The Problem
One-in-three adults in the United States has a criminal record. Over 640,000 people are released from prison each year, and this rate shows no signs of slowing. The rise in the ex-offender population is the result of changes in the criminal justice system (i.e., an increase in both the likelihood of criminal sentences and of longer sentences) and not due to changes in underlying criminal activity. Therefore, any resulting employment consequences are not the product of increased criminal activity within the potential applicant pool.

A survey conducted by the Society for Human Resource Management showed that almost 70 percent of organizations conduct criminal background checks on all of their job candidates. Employers have reported that their use of criminal history information is an attempt to prevent theft, fraud, workplace violence, and liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.

A felony conviction or a prison term can have a substantial negative effect on future employment prospects. There are multiple reasons for this effect, including loss of a worker’s “human capital” like education, job experience, and soft skills. Incarceration can also cause workers to lose access to social networks to help them find jobs and, instead, provides them with new social networks that make criminal activity more likely. However, studies using a variety of methods suggest that traditional human capital measures alone do not explain the resulting impact of a prison term or felony conviction on hiring results. Instead, it is the stigma of incarceration that makes many employers less likely to hire ex-offenders.

Research suggests that employers discriminate based upon criminal records, even if they claim otherwise. Studies have repeatedly demonstrated that job applicants with criminal records are much less likely to receive a callback than those without convictions. In many states, a felony conviction also carries significant legal restrictions on subsequent employment, including limitations on government employment and professional licensing. Unsurprisingly, nearly 75 percent of formerly incarcerated individuals remain unemployed a year after their release. A July 2018 report from the Prison Policy Initiative was the first study to analyze the unemployment rate of formerly incarcerated people who are actively seeking work. The report found that the unemployment rate for formerly incarcerated people is 27 percent, or nearly five times

The Potential Untapped Value of Formerly Incarcerated Job Applicants: What Employers Should Consider

BY HEATHER BREDESON

With the national unemployment rate at historically low levels, some employers are struggling to fill their job vacancies with qualified employees. There may be untapped talent within a group of applicants that are typically overlooked by employers: formerly incarcerated people and those with criminal histories. A July 2018 report shows that formerly incarcerated people are unemployed at a rate five times higher than the total U.S. unemployment rate during any historical period, including the Great Depression. This article explains the employment predicament faced by those with criminal records, why it matters to society, why employers should care, and policies employers should be aware of when it comes to criminal background checks and criminal history questions during the hiring process.
higher than the unemployment rate for the general U.S. population. (It is important to note that the general public unemployment rate also includes formerly incarcerated people. If the appropriate data existed to separate out formerly incarcerated people from the general public unemployment rate, the unemployment rate for formerly incarcerated people would be even greater.13)

Whether newly released convicts obtain employment is of great public concern. Most released prisoners are reconvicted within three years.14 Failure to obtain legitimate employment is the most relevant predictor of recidivism, and research suggests there is a causal connection between employment and recidivism.15 Economists estimate that the gross national product suffers a roughly $80 billion loss annually because ex-offenders are excluded from employment.15 Incarcerating reoffenders also harms taxpayers because of the increased costs to run prisons.16 While there are many public policy considerations that go beyond the scope of this article, employers should consider whether giving job applicants with a criminal history a closer look could increase their bottom line while also limiting their liability for disparate impact discrimination suits or penalties from local authorities due to so-called “ban the box” fair hiring policies that remove the criminal history question from job applications.

**What Employers Should Consider**

Employers should evaluate whether they can build up their workforce by considering those applicants with criminal records. Recent studies show that employee retention is higher among employees with criminal histories.17 Job seekers with criminal histories are likely to have greater job loyalty. Employers know that better retention can significantly reduce recruitment and training costs. For lower-skilled white-collar workers, analysts estimate recruitment and training costs are $4,000 per employee.18 Case studies from several large companies demonstrate the advantage of hiring workers with criminal records. At Total Wine & More, annual turnover was on average 12.2 percent lower for employees with criminal records.19 When Electronic Recyclers International adopted a program to recruit employees with criminal histories, it reduced employee turnover from 25 percent to just 11 percent.20 A continuing study by the Johns Hopkins Health Resource Center found that retention rates were significantly higher for employees with criminal records.21 Additionally, the Work Opportunity Tax Credit is available to employers for hiring qualified restored citizens within a year of being released from prison for the felony.22

**What About Negligent Hiring Liability?**

A business that hires an applicant with a criminal record faces the risk that the employee's criminal record will preclude the company from obtaining private insurance against misconduct. The company may also face the risk that, if the employee harms another individual on the job, their criminal record is generally admissible as evidence of negligence. At this time, there are no systematic studies that support the concern that a criminal record has a major effect on negligent hiring liability defense costs.23 One study estimated that the average cost of defense for a negligent hiring per worker hired with a conviction is only $5.24 Some states have restricted liability for negligent hiring. For example, Texas legislation limits civil actions brought against an employer solely because of an employee's criminal history.25 Some states, such as Alabama, Colorado, Connecticut, the District of Columbia, Georgia, Indiana, Louisiana, Massachusetts, Michigan, Minnesota, New York, North Carolina, Ohio, and Tennessee have also passed legislation to make it easier for employers to hire people with criminal convictions.26

Even if your state does not limit liability for negligent hiring, the Federal Bonding Program assists employers nationwide in hiring people with criminal histories. The Department of Labor program provides six-month bonds for individuals who are qualified for the position despite a criminal history. The program has enabled over 52,000 job placements.27 While negligent hiring liability is a factor for employers to consider, they should do so in conjunction with any state ban-the-box or fair chance hiring laws and Equal Employment Opportunity Commission (EEOC) guidance mentioned below.

**Ban-the-Box Fair Chance Hiring**

Ban-the-box policies restrict employers from asking about applicants' criminal histories on job applications and in job interviews. Generally, employers may still conduct criminal background checks, but only at or near the end of the hiring process. Thirty-two states and over 150 cities and counties have adopted ban-the-box policies. Eleven states—California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, and Washington—have also mandated the removal of conviction history questions from job applications for private employers.28 These laws seek to increase employment opportunities for people with criminal records, but their efficacy is unclear: A recent study found that ban-the-box policies substantially increased racial disparities in employer call-backs. Employers simply discriminated against all black applicants when they were not allowed to inquire about criminal history.29

**EEOC Guidance**

On April 25, 2012, the EEOC updated its guidelines regarding the use of arrest and conviction records in employment decisions. According to the EEOC, employers’ use of arrest and conviction records may constitute disparate impact discrimination under Title VII of the Civil Rights Act of 1964, as amended, because African-Americans and Hispanics are incarcerated at rates disproportionate to their numbers in the general population.30 The enforcement guide cites *Green v. Missouri Pacific Railroad*, in which the Eighth Circuit held that it was discriminatory under Title VII for an employer to “disqualify[] for employment any applicant with a conviction for any crime other than a minor traffic offense.”31 The Eighth Circuit identified three factors that were relevant to assessing whether an exclusion is job related for the position in question and consistent with business necessity: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and/or completion of the sentence, and (3) the nature of the job held or sought. The EEOC recommends developing a narrowly tailored written policy for screening applicants and employees for criminal conduct that identifies essential job requirements, determines the specific offenses that may demonstrate unfitness for performing certain jobs, and determines the duration of exclusions for criminal conduct based on all available evidence. Employees should be assessed individually, and employers should limit inquiries to specific records for which exclusion would be job related for the position in question and consistent with business necessity.32

The state of Texas recently sued the EEOC regarding its enforcement guide. A federal judge enjoined the EEOC from enforcing its interpretation of its guidance against the state of Texas until the EEOC
has complied with notice and comment requirements under the Administrative Procedures Act. However, Texas’ remaining claims were dismissed, including its request that the court declare that Texas has a right to maintain and enforce its laws that bar convicted felons from serving in any job the state deems appropriate. The court seemed to agree with the EEOC’s overall intent. For now, the EEOC guidance remains in effect for employers outside of Texas.

Conclusion
Finding gainful employment for ex-offenders is an important public priority. Employers are encouraged to re-examine their assumptions about applicants with criminal records. Employers may be missing opportunities to hire quality employees by applying a hiring penalty to a criminal record. Employers should consult with an attorney to determine compliance in their hiring procedures with state, federal, and local law.

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Endnotes
6 Schmitt, supra note 4, at 8.
7 Dylan Minor et al., Criminal Background and Job Performance 9 (May 1, 2017), http://wwwSOLE-jole.org/17537.pdf.
10 Schmitt, supra note 4, at 8.
12 Couloute & Kopf, supra note 1.
17 Minor, supra note 7, at 9.
18 Id.
29 Agan & Starr, supra note 9, at 1.
32 EEOC, supra note 30.