's Challenge to Discharge Based on Past Drug Conviction*, DAILY LAB. REP., Sept. 13, 2006, at A-3 (discussing the court's decision in *Wright* that whether a five-year-old drug conviction is rationally related to a sales job is a triable issue); *Case Notes*, HAW. B.J., Nov. 2006, at 26, 26 (summarizing *Wright*).

14. *Wright*, 142 P.3d at 276.

15. *Id.* at 267–68.

16. *Id.* at 268.

17. *Id.*

history.[18]

In September 2002, more than a year after he was hired, Wright applied for a promotion to department supervisor.[19] Home Depot tested Wright for drug use twice during the promotion review and also conducted a background investigation.[20] A Consumer Report revealed Wright's prior conviction, and Home Depot notified Wright in late November that it was considering taking adverse action that could include not offering him the position, termination, or other action.[21] Wright was terminated on December 17, 2002, "because of his 'felony conviction disposition 04-30-96 [sic], use of [a] controlled substance, in violation of company policy.'"[22] Wright thereafter received a right-to-sue notice from the Hawaii Civil Rights Commission and filed a lawsuit alleging that his discharge was wrongful and discriminatory.[23] His amended complaint noted that his termination violated a state statute making it unlawful to discriminate against any individual because of arrest and court record or conviction.[24]

Wright's complaint also alleged that his 1996 conviction "for the use of a controlled substance d[id] not bear a rational relationship to the duties and responsibilities of the position he held at Defendant HOME DEPOT."[25] The defendant moved to dismiss, claiming that its consideration of Wright's criminal record was appropriate under state law in that "it bore a rational relationship to his employment."[26] Home Depot claimed that the drug conviction had "a

18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id*. at 268 & n.4.
24. *Id.* at 268 (quoting HAW. REV. STAT. § 378-2(1)(A) (1993)).
25. *Wright*, 142 P.3d at 269 (emphasis omitted).
26. *Id.* The statute in question, HAW. REV. STAT. § 378-2.5 (Supp. 2006), provides:

> EMPLOYER INQUIRIES INTO CONVICTION RECORD. (a) Subject to subsection (b), an employer may inquire about and consider an individual's criminal conviction record concerning hiring, termination, or the terms, conditions, or privileges of employment; provided that the conviction record bears a rational relationship to the duties and responsibilities of the position.
> (b) Inquiry into and consideration of conviction records for prospective employees shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.
> (c) For purposes of this section, "conviction" means an adjudication by a court of competent jurisdiction that the defendant committed a crime, not including final judgments required to be confidential

moderate, fair, or reasonable relation to employment at a home improvement retailer with substantial concern for the safety of its customers and employees, for its employee culture, for its goodwill and reputation, and for its interest in maintaining an honest environment."[27] Wright argued that issues of fact remained because he was rehabilitated, had tested clean with respect to drugs on three occasions, and that he deserved to work in light of the nondiscrimination law.[28] He also disputed the company policy that the defendant relied on as its basis for termination.[29] In further response to Home Depot's motion to dismiss, Wright argued that because his conviction record was not rationally related to his position, to grant the defendant's motion would make the statute "meaningless."[30] The state circuit court granted Home Depot's motion to dismiss, reasoning that there was a rational relationship between the conviction and his job. Wright appealed.[31]

The Supreme Court of Hawaii reviewed the appellate court's ruling de novo, looking at the allegations in the complaint and construing them in the light most favorable to the plaintiff to determine whether there was a way for him to prove a set of facts in support of his claim that would entitle him to relief.[32] The court noted that rules of statutory construction require it to interpret a statute and its legislative intent in accordance with the language of the statute itself, which is presumed to express the intent of the legislature.[33] Because Section 328-2.5 referred to an employer's ability to consider an individual's criminal conviction in the context of "hiring, termination, or the terms, conditions, or privileges of employment . . . provided that the record bears a rational

> pursuant to section 571–84; provided that the period for which the employer may examine the employee's conviction record shall not exceed the most recent ten years, excluding periods of incarceration.

Section 378-3(13), which was repealed on June 30, 1999 (prior to Wright's hiring in 2001 by Home Depot) provided: "Nothing in this part shall be deemed to: (13) Prohibit or preclude an employer from considering a record of criminal conviction that bears a rational relationship to the duties and responsibilities of the position, pursuant to section 378-2.5, with regard to prospective or continued employment." Home Depot argued for the use of the "minimum rationality test of the fourteenth amendment's [sic] equal protection clause," a standard providing the "widest discretion" to the employer. *Wright*, 142 P.3d at 269.

27. *Wright*, 142 P.3d at 269.
28. *Id.*
29. *Id.* at 269–70.
30. *Id.* at 270.
31. *Id.*
32. *Id.*
33. *Id.* at 271, 273.

relationship to the duties and responsibilities of the position," the court found that the language permitted an employer to consider a conviction record at times other than at hiring.[34] To limit the time for consideration to the time of hiring would have made the other words superfluous, violating a cardinal rule of statutory construction.[35] In addition, the court noted that the consideration of the conviction record was not limited to convictions that occurred during the individual's employment with the employer.[36] Despite a stray remark by one senator to the contrary, the court found that the express terms of the statute permit consideration of current employees' convictions, as well as those of prospective employees.[37]

The court in *Wright* noted that the relationship between the conviction and the employment must be rational in accordance with the plain meaning of the phrase in order for an employer to refuse to hire a prospective employee or terminate a current employee.[38] The court remanded the case, giving Wright an opportunity to prove that his prior conviction was not rationally related to his present duties and responsibilities at Home Depot.[39] Significantly, the court stated that the standard is not "the rational relationship or rational basis test as applied in the context of constitutional equal protection analysis" because Wright's claim was based upon a violation of a statute, and, although the statute did not define the phrase, the ordinary meaning of the terms would apply.[40] Thus, the court specifically rejected the minimum rationality test that Home Depot sought to have applied.[41] The statutory language was not limited to consideration of conviction *prior* to employment, and thus consideration of a current employee's prior conviction is permitted under the statute if the conviction occurred within the preceding ten

34. *Id.* at 274.
35. *Id.*
36. *Id.*
37. *Id.* at 275.
38. *Id.* at 275–76.
39. *Id.* at 276.
40. *Id.* at 276 n.9 (referring to HAW. REV. STAT. § 378-2 (1993 & Supp. 2006)). When a government classification discriminates on any basis not involving a suspect class or fundamental right, that classification will survive Equal Protection Clause scrutiny as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." Fed. Commc'ns Comm'n v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993). The rational basis test thus sets a low bar, and, as a result, most government classifications not involving suspect classes or fundamental rights are upheld as constitutional. Ex-convicts are not considered a suspect class. Geiger, *supra* note 2, at 1191–92.
41. *Wright*, 142 P.3d at 276 n.9.

years.[42]

The Hawaii statute was enacted to protect persons with conviction records by increasing their right to privacy and opportunities for employment.[43] The law permits employers to inquire into conviction records if there is a rational relationship to the job.[44] Whether the rational relationship standard amounts to a business necessity as that standard pertains under federal law is an important question, one that the Hawaii Supreme Court did not squarely answer.[45] However, a report to the 2003 legislature by a working group within the Hawaii Criminal Justice Data Center and Attorney General's office interpreted the "rational relationship" standard in the following way:

> The Hawaii Civil Rights Commission (HCRC) investigates complaints of employment discrimination arising from an employer's hiring decision based on the rational relationship of an applicant's conviction to the job. In investigations of such complaints, an employer is required to show a rational relationship between the conviction and the duties and responsibilities of the position. Although no administrative rules or guidelines have been adopted by the HCRC to set forth when a conviction is "rationally related" to the job, *the rational relationship standard is not a difficult one to satisfy*, requiring only a showing of an understandable or rational connection between the offense and how it may affect an individual's ability to perform the job duties and functions. *Almost any conceivable relationship between the offense and the job will likely satisfy* the rational relationship standard. The HCRC enforcement section has determined that records of conviction for crimes of violence or dishonesty meet the rational relationship standard for a broad range of jobs.
>
> The legislative history surrounding the enactment of HRS § 378-2.5 provides ample grounds for applying this standard most expansively to enable employers to protect their businesses, customers and employees. [One proponent of the legislation stated that] the "rational relationship" between the job and the conviction is the *lowest standard* you can look at. We took that standard because "rational" is *a lot lower than "substantial*." "Rational" is *a lot lower than "reasonable*."

42. *See* Sheri-Ann S.L. Lau, Recent Development, *Employment Discrimination Because of One's Arrest and Court Record in Hawai'i*, 22 U. HAW. L. REV. 709, 715 & n.36 (2000).

43. *Id.* at 735.

44. *Id.* at 710–11.

45. *Wright*, 142 P.3d at 275, 276 & n.9.

> "Rational" is *a very, very low and fair relationship* to establish.[46]

If the trial court follows the HCRC's interpretation of "rational relationship," Wright would probably not be able to succeed in proving that Home Depot acted unlawfully when it terminated him because of his prior conviction, simply because this standard is low, and thus, adverse employment actions on such grounds will be upheld unless clearly irrational. The standard appears to favor employer discretion if the offense has a rational connection to or might affect the employee's ability to perform the job. One wonders if the Working Group, in quoting proponents of the amendment to the statute, sought to reassure employers within the state that they would not be handicapped by the legislation. The HCRC's interpretation of the standard falls below a standard of business necessity.[47] In addition, Home Depot maintained that it had a relevant employment policy that resulted in Wright's discharge when the prior conviction was discovered.[48] It should be noted that the existence of an employment policy, in and of itself, may not excuse an employer from violating antidiscrimination legislation. However, if the employment policy does not directly contradict the statute, it would seem to create a business justification or legitimate business reason for the adverse employment action.

Other variables from the facts of the case should weigh in Wright's favor, including the considerable length of time that elapsed between the pre-hire conviction and the time of termination, the fact that Wright was being considered for a promotion as the event triggering the background investigation that should have been performed prior to hire, the fact that his conviction related to substance abuse rather than violence or dishonesty, and his drug-free status during the relevant period of time.[49]

Since Hawaii is not the only state that has enacted legislation limiting the ability of employers to engage in adverse employment decisions based on a prior criminal conviction, it seems instructive to compare the language of other state laws to Hawaii's "rational relationship" standard.[50] Hawaii's "rational relationship" language

46. HAWAII CRIMINAL JUSTICE DATA CENTER, DEPARTMENT OF THE ATTORNEY GENERAL, CRIMINAL HISTORY RECORD CHECKS REPORT TO THE 2003 LEGISLATURE 4–5 (2002) (emphasis added).

47. *See id.*

48. *Wright*, 142 P.3d at 268.

49. *See id.*

50. Nine states prohibit discrimination on the basis of an arrest record that did not lead to a conviction. *See* Debbie A. Mukamel & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1504 (2003). Kansas protects *employers* from liability

does not appear to be as difficult for employers to meet as the "substantial relationship" in Wisconsin's statute or the "direct relationship exclusion" or "unreasonable risk" tests mentioned in New York's statute.[51] As one commentator noted, Hawaii may be influenced by judicial interpretation of New York's or even Minnesota's statutes.[52]

B. Wisconsin: "Substantial Relation" Test

Wisconsin passed comprehensive legislation barring employment discrimination by employers based on arrest or conviction record,[53] as well as twelve other grounds including age, race, and disability.[54] Unlike other states which have banned such discrimination by public employers only, Wisconsin's legislation extends to private employers as well as "labor organization[s], employment agenc[ies], licensing agenc[ies] or other person[s]."[55] Circumscribing adverse employment actions is not without limit, however, and employees or prospective employees whose arrest or conviction records "substantially relate to the circumstances of the particular job" may find themselves at a disadvantage when seeking to secure or maintain employment.[56]

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for employment decisions "based upon knowledge of . . . criminal history record information, provided the information . . . reasonably bears upon the . . . applicant's or employee's trustworthiness, or the safety or well-being of the employer's employees or customers." KAN. STAT. ANN. § 22-4710(f) (2006).

51. *See infra* Parts III.B, III.D. *But see* Lau, *supra* note 42, at 728 (concluding that the New York standard of direct relationship also implies a low standard like that in Hawaii).

52. *See* Lau, *supra* note 42, at 728–29 (noting that New York refers to eight factors that employers should weigh regarding an applicant's conviction record when using the direct relationship exclusion, and also that New York courts consider rehabilitation).

53. WIS. STAT. § 111.321 (2003) ("Subject to ss. 111.33 to 111.36, no employer . . . may engage in any act of employment discrimination as specified in s. 111.322 against any individual on the basis of . . . arrest record, [or] conviction record . . . .").

54. *See id.*; Gerlach, *supra* note 7, at 986.

55. § 111.321 (including among protected characteristics "age, race, creed, color, disability, marital status, sex, national origin, ancestry, arrest record, conviction record, membership in the national guard, state defense force" and even the "use or nonuse of lawful products off the employer's premises during nonworking hours").

56. WIS. STAT. § 111.335(1)(b)–(c) (2003) ("Notwithstanding s. 111.322, it is not employment discrimination because of arrest record to refuse to employ . . . or to suspend from employment . . . , any individual who is subject to a pending criminal charge if the circumstances of the charge substantially relate to the circumstances of the particular job . . . . Notwithstanding s. 111.322, it is not employment discrimination because of conviction record to refuse to employ . . .

1. Pre-Hire Felony Drug Conviction Is Not "Substantially Related" to Non-Dangerous Employment

In *Wal-Mart Stores, Inc. v. Labor & Industry Review Commission*, the Court of Appeals of Wisconsin relied on this legislation in ordering the reinstatement of an employee who had been fired from Wal-Mart.[57] Before being hired, the employee had been charged but not yet convicted of three felony drug counts related to the seizure of one thousand grams of marijuana on her property.[58] When Wal-Mart learned of these charges four months after her hire, it suspended the employee.[59] Three months after the suspension, the employee pled guilty to misdemeanor possession of marijuana, shortly after which she was fired retroactive to the date of her suspension.[60]

Because Wal-Mart stipulated that the suspension and discharge were based on the arrest and conviction, the only issue for the court to resolve was whether the arrest and conviction were "substantially relate[d] to the circumstances" of her job.[61] The court concluded that there was no substantial relationship.[62] Although the employee sometimes worked in proximity to dangerous conditions, she did not work with dangerous tools or perform dangerous tasks.[63] The court agreed with the reasoning of the Labor and Industry Review Commission ("LIRC"):[64] "To find [a substantial relationship in this case] would be to conclude that individuals with drug-related arrests or conviction records can be legally barred from employment in virtually any industry, warehouse, or agricultural setting . . . ."[65] Given the goal of the statute of "assuring equal employment opportunities for all persons by eliminating certain discriminatory practices,"[66] such a result would be absurd and contrary to the public policy favoring rehabilitation of people who have been arrested or

, or to . . . terminate from employment . . . , any individual who: (1) Has been convicted of any felony, misdemeanor or other offense the circumstances of which substantially relate to the circumstances of the particular job . . . .").

57. No. 97–2690, 1998 WL 286332 (Wis. Ct. App. June 4, 1998).

58. *Id.* at *1.

59. *Id.*

60. *Id.*

61. *Id.* at *1–2.

62. *Id.* at *3.

63. *Id.* at *1–2.

64. *Id.* at *1, *3. The LIRC is the body charged with administering the Wisconsin legislation. *See* Labor & Indus. Review Comm'n, LIRC's Program Responsibilities, http://www.dwd.state.wi.us/lirc/lrc_about.htm#Program (last visited Oct. 2, 2007).

65. *Wal-Mart*, 1998 WL 286332, at *2.

66. Byers v. Labor & Indus. Review Comm'n, 561 N.W.2d 678, 681 (Wis. 1997).

convicted of crimes.[67] Wal-Mart argued that forcing the company to employ an individual who pled guilty to a drug violation during her employment ran counter to its "zero-tolerance" drug policy.[68] However, the court pointed out that nothing in the Wisconsin Act prohibits the discharge of an employee for violation of an employer's drug use policies during the period of employment.[69] Here, however, there was no evidence of drug use *during* the period of employment.[70]

2. Isolated Eight-Year-Old Conviction for Conduct Recklessly (But Unintentionally) Causing Harm to Child Was Not "Substantially Related" to Position of School Boiler Room Attendant

Another decision favoring the employee can be found in *Milwaukee Board of School Directors v. Labor & Industry Review Commission*.[71] In 1988, Mark Moore was involved in an argument with his girlfriend, in which he threw a pan of hot grease at her.[72] Although it missed his girlfriend, it hit her twenty-month-old daughter, causing injury that required extensive surgery and skin grafts.[73] He was convicted of "injury by conduct regardless of life."[74] Shortly thereafter, Moore was hired as a Boiler Room Attendant Trainee in the Milwaukee Public Schools ("MPS") system.[75] During his term of employment, the school discovered his criminal conviction, which had not been disclosed on his application, and it

67. *See* County of Milwaukee v. Labor & Indus. Review Comm'n, 407 N.W.2d 908, 914–15 (Wis. 1987) ("On the one hand, society has an interest in rehabilitating one who has been convicted of crime and protecting him or her from being discriminated against in the area of employment. Employment is an integral part of the rehabilitation process."). The court in *Milwaukee v. LIRC* also did not neglect to mention the countervailing interest:

> On the other hand, society has an interest in protecting its citizens. There is a concern that individuals, and the community at large, not bear an unreasonable risk that a convicted person, being placed in an employment situation offering temptations or opportunities for criminal activity similar to those present in the crimes for which he had been previously convicted, will commit another similar crime. This concern is legitimate since it is necessarily based on the well-documented phenomenon of recidivism.

Id. at 915.

68. *Wal-Mart*, 1998 WL 286332, at *3.

69. *Id.*

70. *Id.*

71. No. 00-1956, 2001 WL 641791 (Wis. Ct. App. June 12, 2001).

72. *Id.* at *1.

73. *Id.*

74. *Id.*

75. *Id.*

fired him for failure to disclose.[76] This discharge was not at issue in the case. However, eight years after the conviction, Moore reapplied for the Boiler Room Attendant position, this time disclosing the conviction.[77] His application was rejected "[b]ased on the violent nature of [the] conviction and the fact that [the] victim of [the] offense was a small child, the nature of the position for which [he] applied, and the nature of [the school's] business (public education)."[78] The Wisconsin Court of Appeals upheld the determination of the LIRC that the school board unlawfully discriminated against Moore because the conviction did not substantially relate to the position of Boiler Room Attendant.[79] Although the court found that Moore would have sporadic contact with children, it found that "such sporadic contact was 'not a circumstance shown to foster criminal conduct on his part.'"[80]

The court and the LIRC may have been influenced by the length of time that had elapsed since the events giving rise to the conviction—at least eight years. Moreover, one could reasonably infer from the facts that Moore's conduct may have arisen at home in the heat of passion. Absent other evidence of a propensity for violence, the likelihood that Moore would be aroused to such a passionate outburst at work seems remote. One can certainly sympathize with the concern of the school board (not to mention students' parents) for the safety of the students. However, the Wisconsin statute mandates a balancing of interests: rehabilitation on the one side, and protecting citizens (including children) on the other.[81] It does not mandate elevating the safety of citizens (even that of children) to the status of an imperative that must be achieved at all costs. Moreover, the proper analysis involves a comparison of the risk that the person with the criminal conviction poses in a particular job to the risk that he would be likely to pose without that job. Declining to hire someone with a criminal record does not eliminate the risk that that person poses to society; rather, it merely shifts the risk elsewhere.

C. Pennsylvania: "Relates To" Test

Under Pennsylvania's Criminal History Record Information Act, employers may consider "criminal history record information," including felony and misdemeanor conviction records, only to the

76. *Id.*
77. *Id.* at *1–2.
78. *Id.* at *2.
79. *Id.* at *8.
80. *Id.* at *7 (quoting the LIRC's written decision).
81. *Id.* at *6.

extent that it "relate[s] to" the applicant's suitability for the particular position in question.[82] However, employers may not consider a prior arrest in making the hiring decision.[83]

Employees should be aware of several significant caveats. First, plaintiffs will be unable to rely on the statute's protections if they voluntarily provide information in the employment application. Information provided voluntarily is simply not included in the definition of "criminal history record information."[84] Thus, in *Foxworth v. Pennsylvania State Police*, twenty-six-year-old Roderick Foxworth was denied employment with the Pennsylvania State Police after candidly providing information about a theft he committed when he was eighteen.[85] Although his criminal record had been expunged under a program for first-time offenders, the court held that he was not entitled to relief because the adverse employment action was based on the underlying criminal conduct, and not on his criminal record per se.[86] While the state police may

82. 18 PA. CONS. STAT. ANN. § 9125 (West 2000) ("(a) . . . Whenever an employer is in receipt of information which is part of an employment applicant's criminal history record information file, it may use that information for the purpose of deciding whether or not to hire the applicant, only in accordance with this section. (b) . . . Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied. (c) . . . The employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information.").

83. *See id.* § 9124(b)(1) (stating that "[r]ecords of arrest if there is no conviction" may not be considered by state licensing agencies in determining eligibility for a license, certificate, registration, or permit); Foxworth v. Pa. State Police, 402 F. Supp. 2d 523, 545 n.21 (E.D. Pa. 2005) ("[U]nder section 9125, employers may consider only a prior conviction and not a prior arrest."); Pokalsky v. Se. Pa. Transp. Auth., No. Civ. 02-323, 2002 WL 1998175, at *5 (E.D. Pa. Aug. 28, 2002) ("[I]t is well established that employers may consider only a prior conviction and not a prior arrest."); Tilson v. Sch. Dist. of Phila., Civ. A. No. 89-1923, 1990 WL 98932, at *4 (E.D. Pa. July 13, 1990) ("Pennsylvania law now permits consideration of job-related convictions only. Employers were formerly allowed to consider arrest records of prospective employees, but the word 'arrest' was removed by statutory amendment in 1979 . . . .") (citations omitted); *cf.* 18 PA. CONS. STAT. ANN. § 9121(b)(2) (West 2000) ("Before a . . . police department disseminates criminal history record information to an individual or noncriminal justice agency, it shall extract from the record all notations of arrests . . . where: (i) three years have elapsed from the date of arrest; (ii) no conviction has occurred; and (iii) no proceedings are pending seeking a conviction.").

84. Foxworth v. Pa. State Police, No. Civ. A. 03CV6795, 2005 WL 3470601, at *2 (E.D. Pa. Dec. 19, 2005).

85. *Foxworth*, 402 F. Supp. 2d at 527–28.

86. *Id.* at 545 n.21.

have legitimate reasons for declining to hire those with criminal histories, the *Foxworth* decision suggests that if Foxworth had not been truthful on his application, he might well have been hired for the position. This case sends the message to those with expunged criminal histories that honesty may be an impediment to employment, a perverse message to be sending to those whom society seeks to rehabilitate.

Second, despite the language of the statute specifically stating that the Criminal History Record Information Act "appl[ies] . . . to any agency of the Commonwealth or its political subdivisions which collects, maintains, disseminates or receives criminal history record information,"[87] at least one court has held that the Commonwealth of Pennsylvania may nevertheless raise the defense of sovereign immunity.[88] In *Poliskiewicz v. East Stroudsburg University*, a police officer of East Stroudsburg University was discharged after being involved in a bar incident.[89] Although the charges for disorderly conduct and public drunkenness were dismissed, the University declined to reinstate the officer.[90] However, the complaint was dismissed based not on the relation between the conduct and the position, but on grounds of sovereign immunity.[91] Thus, the Commonwealth may apparently avoid the restrictions of the statute at its whim by simply claiming sovereign immunity.

Third, even where the conviction is decades-old, the statute may not protect the applicant. In *El v. Southeastern Pennsylvania Transportation Authority*, a paratransit driver-trainee was terminated solely on the basis of a forty-year-old conviction for his role in a gang-related homicide.[92] In denying the plaintiff's claims and holding that the plaintiff's record was related to the position in question,[93] the court noted that significant evidence had been proffered "of the greatly increased risk that former convicts will again engage in criminal conduct."[94] This decision was upheld on

87. 18 PA. CONS. STAT. ANN. § 9103 (West 2000).

88. McNichols v. Dep't of Transp., 804 A.2d 1264, 1267 (Pa. Commw. Ct. 2002) ("Wrongful discharge . . . is not one of the enumerated exceptions [to sovereign immunity]."); Poliskiewicz v. E. Stroudsburg Univ., 536 A.2d 472, 475 (Pa. Commw. Ct. 1988) (holding that sovereign immunity remains in effect unless it has been specifically waived).

89. 536 A.2d at 473.

90. *Id.*

91. *Id.*

92. 418 F. Supp. 2d 659, 663–64 (E.D. Pa. 2005), *aff'd*, 479 F.3d 232 (3d Cir. 2007).

93. *Id.* at 670.

94. *Id.* at 674. Expert testimony offered by the employer included statements that

> former prisoners are much more likely to engage in criminal conduct

appeal. In affirming, the Third Circuit expressed concern regarding the employer's policy of denying employment to any person with a "record of any felony or misdemeanor conviction for any crime of moral turpitude or of violence," regardless of how remote the conviction.[95] It noted that the employer's expert witnesses, who averred that those with a history of violent crime are more likely to commit a future violent act than those without such a history, relied heavily on data from the Department of Justice indicating "relatively high" recidivism rates for the three-year period after prisoners were released from prison.[96] The court questioned the relevance of these statistics to El, for whom there was no record of violence since his conviction forty years earlier.[97] Moreover, the court was distressed by the employer's complete inability to explain how it had developed the specific exclusionary provisions of its policy, despite depositions of eight employees including the drafter of the policy himself.[98] Nevertheless, the court held that there was no genuine issue of material fact preventing the grant of the employer's summary judgment motion because El had failed to produce any evidence that would rebut the expert witnesses' claims.[99]

Fourth, the statute provides protection only during the *hiring* stage and is not applicable to ongoing or post-employment adverse employment actions.[100] This limited coverage may account for the

> (subsequent to release) than the "typical" adult in the general population . . . . [R]eleased prisoners are approximately 31 times more likely to engage in homicide, 5–6 times more likely to engage in rape, and 10–11 times more likely to engage in assault than a randomly selected adult from the general population . . . .

Id. at 670.

95. El v. Se. Pa. Transp. Auth., 479 F.3d 232, 235, 236 (3d Cir. 2007) ("[W]e have reservations about such a policy in the abstract . . . .").

96. *Id.* at 246.

97. *Id.* ("Indeed, those data show relatively high rates of recidivism in those first three years. But what about someone who has been released from prison and violence-free for 40 years?").

98. *Id.* at 247–48 ("If the policy were developed with anything approaching the level of care that *Griggs*, *Albemarle*, and *Dothard* seem to contemplate, then we would expect that someone [in the Department] would be able to explain how it decided which crimes to place into each category, how the seven-year number was selected, and why [the employer] thought a lifetime ban was appropriate for a crime like simple assault.").

99. *Id.* at 235.

100. 18 PA. CONS. STAT. ANN. § 9125 (West 2000); *see also* Commonwealth v. D.M., 695 A.2d 770, 773 n.2 (Pa. 1997) ("[Section] 9125 forbids any employer from denying employment on the basis of an arrest not resulting in conviction.").

small number of cases decided under the Pennsylvania law.[101] If applicants volunteer criminal history information, they are not protected by the statute, as noted above. If applicants do not volunteer the information at the time of hire, and this information is discovered post-hire and used as a basis for termination, the statute's protections do not apply because the adverse employment action is not being made at the time of hire. The only time the law protects applicants is when the applicant does not disclose the information voluntarily, but the employer nevertheless discovers the criminal history through a record check or other means. Assuming that the employer asked for full disclosure of criminal history and the employee purposely omitted this information from the application, the employer would then have an independent reason for declining to hire the applicant: application fraud.[102] The Pennsylvania legislation clearly favors employers.

D. New York: "Direct Relationship" Test

New York enacted legislation which, like Pennsylvania's, protects applicants only at the time of hire.[103] This legislation lists eight factors that employers are to consider when making an employment determination.[104] Under the New York statute, "[n]o

101. Another possibility that has been proffered to explain the "paucity of actions under this law" is the "lack of a statutory attorneys' fee" provision. Sharon Dietrich et al., *Work Reform: The Other Side of Welfare Reform*, 9 STAN. L. & POL'Y REV. 53, 67 n.49 (1998).

102. *See* 18 PA. CONS. STAT. ANN. § 9125 (West 2000).

103. N.Y. CORRECT. LAW § 752 (McKinney 2003) (amended in 2007) ("No application for . . . employment . . . shall be denied or acted upon adversely by reason of the individual'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 individual 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 . . . employment sought or held by the individual; or (2) . . . the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."). Note, however, that New York courts have discussed Section 752 in the context of other adverse employment decisions, such as failure to promote. *E.g.*, Alston v. City of New York, 703 N.Y.S.2d 186, 187 (App. Div. 2000) (noting in dicta that the plaintiff's "mail fraud conviction, which involved [plaintiff's] submission of false car service vouchers in connection with his employment as a caseworker, raises legitimate issues about his fitness for the supervisory position [in human resources administration]").

104. N.Y. CORRECT. LAW § 753(1) ("In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors: (a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons

application for . . . employment . . . shall be denied or acted upon adversely by reason of the individual's having been previously convicted[, unless] there is a direct relationship between one or more of the previous criminal offenses and the specific . . . employment sought."[105] In *City of New York v. New York City Civil Service Commission*, the Appellate Division declined to reverse a reinstatement determination, where the employee to be reinstated as a watershed maintainer had a record of two felony convictions for attempted robbery and sexual abuse, and two misdemeanor convictions for criminal possession of a weapon and theft of transportation services.[106] The court noted that reference letters had been submitted on the employee's behalf "attesting to his work ability and that he is a responsible and hard working employee" and that a period of his employment had been "without disciplinary problems."[107] Because the work was to be performed under supervision and did not involve dealing with the public, multiple felony and misdemeanor convictions did not directly relate to the employment.[108] Where the employer is a public agency, the statute in a sense creates a safe harbor in that, when the agency considers all eight factors, the court will not reweigh the factors and the agency's employment decision will stand.[109]

Considering the myriad combinations of different types of felony and misdemeanor convictions, and the equally variable job requirements of the positions for which ex-offenders could conceivably apply, one quickly realizes that application of the "direct relationship" test will be a fact-specific inquiry, the answer to which may not always be readily apparent. On the other hand, certain conviction/position combinations make for facile resolution. In *Rosa*

previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person. (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 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.").

105. *Id.* § 752.

106. 817 N.Y.S.2d 254, 255 (App. Div. 2006).

107. *Id.*

108. *Id.* at 256.

109. Gallo v. Office of Mental Retardation & Developmental Disabilities, 830 N.Y.S.2d 796, 797 (App. Div. 2007).

v. City University of New York, a professor of business law and business ethics was discharged after he was convicted of stealing money from a client.[110] Although the professor's claim was dismissed as untimely, the court noted that in any event a "direct relationship" existed between the criminal offense (involving unethical behavior) and the teaching of ethics, preventing a claim under the New York antidiscrimination law.[111]

E. California, Connecticut, the District of Columbia, Louisiana, Minnesota, Maine, and Massachusetts

More limited legislation has been enacted in California (limiting the ability of most employers to request that job applicants disclose arrest records that did not result in conviction),[112] Connecticut (applying discrimination prohibition to state employers,[113] but exempting law enforcement agencies),[114] Washington, D.C. (restricting the ability of employers to pass along the cost of background checks to applicants),[115] Illinois (limiting the ability of employers to make adverse employment decisions based on criminal records that have been expunged or sealed),[116] Louisiana (protecting

110. 789 N.Y.S.2d 4, 5 (App. Div. 2004).

111. *Id.* at 5–6.

112. CAL. LAB. CODE § 432.7(a) (Deering 2006) ("No employer, whether . . . public . . . or private . . . shall ask an applicant . . . to disclose . . . information concerning an arrest or detention that did not result in conviction, . . . nor shall any employer . . . utilize, as a factor in determining any condition of employment including hiring, promotion, [or] termination . . . any record of arrest or detention that did not result in conviction . . . .").

113. CONN. GEN. STAT. § 46a-80 (2007) ("(a) Except as provided in subsection (b) of this section and subsection (b) of section 46a–81, . . . a person shall not be disqualified from employment by the state of Connecticut . . . solely because of a prior conviction of a crime. (b) A person may be denied employment by the state . . . by reason of the prior conviction . . . if after considering (1) the nature of the crime and its relationship to the job . . . ; (2) . . . the degree of rehabilitation . . . ; and (3) the time elapsed since the conviction . . . , the state . . . determines that the applicant is not suitable for the position of employment sought . . . .").

114. CONN. GEN. STAT. § 46a-81(b) (2007) ("[Section 46a-80] shall not be applicable to any law enforcement agency . . . .").

115. D.C. CODE § 2-1402.66 (2001) ("It shall be an unlawful practice . . . for any person to require the production of any arrest record . . . at the monetary expense of any individual to whom such record may relate. Such 'arrest records' shall contain only listings of convictions and forfeitures of collateral that have occurred within 10 years of the time at which such record is requested.").

116. 775 ILL. COMP. STAT. 5/2-103 (2006) ("(A) Unless otherwise authorized by law, it is a civil rights violation for any employer . . . to inquire into or to use the fact of an arrest or criminal history record information ordered expunged, sealed or impounded . . . as a basis to refuse to hire . . . [or as a basis to] discharge . . . . This Section does not prohibit a State agency, unit of local government or school district, or private organization from requesting or

applicants from employment discrimination in occupations requiring a state license),[117] and Minnesota (restricting the ability of public employers from using prior conviction records to disqualify applicants from employment).[118] Minnesota specifically provides that, even where the conviction relates to the employment sought, the applicant may show evidence of rehabilitation so as to come within the protection of the statute.[119] Maine preserves the ability of employers to take adverse employment action based upon drug convictions, if the employer has established rules to this effect.[120] Massachusetts restricts employer inquiries concerning arrests without convictions, convictions for misdemeanors that are minor,

utilizing sealed felony conviction information obtained from the Department of State Police . . . or under other State or federal laws or regulations that require criminal background checks in evaluating the qualifications and character of an employee or a prospective employee. (B) The prohibition against the use of the fact of an arrest contained in this Section shall not be construed to prohibit an employer . . . from obtaining or using other information which indicates that a person actually engaged in the conduct for which he or she was arrested.").

117. LA. REV. STAT. ANN. § 37:2950 (2007) ("A. [A] person shall not be . . . held ineligible to . . . engage in any . . . occupation . . . for which a license . . . is required to be issued by the state of Louisiana . . . solely because of a prior criminal record, except in cases in which the applicant has been convicted of a felony, and such conviction directly relates to the position of employment sought . . . . D. (1)(a) This Section shall not be applicable to: (i) Any law enforcement agency. . . . (ix) The Louisiana State Bar Association. . . . (xiv) The Louisiana State Board of Elementary and Secondary Education. (b) Nothing herein shall be construed to preclude the agency, in its discretion, from adopting the policy set forth in this Section. (2) This Section shall not be applicable to the office of alcohol and tobacco control of the Department of Revenue.").

118. MINN. STAT. § 364.03 (2006) ("Notwithstanding any other provision of law to the contrary, no person shall be disqualified from public employment . . . solely or in part because of a prior conviction of a crime . . . , unless the crime . . . for which convicted directly relate[s] to the position of employment sought . . . . In determining if a conviction directly relates to the position . . . , the hiring . . . authority shall consider: (a) The nature and seriousness of the crime . . . ; (b) The relationship of the crime or crimes to the purposes of regulating the position of public employment sought . . . ; (c) The relationship of the crime or crimes to the ability . . . required to perform the duties . . . of the position . . . .").

119. *Id.* ("A person who has been convicted of a crime . . . which directly relate[s] to the public employment sought . . . shall not be disqualified from the employment . . . if the person can show competent evidence of sufficient rehabilitation . . . .").

120. ME. REV. STAT. ANN. tit. 26, § 681(7) (2007) ("This subchapter does not prevent an employer from establishing rules related to the possession or use of substances of abuse by employees, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules, except when a substance abuse test is required, requested or suggested by the employer or used as the basis for any disciplinary action.").

and convictions for any misdemeanor five or more years old.[121]

F. The Impact of After-Acquired Evidence of Criminal Convictions upon Remedies for Employment Discrimination—States Follow the United States Supreme Court's Rule in McKennon v. Nashville Banner Publishing Co.[122]

The discussion has, to this point, concerned adverse employment actions motivated by the criminal history of an employee or applicant. In some cases, however, an employer may discharge or decline to hire a person for a reason that is not permitted by law, and at the time of the adverse employment action, be unaware of the person's criminal history or other malfeasance, such as falsification of company documents, that would have provided an independent legitimate reason for the adverse employment action. The employee or applicant may thereafter allege that he has been discriminated against on the basis of a protected characteristic, such as race or national origin, or because of a criminal record which state law protects, or in violation of public policy. If the employer later discovers—for example, during discovery in a suit for race or national origin discrimination—that the person has a criminal record which would have provided a legitimate basis for the discharge, the employer may attempt to use the after-acquired evidence of criminal conduct to justify the employer's actions. Following the Supreme Court's rule in *McKennon v. Nashville Banner Publishing Co.*, state courts in Wisconsin, Minnesota, and Oklahoma have held that such after-acquired evidence of a legitimate basis for the employer's action cannot be used as a post-hoc justification to prevent liability for an unlawful act.[123] Nevertheless, these courts have confirmed that such evidence generally will affect the remedies available. The cases discussed in Subsections 1–3 illustrate how state laws prohibiting discrimination on the basis of a criminal record provide some

121. MASS. GEN. LAWS ch. 151B, § 4(9) (2006); *see also* Lau, *supra* note 42, at 725–26 (comparing the Massachusetts statute to that in Hawaii and noting that both prohibit inquiries into arrests and place a time frame upon relevance of prior convictions).

122. 513 U.S. 352 (1995).

123. *Id.* at 358 ("It would not accord with this scheme if after-acquired evidence of wrongdoing that would have resulted in termination operates, in every instance, to bar all relief for an earlier violation of the [Age Discrimination in Employment] Act."); *see* Meads v. Best Oil Co., 725 N.W.2d 538, 546 (Minn. Ct. App. 2006); Silver v. CPC-Sherwood Manor, Inc., 151 P.3d 127, 131 (Okla. 2006); McKnight v. Silver Spring Health & Rehab., ERD Case No. 199903556 (Wis. Labor & Indus. Review Comm'n Feb. 5, 2002), *available at* http://www.dwd.state.wi.us/lirc/erdecsns/459.htm.

protection against improper motivation for an employment decision. The cases caution, however, that reinstatement will not be mandated where the employee would not have been hired or would have been terminated anyway for an alternative lawful reason.

1. Wisconsin: Refusal to Hire on a Permanent Basis Because of Record of Conviction Violates a State Statute, but False Information on Application Affects the Remedy Based on the After-Acquired Evidence Rule

A Wisconsin case, initially decided by an administrative law judge and later appealed to the Labor and Industrial Relations Commission, further illustrates the breadth of protection afforded by the Wisconsin statute prohibiting discrimination based upon arrest or conviction record.[124] *McKnight* is not a traditional after-acquired evidence case because the employer did not discover the offense or conviction *after* it made an adverse employment decision. Rather the employer's decision was in fact made based on the evidence of a criminal record.[125] However, because the complainant, McKnight, failed to disclose her offense at the time of application, she violated company policy, and the employer's later discovery of this falsification of the application provided an independent non-discriminatory basis for her discharge.[126]

McKnight applied to work as a certified nursing assistant ("CNA") at Silver Spring Health and Rehabilitation Center.[127] She was hired temporarily, but her background check revealed a number of arrests for charges including retail theft, and a misdemeanor conviction for recklessly endangering safety by use of a dangerous weapon.[128] The complainant admitted that she and the father of her child each had a knife in the midst of a domestic dispute, and that she had been convicted of disorderly conduct—a non-criminal conviction—and fined as a result.[129] The LIRC found that McKnight was not terminated because of her arrest record, but rather she was discriminated against because of her conviction record in violation of the Wisconsin statute.[130] However, the evidence also showed that McKnight falsified company documents by indicating that she did not have a conviction.[131] Under the respondent's disciplinary policy, the employer would have terminated her employment anyway upon

124. *McKnight*, ERD Case No. 199903556.
125. *Id.* at *3.
126. *Id.* at *4.
127. *Id.* at *1.
128. *Id.* at *2.
129. *Id.* at *3–4.
130. *Id.* at *4.
131. *Id.* at *3–4.

discovery of that fact.[132] In light of these findings of fact and conclusions of law—in particular, that the respondent discriminated against McKnight based on her noncriminal conviction—the LIRC ruled that the complainant was entitled to backpay from the date of termination until the date of the hearing when knowledge of her falsification of documents would have resulted in her termination anyway.[133] The LIRC specifically followed the after-acquired evidence rule from *McKennon* when finding the employer liable for a violation of the state statute against discrimination, but curtailed the damages as of the date of discovery of the other evidence that would have resulted in the complainant's termination.[134] The LIRC found that the evidence failed to establish that McKnight's disorderly conduct was "substantially related" to her position as a CNA; thus, her offense would not have barred her from the job, yet her failure to report the offense on required company forms did.[135]

2. Minnesota: Conviction Discovered During Lawsuit Alleging Discriminatory Failure to Hire

In another more typical case involving after-acquired evidence of a criminal conviction, *Meads v. Best Oil Co*., an African-American applicant for a cashier position at a convenience store filed a complaint of race discrimination when he was denied employment in favor of two Caucasian applicants.[136] The City of Duluth Human Rights Office found probable cause that an unfair discriminatory employment practice occurred and filed suit.[137] The court of appeals reversed and remanded a summary judgment decision in favor of the employer, finding that "a dispute of material fact [remained as to] whether the employer's refusal to hire was based on a legitimate, nondiscriminatory reason or whether that reason was a pretext for racial discrimination."[138]

Mead's claim of employment discrimination survived the employer's after-acquired discovery that Mead had a twelve-year-old conviction for aiding in a burglary.[139] The Minnesota Court of Appeals noted that discovery of improperly withheld information on a job application may limit remedies, but does not bar the claim pursuant to the after-acquired evidence doctrine enunciated in

132. *Id.* at *4.
133. *Id.* at *5.
134. *Id.* at *11–12.
135. *Id.* at *4.
136. 725 N.W.2d 538, 540 (Minn. Ct. App. 2006).
137. *Id.* at 541.
138. *Id.* at 539 (syllabus).
139. *Id.* at 546.

McKennon.[140] The court reasoned that the conviction was old and that there was "no evidence of a clear and present impact on the employee's ability to do the work."[141] In its discussion of the case, the Minnesota court opined that, in addition to the twelve-year period that had passed since the conviction, the appellant's actual role in aiding the burglary was not clear.[142] While an employer may "establish reasonable rules regarding the criminal history of its employees who handle money," for example, that they be "bondable," state law encourages employers to provide job opportunities to those with a criminal record as such opportunities are "essential to rehabilitation . . . and the resumption of the responsibilities of citizenship."[143]

The court noted that it generally construes the state antidiscrimination law in accordance with federal law.[144] The court specifically did not bar remedies such as backpay that would run from the date of the unlawful discrimination until the date when the after-acquired evidence was discovered, in the event of a finding of liability for discrimination.[145]

3. Oklahoma: Conviction Discovered After Termination

In a case involving alleged wrongful discharge in violation of public policy, *Silver v. CPC-Sherwood Manor, Inc.*, the Supreme Court of Oklahoma held that after-acquired evidence of a prior criminal conviction limits damages rather than bars liability.[146] The discharged employee, Silver, alleged that he was wrongfully terminated after he left work in the midst of his shift because he was suffering from diarrhea and vomiting, and that this termination violated State Department of Health rules.[147] The trial court granted the defendant nursing home's motion to dismiss, and Silver appealed.[148] On the first appeal, the Supreme Court of Oklahoma granted certiorari, found that Silver had a claim, and thus reversed the trial court's judgment.[149] On remand, the district court granted

140. *Id.* at 544–45 (discussing McKennon v. Nashville Banner Publ'g. Co., 513 U.S. 352, 352 (1995)); *see also supra* notes 122–23 and accompanying text (discussing *McKennon*).

141. *Meads*, 725 N.W.2d at 545.

142. *Id.* at 546.

143. *Id.* (citing Minnesota Criminal Rehabilitation Act, MINN. STAT. § 364.01 (2004)).

144. *Meads*, 725 N.W.2d at 545–46.

145. *Id.* at 546.

146. 2006 OK 97, ¶ 1, 151 P.3d 127, 128 (*Silver II*).

147. *Id.* ¶ 3, 151 P.3d at 128.

148. *Id.*, 151 P.3d at 128.

149. *Id.*, 151 P.3d at 128. The earlier decision of the Oklahoma Supreme

summary judgment to the defendant and the court of civil appeals affirmed, holding that Silver's felony conviction for robbery and aiding and abetting a murder (accessory before the fact), discovered after his termination, was a complete bar to relief.[150]

The Oklahoma Supreme Court again granted certiorari and held that in an action for wrongful discharge in violation of public policy, when an employee is not statutorily disqualified from employment, the after-acquired evidence doctrine limits compensatory damages but does not bar all recovery.[151] The court noted that the employment application asked about criminal convictions within the past ten years.[152] While Silver did not answer this question, he could have truthfully responded "no" since his conviction was more than ten years old at the time he applied to work for the defendant.[153] The nursing home had a statutory duty to complete a criminal arrest check, but the record did not reveal whether they had done so after hiring Silver on a temporary basis. If they had discovered his conviction, the nursing home would have been obligated to discharge him.[154] The Oklahoma court remanded the case for further proceedings to ascertain the relevant facts.[155] Once again, the employer's after-acquired discovery of evidence should bar Silver's reinstatement and curtail backpay as of the date of discovery.

4. Analysis of After-Acquired Evidence of Criminal Convictions

The state courts' treatment of after-acquired evidence of criminal convictions in employment discrimination and wrongful termination cases correctly follows the United States Supreme Court's decision in *McKennon*.[156] As the Minnesota court noted in the *Meads* case, it is appropriate to look at the interpretation of federal antidiscrimination legislation when interpreting parallel state laws.[157] After-acquired evidence cannot belatedly create a

Court appears at Silver v. CPC-Sherwood Manor, Inc., 2004 OK 1, 84 P.3d 728 (*Silver I*).

150. *Silver II*, 2006 OK 97, ¶ 5, 151 P.3d at 129.

151. *Id.* ¶ 15, 151 P.3d at 131.

152. *Id.* ¶ 17, 151 P.3d at 131.

153. *Id.*, 151 P.3d at 131.

154. *Id.*, 151 P.3d at 131.

155. *Id.* ¶ 18, 151 P.3d at 132.

156. 513 U.S. 352 (1995). It should be noted that the *McKennon* case involved after-acquired evidence of post-termination misconduct on the part of the plaintiff, rather than after-acquired evidence of prior criminal convictions. *Id.*

157. *Meads*, 725 N.W.2d 538, 545–46; *see also* Alex B. Long, "*If the Train*

legitimate justification for a pre-existing adverse employment action primarily because the employer was unaware of the evidence at the time of its action.[158] Thus, the employer's action could not have been motivated by the later-discovered information. Nonetheless, where an employer has engaged in unlawful discrimination, but later uncovers evidence of an employee's previous criminal conviction, the evidence of conviction should be considered relevant to the remedy where the employer proves by a preponderance of the evidence that the plaintiff would have been terminated (or adversely affected) anyway because of, and upon discovery of, the conviction.[159] It is clear that at times it may be legally necessary to terminate an employee because of after-acquired discovery of criminal convictions, for example, where a statutory obligation exists. This may be due to a legislatively perceived need to protect a vulnerable population, such as nursing home residents, or other disabled or youth populations.[160] State statutes regarding employer consideration of arrest and conviction records will not protect applicants and employees from compliance with other legislation.[161]

Should Jump the Track . . .": Divergent Interpretations of State and Federal Employment Discrimination Statutes, 40 GA. L. REV. 469, 556–57 (2006) (recommending that state courts adopt a "canon of construction favoring uniform construction of state and federal statutes employing identical or substantially similar language"); *supra* notes 136–45 and accompanying text (discussing *Meads*).

158. *McKennon*, 513 U.S. at 360.

159. *See* O'Day v. McDonnell Douglas Helicopter Co., 79 F.3d 756, 761 (9th Cir. 1996) (outlining defendant's burden of proving that it would have terminated the plaintiff anyway upon discovery of the damaging after-acquired evidence); *see also* Christine Neylon O'Brien, *The Law of After-Acquired Evidence in Employment Discrimination Cases: Clarification of the Employer's Burden, Remedial Guidance, and the Enigma of Post-Termination Misconduct*, 65 UMKC L. REV. 159, 161 (1996) (discussing same).

160. *See generally* Elizabeth Redden, *Criminals and Colleges in the Capital*, INSIDE HIGHER ED, Feb. 14, 2007, http://www.insidehighered.com/layout/set/print/news/2007/02/14/dc. The article discusses the national trend toward increased use of background checks in higher education when making personnel decisions. It notes that the proposed Human Rights for Ex-Offenders Amendment Act of 2007 being considered in the District of Columbia runs counter to that trend as it would limit use of a person's criminal background regarding employment, housing, and enrollment decisions at ten higher education institutions in D.C. The bill is co-sponsored by former Mayor Marion Barry, who himself served time for drug charges. University leaders have expressed concern about the bill as it reduces their flexibility in decision making and may interfere with risk management. The article notes that law enforcement, schools, and those employers offering care for children would be exempt from the bill.

161. *See generally* Geiger, *supra* note 2 (arguing that ex-offenders should be treated as a suspect class for equal protection purposes under statutes that

When one considers the potentially significant legal impact of after-acquired evidence of employee misconduct, including criminal convictions, upon a discrimination complaint, it once again raises the overall public policy question of just what misconduct or convictions should be considered relevant to employment decisions. Should pre-hire misconduct resulting in a prior criminal conviction come back to result in termination of an employee when he is gainfully employed and performing well? In the ordinary course of events, should the actual period of employment not be the most critical time for assessing an employee's performance and for determining employment actions including discipline and discharge? In many cases, prior convictions may be in the distant past and may have only a tenuous connection to the employee's ability to perform the job. In all fairness, such evidence should not serve as the basis for separation from employment absent strong public policy reasons embodied by statute or an employee's false response to a lawful inquiry.

IV. ANALYSIS OF THE CURRENT LEGAL ENVIRONMENT REGARDING ANTIDISCRIMINATION STATUTES FOR EX-OFFENDERS AND RECOMMENDATIONS

The state laws considered in this Article approach the issues differently; some provide a higher standard of protection to ex-offenders and apply in more situations than others. In addition, as will be discussed in this Section, a number of major cities have adopted ordinances to prevent employment discrimination against ex-offenders, but these ordinances primarily address public sector employees or contractors for those cities.[162] It should be noted that federal laws also impact employers' obligations to carefully evaluate employment actions toward individuals who have been arrested or convicted of criminal conduct, but again these federal laws are not specifically targeted at protecting the population of ex-offenders.[163] In the current global economy, one wonders if the use of a patchwork of state and local laws providing varying degrees of protection is the best way to balance the interests of society, ex-offenders, and employers, or whether federal legislation would be preferable. An alternative to federal legislation could be a uniform state law promulgated by the National Conference of Commissioners on Uniform State Laws. Would such a uniform law gain nearly universal acceptance like the Uniform Commercial Code? It may be

classify and disenfranchise them, including those statutes that impact employment).

162. *See infra* Part IV.B.

163. *See, e.g.*, 42 U.S.C. § 2000e-2 (2000).

difficult to achieve widespread adoption among states that have significant variations in their criminal laws and laws regarding employer liability for negligent hiring and retention.

A. Advantages of State Laws

States, recognizing the large number of citizens with criminal records and the importance of encouraging their rehabilitation and reintegration into society, have begun to address the issue through legislation.[164] Although the extent of the protection available varies from state to state, such state statutes have the potential to greatly improve upon the protections currently available under federal law. State statutes can apply to all employers, regardless of size or impact on interstate commerce. These statutes can also directly prohibit discrimination against individuals with criminal histories, making this group a protected class, rather than forcing aggrieved individuals to show a disparate impact on an already-recognized protected group. Thus, those who have a criminal record, but who are not otherwise members of a protected group, would be protected. Furthermore, allowing individuals to bring suit under a direct discrimination theory can preserve the remedies of compensatory and punitive damages (to the extent provided by statute), and may reduce the evidentiary burden on plaintiffs as compared to disparate impact cases. Given that those with criminal records may tend to have even fewer resources than other traditionally protected groups, the possibility of greater potential damages and a lower evidentiary burden may put civil actions within reach, even where a federal disparate impact claim might be beyond reach.

At the same time, the greatest benefit of state statutes prohibiting discrimination against those with criminal records is that such statutes can serve as a testing ground for achieving the optimum balance between combating unjustified discrimination and protecting society from the potentially dangerous or harmful acts of ex-offenders. It is here that discrimination against those with criminal records differs somewhat from discrimination against traditionally protected groups: for individuals with criminal records, there is a strong countervailing interest in protecting society by allowing discrimination in certain cases.

Yet, in a sense, this balancing of interests is not new at all. Existing federal statutes make exceptions to prohibitions against discrimination, allowing discrimination on the basis of age where age is a "bona fide occupational qualification reasonably necessary to the normal operation of the particular business,"[165] or on the basis

164. *See supra* Part III.

165. 29 U.S.C. § 623(f)(1) (2000).

of disability where selection criteria have "been shown to be job-related and consistent with business necessity."[166] Similarly, state statutes seeking to prevent discrimination against those with criminal records allow exceptions where the criminal conduct or conviction record bears a relationship to the position.

Whether the appropriate degree of relationship between the conviction and the position should be merely "related" (Pennsylvania), "substantial" (Wisconsin), or somewhere in between is a matter that is open for debate. What is clear is that some level of protection greater than that currently available under federal law is warranted. Nobody is perfect, after all. People who make mistakes resulting in criminal conviction should be allowed to recover from them and reintegrate into society. Is society really better off by denying employment as a bus driver to someone who had some role in a felony forty years ago? Is the state of affairs really advanced by denying employment at a home improvement store to an employee who has earned consideration for promotion, because his record is scarred by a six-year-old drug conviction?

A rational employer, when choosing between otherwise equally qualified applicants, can be expected to consistently choose the one without the criminal record over the one whose record is imperfect. Where the nature and circumstances of an individual's criminal record indicate an unacceptably high level of risk for a given position, such discrimination may be justified. At the same time, this justification must not be extended recklessly to allow discrimination at whim. Such unbridled discrimination may keep ex-offenders unemployed, reducing on-the-job risks but potentially increasing risks to society as a whole. Will an ex-offender who is unable to secure honest employment be less likely to commit a crime while unemployed, or more likely?

B. City and County Ordinances

It merits mentioning that a number of major cities have recently adopted ordinances that seek to prevent discrimination in employment among city employees.[167] The City of Boston, for

166. 42 U.S.C. § 12113(a) (2000).

167. These include Boston, Chicago, Minneapolis, San Francisco, St. Paul, Alameda County (California), Indianapolis and Marion County, the County and City of Los Angeles, Newark, and the City and County of Philadelphia. Certain traditionally sensitive job categories where ex-offenders are barred by statute, such as law enforcement and education, are exempt. The action has been lauded as moving in the right direction in that it provides opportunities for currently law-abiding ex-offenders whose offenses may have been minor and in the distant past. *See* NATIONAL EMPLOYMENT LAW PROJECT, MAJOR U.S. CITIES ADOPT NEW HIRING POLICIES REMOVING UNFAIR BARRIERS TO EMPLOYMENT OF

example, will conduct a criminal background check on applicants only after it has determined that the applicant is otherwise qualified for the position.[168] This important measure helps to ensure that applicants are not automatically removed from consideration on the basis of their criminal record. If the employee is otherwise qualified, the City may still decline to hire the applicant on the basis of her criminal record, but the decision must be made after a consideration of the following factors: (1) the seriousness of the crime, (2) the relevance of the crime, (3) the number of crimes, (4) the age of the crime, and (5) the occurrences in the life of the applicant since the crime.[169] Where an adverse employment decision is made, the applicant must be notified of the "specific reason(s)" for the rejection.[170] This requirement serves as a procedural safeguard by promoting transparency in the hiring process and facilitating monitoring of the effectiveness of the ordinance, which monitoring is required by law.[171] Extending the reach of these policies as widely as possible, the City of Boston has declared that it "will do business only with vendors [defined to include contractors as well as suppliers of goods and services] that have adopted and employ [Criminal Offender Record Information Act]-related policies, practices, and standards that are consistent with" the policies already employed by the City.[172]

San Francisco has recently adopted similar policies. In 2005, the San Francisco Board of Supervisors adopted a resolution urging the Civil Service Commission and the Department of Human Resources "to review and revise current policies and procedures . . . so that people who have been . . . convicted of criminal activity are not unreasonably denied City employment."[173] The Board further supported the elimination of questions on preliminary application forms requiring applicants to disclose all past convictions.[174] Such check-the-box requirements at the early stages of the application process were considered to potentially promote needless discrimination.[175] In response, the San Francisco Civil Service Commission issued a revised policy requiring that due consideration be given to seven factors when reviewing an applicant's criminal

PEOPLE WITH CRIMINAL RECORDS (2007), http://www.nelp.org/nwp/second_chance_labor_project/citypolicies.cfm.

168. BOSTON, MASS., MUN. CODE § 4-7.3(b) (2005).
169. *Id.* § 4-7.3(e).
170. *Id.*
171. *Id.* § 4-7.5.
172. *Id.* § 4-7.3.
173. City and County of S.F., Cal., Res. 764-05 (Oct. 11, 2005).
174. *Id.*
175. *Id.*

history information: (1) the nature and gravity of the offense, (2) the degree to which the conviction is related to the position, (3) the time elapsed since conviction, (4) the age of the applicant at the time of the conviction, (5) the frequency of convictions, (6) evidence of rehabilitation, and (7) any other mitigating circumstances.[176] A current city employee may be disciplined or terminated where that employee's criminal history record contains information that is "material to the employee's employment."[177] Moreover, a criminal background check will only be performed after the applicant has been preliminarily evaluated and deemed to have met the minimum qualifications for the position.[178]

C. Existing Federal Laws Impact Employee Rights and Employer Decisions Regarding Arrest and Conviction Records

Numerous federal statutes may restrict employers' actions with respect to criminal convictions of applicants or employees. Title VII of the Civil Rights Act of 1964 prohibits employment discrimination, including the use of arrest or conviction records in a manner that disparately impacts protected groups based on race, color, religion, sex, or national origin.[179] In essence, employers should not use such records to make employment decisions, unless the record is relevant to the individual's ability to perform the job. If an applicant or employee has an arrest or conviction record and is a member of a protected class disparately impacted by exclusion of those with a

176. S.F. CIVIL SERVICE COMM'N, DISCLOSURE AND REVIEW OF CRIMINAL HISTORY RECORDS (2006), http://www.sfgov.org/site/civil_services_page.asp?id=43695.

177. *Id.*

178. Telephone Interview with Jennifer Johnston, Chief of Policy & Admin., City & County of S.F., Cal. (Mar. 28, 2007).

179. 42 U.S.C. § 2000e-2(a) (2000); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC COMPLIANCE MANUAL, at 15-29 to -30 (2006), *available at* http://www.eeoc.gov/policy/docs/race-color.html.

> In addition to avoiding disparate treatment in rejecting persons based on conviction or arrest records, upon a showing of disparate impact, employers must be able to justify such criteria as job related [sic] and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought. A blanket exclusion of persons convicted of any crime thus would not be job-related and consistent with business necessity. Instead, the above factors must be applied to each circumstance. Generally, employers will be able to justify their decision when the conduct that was the basis of the conviction is related to the position, or if the conduct was particularly egregious.

Id. (citations omitted).

record, then the absence of such a record must meet the standard of a business necessity for the position.[180] The Age Discrimination in Employment Act ("ADEA") similarly protects applicants and employees forty years of age or more who have records of an arrest or conviction that are disparately impacted by an employment criteria relating to such records.[181] The Americans with Disabilities Act ("ADA") prohibits employment discrimination against otherwise qualified individuals with disabilities that constitute major life impairments, including rehabilitated substance abusers with records of addiction.[182] Because rehabilitated substance abusers may have arrests or criminal convictions related to possession of illegal substances or even driving under the influence, the ADA's protections also come into play for employment decisions regarding individuals who fit into this protected category. Finally, the National Labor Relations Act ("NLRA") protects applicants and employees who engage in concerted activities, such as matters related to wages, hours, working conditions, mutual aid or protection, or unionization, from discrimination by employers.[183] Clearly, Title VII, the ADEA, the ADA, the NLRA, as well as state and local laws, should be carefully considered any time that a covered employer makes an employment decision about a member of one of these protected groups who has been, or is later convicted of a crime.[184]

180. *See* DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 417 (13th ed. 2007) (discussing Title VII actions regarding the use of arrest and conviction inquiries, the EEOC's position regarding such use, and the requirement that an employer show a business necessity if disparate impact is found).

181. 29 U.S.C. § 623 (2000).

182. 42 U.S.C. § 12112(a) (2000); *see* Raytheon Co. v. Hernandez, 540 U.S. 44 (2003) (involving employer Raytheon's refusal to rehire former employee who had tested positive for cocaine prior to his voluntary resignation and the legal implications of no-rehire policies); Christine Neylon O'Brien, *Facially Neutral No-Rehire Rules and the Americans with Disabilities Act*, 22 HOFSTRA LAB. & EMP. L.J. 114, 122–23 (2004) (discussing *Raytheon*); Christine Neylon O'Brien & Jonathan J. Darrow, *The Question Remains after* Raytheon Co. v. Hernandez*: Whether No-Rehire Rules Disparately Impact Alcoholics and Former Drug Abusers*, 7 U. PA. J. LAB. & EMP. L. 157 (2004) (discussing *Raytheon*); James R. Todd, *"It's Not My Problem": How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-Convicts*, 36 ARIZ. ST. L.J. 725, 729–30 (2004) (noting that although "the majority of the states place few restrictions on the use of criminal records to exclude prospective applicants from employment[,] . . . some states, namely Wisconsin, New York, Illinois, Pennsylvania and Hawaii, explicitly bar employers from . . . [such] discrimination").

183. 29 U.S.C. §§ 157, 158(a) (2000).

184. It should be noted that varying minimum numbers of employees (from fifteen to twenty) are required under the federal anti-discrimination statutes in

D. New Federal Legislation Recommended and Proposed

A federal statute mandating nondiscrimination for those with a criminal record would provide uniformity, simplifying matters for employers that employ across state lines. Moreover, there is a greater likelihood that ex-offenders would be aware of the protections of one federal law.[185] A federal law regarding nondiscrimination in employment based upon criminal records of ex-offenders need not be as broadly configured as the proposed Second Chance Act, which has stalled in Congress for several terms but was recently reintroduced by Congresswoman Stephanie Tubbs Jones and Congressmen Danny Davis and Chris Cannon.[186] That proposed bill would fund proactive prisoner reentry programs covering many more aspects than employment, e.g., areas such as housing, health, and mentoring.[187] The most recent bill makes no provision for anti-

order for an employer to be considered a "covered entity" and required to comply with the federal statutes; the employee thresholds for state antidiscrimination laws are generally lower. *See* Stephanie M. Greene & Christine Neylon O'Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L.J. 781, 782 n.3 (2003) (discussing employee thresholds under federal statutes); Stephanie Greene & Christine Neylon O'Brien, *Who Counts?: The United States Supreme Court Cites "Control" as the Key to Distinguishing Employers from Employees Under Federal Employment Antidiscrimination Laws*, 2003 COL. BUS. L. REV. 761, 762 n.2 (discussing same); Lau, *supra* note 42, at 722–28 (comparing Title VII, which protects those with criminal records when they are also members of a protected minority group, to state laws that protect everyone with arrest or conviction records and do not provide exclusions based on the number of employees working for an employer).

185. *But see* Todd, *supra* note 183, at 761–62 (expressing reservations about ex-convicts being added as a protected class under Title VII because of the variations among states regarding liability for negligent hiring).

186. H.R. 1593, 110th Cong. (2007); Press Release, Congresswoman Stephanie Tubbs Jones, Congresswoman Tubbs Jones Reintroduces Second Chance Act of 2007 (Mar. 23, 2007), *available at* http://tubbsjones.house.gov/index.cfm?sectionid=24&parentid=23&sectiontree=23,24&itemid=91.

187. H.R. 1593 § 111(b)(4); *see also* Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623, 681–82 (2006) (discussing the Second Chance Act of 2005 and noting that it would call for the United States Attorney General and others to form an inter-agency task force to study federal and other barriers to successful reentry, including employment-related barriers). In the House bill introducing the Second Chance Act of 2005 on April 19, 2005, President Bush's 2004 State of the Union Address is quoted: "We know from long experience that if [former prisoners] can't find work . . . they are much more likely to commit crimes and return to prison . . . . America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life." H.R. 1704, 109th Cong. § 2(4)

discrimination in employment for ex-offenders.[188] The bill does reference promoting the employment of people released from prison, jail, or juvenile facilities, and facilitating the creation of job opportunities, including transitional and time-limited subsidized work experiences, by providing financial incentives, connecting offenders to employment, and "address[ing] obstacles to employment that are not directly connected to the offense committed and the risk that the offender presents to the community."[189]

A narrower way to address employment discrimination against those with criminal records would be to amend Title VII of the Civil Rights Act to include those with criminal records as a protected class.[190] This would make it an unlawful employment practice to discriminate against such individuals absent a showing that a conviction record is at least rationally related to the position, if not a business necessity. Title VII seems the logical place to address this problem. More minorities than non-minorities have criminal records, and the matter is of concern to the EEOC, which has instructed on the discriminatory use of arrest and criminal records

(2005) (quoting President George W. Bush, State of the Union Address (Jan. 20, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html)). According to a summary of The Reducing Recidivism and Second Chance Act of 2007, introduced March 29, 2007 by Senators Biden, Specter, Brownback, and Leahy, the purpose of the Act is "[to provide] competitive grants to promote innovative programs to test out a variety of methods aimed at reducing recidivism rates." Justice Fellowship, OnePager: The Reducing Recidivism and Second Chance Act of 2007 (2007), http://www.justicefellowship.org/media/justicefellowship/Docs/SCAOnePager_new_070329.doc. The budgetary authorization recommended is $181 million annually. *Id.* The bill's proponents note that offenders re-enter society with little or no job skills, sixty percent are unemployed, and two-thirds of released prisoners are expected to be rearrested for felonies or serious misdemeanors within three years of release. *Id.* Employment discrimination against ex-offenders is not mentioned in the summary. *See also* H.R. REP. No. 110-140, at 1 (2007) (discussing the purpose of the Second Chance Act).

188. Recidivism Reduction and Second Chance Act of 2007, S. 1060, 110th Cong. (2007). The Senate and House bills are similar. The Senate's bill was introduced on March 29, 2007. *Id.* The House bill was introduced on March 20, 2007. H.R. 1593.

189. S. 1060 § 101 (a)(4).

190. 42 U.S.C. § 2000e-2(a), (b), (c)(1)–(2), & (d) (2000) could be amended to add "or criminal record" to the list of protected status groups. In addition, qualifying language could be added to establish a standard of business justification or necessity regarding consideration of the relevance of a criminal conviction record. Arrest records should not be the basis for exclusion or discrimination. Special care would have to be taken to integrate this proposed protection with existing laws that regulate and prohibit access to certain professions and licensed occupations for those with criminal conviction records.

where members of protected groups are disparately impacted.[191] Also, there is a considerable body of law and guidance built up around the statute.

While federal law already provides some protection from adverse employment action for those in otherwise protected groups who have criminal records, this protection is far from comprehensive. Not only may small employers be outside the scope of the various federal laws, but aggrieved individuals must in any case show that the challenged employment action disparately impacts a protected group. This showing can be difficult to make. Even if made, disparate impact cases do not allow for the recovery of punitive or even compensatory damages, reducing their attractiveness and utilization.[192] Absent federal legislation in this area, ex-offenders may, depending upon geographical location, look to state statutes or local ordinances for protection from discrimination in employment, but there will be many more ex-offenders who will have no protection from discrimination and, consequently, no employment.

Perhaps it is unrealistic to recommend or expect the enactment of federal legislation on this issue in light of the current political climate where there is considerable resistance to adding to the regulatory burden of business. The fear of lawsuits brought by members of protected classes, and a concomitant concern about retaliation allegations,[193] have reportedly placed some employers in a position where they are afraid of making legitimate employment decisions.[194] However, employers that recognize a moral obligation to offer opportunities on a fair and equal basis to the entire community may be drawn to adopt a voluntary program concerning treatment of those with criminal records. A voluntary program would allow employers to incorporate palatable standards that relate to their particular businesses, and would permit them to selectively assist motivated and otherwise qualified individuals who have paid the price for their mistakes in gaining access to

191. EEOC Compliance Manual, *supra* note 179, at 15-29 to -30.

192. Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 598 (2004).

193. Retaliation allegations involve claims by employees that they were adversely treated after they brought up a claim of mistreatment or discrimination. 14A C.J.S. *Civil Rights* § 246 (2006).

194. Michael Orey, *Fear of Firing: How the Threat of Litigation is Making Companies Skittish about Axing Problem Workers*, BUS. WK., Apr. 23, 2007, at 52. This cover story notes that in 2005 and 2006, thirty percent of all charges filed at the Equal Employment Opportunity Commission were retaliation claims. *Id*. at 55.

employment opportunities. Such programs could follow a model similar to that of voluntary affirmative action programs with flexible goals and timetables, and financial incentives may be available if legislation such as the proposed Second Chance Act is enacted.[195]

CONCLUSION

To a considerable extent, society's attitude toward those with criminal records is comparable to its attitude toward power plants, power lines, highways, and reservoirs: it is generally agreed that these structures are necessary and beneficial to modern society, but no one wants them to be located on or near their property. Similarly, it is generally agreed that employment is beneficial to ex-offenders, but often no employer wants to be the one employing them. Appropriate laws can and should correct this market failure, encouraging rehabilitation and reintegration through employment, while at the same time providing sensible limits to promote safety for all. A number of states and major cities have taken steps to eradicate employment discrimination against qualified applicants and employees who carry the burden of a criminal record. But the standards vary from state to state, and city to city, with some states having no protection, and city ordinances providing limited coverage. If federal protection is enacted, it is more likely that ex-offenders will have a fair chance to obtain employment upon re-entry after prison or while on probation. We must ask ourselves whether we as a society want ex-offenders to have a second chance at a legal lifestyle, and what is the alternative?

195. *See supra* notes 187–90 and accompanying text.