

Anti-Discrimination for Ex-Offenders

The case and structure for a California anti-discrimination statute for individuals with criminal histories

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Introduction

[OMITTED]

Importance of Employment in Reentry

A study by the Vera Institute of Justice of 49 felons released from New York prisons found that the most important goal for these individuals was to find a job.¹ This is, by any measure, an important goal for the successful reintegration of those released from incarceration. “Finding a job is a way of securing income for one’s self and others, establishing a positive role in the community, and keeping a distance from negative influences and opportunities for illegal behavior.”² But the sentiment is not unique to those released from incarceration. Forty states across the country, including California, *require* parolees to acquire “gainful employment” as part of the terms of their release.³

Reentry has become an increasingly important issue on the national front. On April 9, 2008, President Bush signed the Second Chance Act into law. The legislation provides grants to government agencies and nonprofit organizations to assist offenders with reentry and reduce recidivism. Agencies providing services such as employment assistance, substance abuse treatment and housing, among others, are eligible to apply for grants. President Obama signed an omnibus appropriations bill on March 11, 2009, for the remainder of fiscal year 2009, which

¹ Jeremy Travis, *But They All Come Back: Facing the Challenges of Prisoner Reentry* (The Urban Institute Press 2005) Page 162 [hereinafter *But They All Come Back*].

² *Id.* at 162.

³ Travis, *supra* n.11 at 162.

provides \$25 million for Second Chance Act programs. He has requested \$109 million for the 2010 fiscal year budget.⁴ Additionally, the Work Opportunity Tax Credit serves to enable felons in acquiring employment and was extended in May of 2007 to be effective through August 31st, 2011. The law provides tax credits of up to 40% of an individual's salary if the individual has been convicted of, or released from a felony conviction, within one year of the hire.⁵

In 2007, the American Bar Association Commission on Effective Criminal Sanctions (Commission) developed a series of policy recommendations to “provide the basis for a broad reform agenda to reduce reliance on incarceration and remove legal barriers to offender reentry.”⁶ The Commission suggested policy changes to provide alternatives to incarceration and conviction, improvements in probation and parole supervision, and employment and licensure of persons with a criminal record.

Indeed, within the reentry discussion, employment has taken a key focus. The Commission recognized that “[t]he ability to get and maintain employment has been identified as a reliable predictor of a criminal offender's ability to successfully reenter society after a term in prison and remain law-abiding.”⁷ Those who do not find employment are three times more likely to return to prison than those who do. Sadly, 60 % remained unemployed one year after their release.⁸

⁴ Reentry Policy Council Website. 3 Dec. 2009. <http://reentrypolicy.org/government_affairs/second_chance_act>

⁵ United States Department of Labor Website. 3 Dec. 2009 <<http://www.doleta.gov/business/Incentives/opptax/>>

⁶ American Bar Association Commission on Effective Criminal Sanctions (2007) *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies*, Pp. 6 [hereinafter *Second Chances*].

⁷ *Second Chances*, Pp. 27 (citing to Joan Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* at 196 (Oxford Univ. Press 2003) (“Research has also consistently shown that if parolees can find decent jobs as soon as possible after release, they are less likely to return to crime and prison.”).

⁸ *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*, final Report of the Mayoral Policy Caucus on Prisoner Reentry at 15 (2006).

Among their recommendations the Commission suggested that government agencies and licensing boards should review their policies and remove across the board bans of ex-offenders⁹, making case-by-case decisions allowing discrimination in cases only where the crimes *substantially relate* to the job duties or public safety.¹⁰ The study suggests that municipalities extend these policies to employers who contract with the municipality.¹¹

“Ban the Box” Movement

The Commission’s findings were influenced by, and promoted, a movement referred to as the “Ban the Box Movement” which originated in San Francisco, Boston, and Chicago. These cities have prohibited the question about criminal convictions from being asked on city employment applications as well as the application forms for jobs with the cities’ contractors and vendors, and leave the determination to a human resource expert who may determine if the convictions are sufficiently related to the job duties or public safety to prohibit employment.¹² Following the lead of these cities, and the recommendations of the Commission, cities across the country have begun to consider similar initiatives. In Cambridge, Baltimore, Minneapolis and St. Paul, and Oakland such initiatives have been taken, and other cities, such as Los Angeles, Philadelphia, and New Haven have begun to attempt similar initiatives.¹³

⁹ Second Chances, Pp. 26.

¹⁰ Second Chances Pp. 26.

¹¹ Second Chances Pp. 26.

¹² Gill, J. (2009 January 10). Ban the box - ex-convict job seekers no longer required to disclose criminal past. *Examiner.com*. 18 April 2009. <<http://www.examiner.com/x-662-Strange-News-Examiner-y2009m1d10-Ban-the-box--exconvict-job-seekers-no-longer-required-to-disclose-criminal-past>>.

¹³ Benton, Elizabeth. “Measure Aims to Help Reduce Recidivism.” *New Haven Register*. 15 December 2008.

California and Three Judge Panel

Successful reentry is of the utmost importance to California. As of the end of 2008, there were 123,597 California parolees. In addition, the three judge panel in *Coleman v. Schwarzenegger* has ordered, as a preliminary step towards providing the constitutionally required medical services to inmates, that the CDCR reduce the prison population to 137.5% of design capacity, or slightly lower than 110,000, a figure much lower than the current population of approximately 155,000.¹⁴ If this preliminary step is not sufficient to ensure a constitutionally required level of medical services, further population cuts may be ordered.¹⁵

The bottom line is that there are a lot of individuals who have been paroled from California prisons and, pending the appeals process in *Coleman*, there may a huge surge of new parolees in the state. If California's most recent three year recidivism rate of 58.99% does not improve, it will not take long for the constitutional issues that arose in *Coleman* to arise again. And if we grant the findings of the Commission, the recidivism rate is a result of the high parolee unemployment rate. Any long term solution to both the providing of constitutional medical services, and the rehabilitation and successful reentry of ex-offenders will have to address the issue of parolee unemployment.

Legislative Efforts in California

California law allows for post-conviction relief in certain circumstances. This statutory scheme allows individuals who have been convicted of misdemeanor and felony offenses to later clear their record from consideration by employers. While this is very helpful for employment

¹⁴ *Coleman v. Schwarzenegger*, 2009 U.S. Dis. LEXIS 67943 (E.D. Cal. 2009); 2008 CDCR Fourth Quarter Facts and Figures Report, accessible at: http://www.cdcr.ca.gov/Divisions_Boards/Adult_Operations/docs/Fourth_Quarter_2008_Facts_and_Figures.pdf

¹⁵ *Coleman v. Schwarzenegger*

searches of ex-offenders, the relief often comes after displayed rehabilitation, instead of upon reentry when the ex-offender needs the most help.

California's statutory scheme is comprised of expungements, Certificate of Rehabilitation, pardons, and the Investigative Credit Reporting Agency Act. Also affecting employment of criminals is the Fair Employment and Housing Act, however, in terms of ex-offenders, it is the functional equivalent of Title VII.

The expungement law, CA Penal Code § 1203.4, removes criminal convictions from the public record. There are only three situations where the criminal convictions are still considered. The first is when the individual is applying for a state license or the individual is applying for a job with any government agency, whether it be in California, another state, or Federal Government. Secondly, the criminal convictions may be used in subsequent criminal trials for sentencing purposes. Finally, the convictions must be disclosed when contracting with the California State Lottery.

If a defendant is convicted of a wobbler, meaning the conviction of such could be a felony or a misdemeanor, the court may impose a misdemeanor sentence. If the court chooses to impose a felony sentence, they can either sentence the defendant to prison, or suspend felony punishment and place the defendant on felony probation. If the defendant is placed on felony probation, they may or may not receive county jail time, and the prison sentence is suspended pending termination of probation. If all of the terms of probation set out by the court are followed and the probationer successfully completes probation, probation is terminated and the prison sentence is not imposed. If the terms of probation are not successfully completed, the defendant's probation may be revoked, and pending the outcome of a probation hearing, the

court may impose a felony prison sentence. Penal Code § 1203.4 applies only in the situations where the defendant was not sentenced to prison.

(a) Expungement

PC §1203.4(a) applies to any defendant who has fulfilled the conditions of probation for the entire period or had probation terminated early, or in the discretion of the court. The court shall withdraw any pleas of guilty or no contest, or set aside a guilty verdict, and dismiss the accusations or information. The defendant is technically no longer been convicted of the crime. The statute does not protect against the collateral consequences of: (1) subsequent criminal cases (which may use prior convictions for sentencing purposes); (2) applications to state licensure, state and local agencies, public office, or (3) contracting with the California State Lottery.

(b) Certificate of Rehabilitation and Pardon

When the defendant is actually sentenced to prison, not county jail, 1203.4 is not available as a remedy to conviction. In this case, the ex-offender rights and privileges are restored only through a full pardon by the governor. The governor may grant a pardon based upon the applicant’s innocence or rehabilitation. A pardon based on rehabilitation, absent a Certificate of Rehabilitation, is a “traditional pardon” and is granted only in rare circumstances.¹⁶ Where the applicant is eligible for a Certificate of Rehabilitation, the governor requires that they apply for the certificate before applying for the pardon.

Certificate of Rehabilitation Eligibility Requirements:

An applicant for a certificate of rehabilitation must have completed a sufficient period of rehabilitation in order to apply for the certificate. In a case where the conviction was for a crime

¹⁶ PC § 4852.01(e); *People v. Ansell* (2001) 25 Cal. 4th 868.

which carries a life sentence, nine years must pass from the time they are discharged from their sentence or are released on parole until the time they are eligible to apply for the certificate. In most cases requiring registration under the Sex Offender Registration Act ten years must have passed, and for all other crimes, seven years must have passed.

Additionally, the applicant must have resided within the state of California for at least the previous five years before submitting the application.

During the period of rehabilitation, the applicant must live an honest and upright life, must conduct themselves with sobriety and industry, must display a good moral character, and must conform to and obey the laws of the land, meaning no subsequent convictions.¹⁷

If the petitioner meets all of the eligibility requirements, they are afforded a hearing in the Superior Court which they were convicted. If a hearing is granted and the court finds that the petitioner has successfully demonstrated their rehabilitation and fitness to exercise the rights of citizenship, they may make an order to that effect, commonly called the Certificate of Rehabilitation. This certificate is forwarded to the governor, the Board of Parole Hearings, Department of Justice, and in the case of a person twice convicted of a felony, to the California Supreme Court.¹⁸

If an offender has been twice convicted of felonies, the governor may not grant a pardon without the recommendation of a majority of the Supreme Court.¹⁹ Otherwise, the governor may grant the pardon, and usually utilizes the investigations of the Board of Parole Hearings to make the determination. If the pardon is granted, the rights and privileges of the applicant are

¹⁷ PC § 4852.05.

¹⁸ PC § 4852.14.

¹⁹ Cal. Const. art. V, § 8; see *In re Billings* (193) 210 Cal. 669, 685-687.

restored, but the conviction remains public, albeit with the pardon. California law prohibits employers from asking about convictions which have been expunged (e.g. 1203.4), sealed, or statutorily eradicated.²⁰ However, no such protections exist for convictions later pardoned.

(c) Investigative Credit Reporting Agencies Act

In addition, California has the Investigative Credit Reporting Agencies Act which exceeds the protection of the federal Fair Credit and Reporting Act by prohibiting credit reporting agencies from furnishing conviction records where more than seven years has passed from final disposition of the case, which includes release from prison.²¹ This does not mean that an employer is restricted from asking. And if a potential employee claimed to not have a conviction, because it was older than seven years, they would be lying and subject to dismissal. In addition, employers are not restricted from independently checking an applicant's criminal history, meaning they can continue to discriminate if they learn of the applicant's conviction through means other than a credit reporting agency.

Ban the Box Movement Sputters

Despite the fact that San Francisco was at the forefront of the Ban the Box movement, the idea has failed to gain traction in other cities around the state. As a result, the "movement" has begun to sputter, both in California and around the country. – [show some failed efforts to adopt Ban the Box – Oakland, etc.]

In Oakland, California, Mayor Ron Dellums promised the citizens of Oakland that he would remove the question about criminal history. ... In Los Angeles, attempts to implement the

²⁰ 2 CCR 7287.4.

²¹ CA Civil code §1786.18; 15 U.S.C. 1681c(b)(5).

policy have failed, thus far. The Fair Employment Resolution was rejected by the Los Angeles County Board of Supervisors. However, the City's Personnel Committee is now considering the resolution and, should it pass, the City Council will consider the matter. As of the time this paper was written, the resolution has not passed.²²

In Washington, D.C., motivated by researchers' findings that unemployment was the single biggest factor of recidivism, the City Council passed a measure in 2007 to ban discrimination of ex-offenders in employment as well as housing and education. However, then Mayor Anthony Williams vetoed the measure because of concerns from business groups that they would be sued for rejecting applicants with criminal backgrounds.²³

FEDERAL LAW

At the national level, there is no protection of criminals as a class. Employment law issues with criminal convictions are sensitive only to Title VII disparate impact, equal protection and due process claims.

(1) Equal Protection

Unless a statute affects a "fundamental right" or discriminates against a "suspect class," the default rational basis review applies. Public employment is not considered a fundamental right²⁴ and ex-offenders do not constitute a suspect class,²⁵ therefore the issue has been dealt with under rational basis review. Under rational basis review, a statute will survive an equal

²² <http://per.lacity.org/Application.pdf> see question 22

²³ Hutchinson, Earl. "Oakland Police Shooting Casts Ugly Glare on Ex-Felon Desperation." 24 March 2009. 20 Nov. 2009. <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/03/23/EDLU16LJ0U.DTL#ixzz0Y252vZJs>>

²⁴ *Massachusetts Bd. Of Retirement v. Murgia*, (US 1976) 427 U.S. 307, 313; 96 S. Ct. 2562, 2566-67, 49 L. Ed. 2d 250

²⁵ *Miller v. Carter*, 547 F.2d 1314, 1321 (7th Cir. 1977), *aff'd*, 434 U.S. 356, 98 S. Ct. 786, 54 L. Ed. 2d 603 (1977) (*per curium*); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970)

protection challenge if there is a legitimate government interest for the classification and if that classification is rationally related to the governmental purpose.²⁶

Courts have been willing to find equal protections where “across-the-board” prohibitions on hiring ex-offenders are enacted. In *Kindem v. Alameda*²⁷, the district court for the Northern District of California recognized the City of Alameda’s unquestionable “legitimate interest in hiring qualified, competent and trustworthy employees, and in employing persons who will inspire the public’s confidence.”²⁸ However, an across-the-board prohibition of felons to work for the city was not rationally related to the government’s purpose, as it made no attempt to fit the classification to the legitimate governmental interests.²⁹ Similarly, using Equal Protection, federal courts have invalidated across-the-board disqualifications of an Iowa across-the-board statute disqualifying convicted felons from holding civil service positions,³⁰ a Connecticut statute universally prohibiting ex-felons from obtaining a license to work as a private detective or security guard³¹ and discharge for no reason other than a criminal conviction.³²

Litigants have been unsuccessful in persuading courts that employment is a ‘fundamental right’³³ or to treat ex-offenders as a ‘suspect class’³⁴ to trigger the strict scrutiny analysis. Even if courts were willing to accept either of these arguments, it is possible that a discriminatory statute would pass strict scrutiny muster, under the common rationales of public safety and

²⁶ *United States v. Carolene Products Co.*, 304 U.S. 144 (1938)

²⁷ 502 F.Supp. 1108 (N.D.Cal.1980)

²⁸ *Id.* at 1112

²⁹ *Kindem v. Alameda*, 502 F.Supp. at 1112.

³⁰ *Butts v. Nichols*, 381 F. Supp. 573 (S.D. Iowa 1974).

³¹ *Smith v. Fussenich*, 440 F. Supp. 1077 (D. Conn. 1977).

³² *Furst v. New York City Transit Authority*, 631 F. Supp. 1331.

³³ See *Schanuel v. Anderson*, 546 F. Supp. 519, 524 (S.D. Ill. 1982).

³⁴ *Schanuel*; see also *United States v. McKenzie*, 99 F.3d 813 (7th Cir. 1996); *Owens v. Barnes*, 711 F.2d 25 (3d Cir. 1983). See also Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 Calif. L. Rev. 1191 (arguing that because of the immutable characteristic of criminal conviction the criminal class should be classified as a suspect class).

employer liability, if the prohibitions were carefully crafted. More importantly, because the 14th Amendment prohibits only state action, no protection against private employer discrimination would be achieved through equal protection claims.³⁵ So for the time being, the sum of equal protection claims is to prohibit government agencies from enacting across-the-board prohibitions of ex-offenders for agency employment.

(2) Substantive Due Process

Many of the cases that proceeded on the theory of Equal Protection also claimed due process violations for creating conclusive presumptions that deprived the individual their opportunity to a meaningful hearing prior to deprivation of public employment.³⁶ In *Kindem v. Alameda*, the court found such a violation, but *Miller v. Carter*, given the uncertainty of the law of conclusive presumptions at the time, left the questioned unresolved since it had been resolved through a finding of an equal protection violation.

(3) Disparate Impact

As mentioned above, Equal Protection and Due Process are limited to public employment. Under Title VII of the Civil Rights Act of 1964, however, plaintiffs may sue public or private employers who discriminate on the basis of race, color, religion, sex, or national origin. Title VII claims are not limited to policies and actions of employers with discriminatory purpose, however, their applicability extends to situations which are discriminatory in their effect. The US Supreme Court, in *Griggs v. Duke Power Co.*,³⁷ stated that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in

³⁵ *Civil Rights Cases* 109 U.S. 3 (1883).

³⁶ See *Kindem v. Alameda*, *supra* n.13; *Miller v. Carter*, *supra* n.15.

³⁷ 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

operation.”³⁸ Such practices, resulting in disparate impact on a Title VII protected class, are only justifiable when job related and consistent with a “business necessity,” and the plaintiff is unable to show that alternative practices would meet the business necessity without the discriminatory effect.³⁹

Because of the racial disparity of individuals convicted of crimes in the United States, practices of not hiring individuals with criminal records may have a disparate impact against particular races. In *Green v. Missouri Pac. R.R.*⁴⁰, the court recognized a Title VII violation under the disparate impact theory based upon the policy of Missouri Pacific Railroad to reject any job applicant who was convicted of any crime, other than a minor traffic offense, because of the discriminatory effect the practice had. Despite the business necessities that Missouri Pacific put forward, potential theft and vicarious liability, the court noted that it could not “conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.”⁴¹

Title VII, as amended in 1991, also carries with it a large evidentiary burden of selecting the business practice which creates the discriminatory effect,⁴² unless the “elements of a respondent’s decisionmaking process are not capable of separation for analysis.”⁴³ A statistical showing of discriminatory effects is irrelevant without a policy to pin the effects on. If a plaintiff

³⁸ *Id.* at 431.

³⁹ *Id.* See also, 42 U.S.C. 2000e – 2(k)(1)(A)(i) – 2(k)(1)(B)(i).

⁴⁰ 523 F.2d 1290 (8th Cir. 1975).

⁴¹ *Id.* at 1298.

⁴² 42 U.S.C. § 2000e-2(k)(1)(A)(i).

⁴³ 42 U.S.C. § 2000e-2(k)(1)(B)(i).

is able to do so, however, the affirmative defense of “business necessity” is widely available in the context of practices dealing with criminal convictions.⁴⁴

Combined, the Equal Protection Clause and Disparate Impact provide very limited protection to ex-offenders. The most substantial protections come through legislation.

Legislative Efforts

At the federal level, there are incentives to hire ex-felons and funding to organizations that provide assistance to ex-felons.⁴⁵ However, only at the state and local level is there any protections or prohibitions against discriminating against criminals. Previously mentioned were local ordinances, such as those enacted in San Francisco, Boston and Chicago.

At the state level, various jurisdictions have implemented statewide protections for ex-felons. Arizona, Colorado, Connecticut, Florida, Kentucky, Louisiana, Minnesota, New Mexico and Washington have statutory provisions to prohibit discrimination by public employers.⁴⁶ Hawaii, Kansas, Wisconsin, New York and Pennsylvania all have statewide anti-discrimination statutes that regulate both public and private employers.

In Hawaii, an employer may inquire into a potential employees’ record only if there is a *rational relationship* to the duties and responsibilities of the position.⁴⁷ This inquiry and consideration of the conviction record shall take place only after the employee has received a conditional offer of employment which may be withdrawn if there is a rational relationship

⁴⁴ See *Richardson v. Hotel Corp. of America*, 332 F. Supp. 519 (where an African American was denied Title VII relief because his discharge for prior convictions of theft were sufficiently harmful to the business necessity of maintaining “security sensitive” positions, such as bellboy). Other business necessities are safety, 1979 EEOC Lexis 25 (EEOC 1979); efficiency and safe operation 1978 EEOC LEXIS 44 (EEOC 1978).

⁴⁵ Including Work Opportunity Tax Credit and Second Chance Act.

⁴⁶ http://www.cjcj.org/files/criminal_history.pdf pg. 7.

⁴⁷ HRS § 378-2.5(a).

between the convictions and the duties and responsibilities of the position.⁴⁸ In Kansas, it is illegal to discriminate against an employee on the basis of the criminal conviction record unless the decision *reasonably bears* upon the employee’s trustworthiness, or the safety or well-being of the other employees or customers.⁴⁹ In Pennsylvania, “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.”⁵⁰ The Wisconsin Fair Employment Act prohibits discrimination on the basis of an arrest or conviction record unless it *substantially relates* to the particular job.⁵¹ Additionally, Massachusetts prohibits employers from discriminating against a potential employee for a first conviction of drunkenness, simple assault, minor traffic violations, affray or disturbing the peace.⁵²

State	Standard	Public Safety
Hawaii	Rational Relationship	
Kansas	Reasonably bear	Reasonably bear on trustworthiness or customer/employee safety
New York	Direct relationship	Unreasonable risk to property, public/individual safety
Pennsylvania	Relate to applicant’s suitability	
Wisconsin	Substantially relate	

⁴⁸ HRS § 378-2.5(b).

⁴⁹ Kan. Stat. Ann. §22-4710 (f).

⁵⁰ 18 Pa.C.S. § 9125.

⁵¹ Wis. Stat. §111.335.

⁵² ALM. GL. Ch. 151B, §4.

State Income Tax Credit

Similar to the Work Opportunity Tax Credit offered by the federal government, six states offer tax credits for employers to hire ex-offenders. Additionally, there are five states, Florida, Missouri, Indiana, Delaware and Pennsylvania, offer tax credits for any business that contributes to crime prevention. The six states that offer tax credits directly for employing ex-offenders are listed below.

California

Any employer who hires an “ex-offender” may be eligible for a state tax credit. This credit also applies to individuals who are on county probation. The credit given is equal to the sum of each of the following:

- (1) 50% of qualified wages in the first year of employment.
- (2) 40% of qualified wages in the second year of employment.
- (3) 30% of qualified wages in the third year of employment.
- (4) 20% of qualified wages in the fourth year of employment.
- (5) 10% of qualified wages in the fifth year of employment.

CAL. REV. & TAX CODE § 17053.34; Cal. Rev. & Tax Code § 23622.7 (b)(1)(C)(VI)

Illinois

The Ex-felon Jobs Credit provides a tax credit equal to 5% of the wages of an ex-offender, up to \$600 per individual. A “qualified ex-offender” is an individual previously

incarcerated in an Illinois adult correctional facility and hired within his or her first year of release.

Illinois Tax Code § 216

Iowa

Iowa employers are allowed an additional deduction of 65% of the wages paid in the first 12 months of employment, up to a maximum deduction of \$20,000 for hiring an ex-offender. An ex-offender is a person who has been convicted of a felony (in Iowa, any other state, or the District of Columbia) is on probation or parole, or is in a work release program.

IOWA CODE § 422.35 (2003); *see also* <http://www.iowa.gov/tax/educate/78522.html>

Louisiana

A \$200 tax credit is available to employers who hire an individual for full-time employment who has been convicted of a first time drug offense and is less than 25 years old.

LA. REV. STAT. ANN. § 47:287.752

Maryland

Employers are given a credit of the following amounts, for each taxable year, for wages paid to a qualified ex-felon:

(1) 30% of up to the first \$ 6,000 of the wages paid to the qualified ex-felon employee during the first year of employment; and

(2) 20% of up to the first \$ 6,000 of the wages paid to the qualified ex-felon employee during the second year of employment.

For purposes of this credit, an ex-felon employee is anyone who has been convicted of a state or federal felony; is hired within a year of being convicted or released from prison; and is member of a family with an annual income 70% below the Bureau of Labor Statistics living standard.

MD. CODE ANN., LABOR AND EMPLOYMENT § 11-702 (2002)

Texas

The amount of the credit for wages paid by a corporation to an employee who was employed by the corporation when the employee was a work program participant is equal to 10% of that portion of the wages paid that, were the employee still a participant, the department would apportion to the state as reimbursement for the cost of the participant's confinement.

TEX. TAX CODE ANN. § 171.654

Effects of Legislation

As mentioned above, felony criminal convictions in California, as well as in other states, may remain part of a person's record long after they are discharged from parole, or even if they never went to prison (i.e. served county jail time for their felony conviction). For the purposes of this section, however, I have focused only on statistics of parolees, because individual states' parole divisions' records make these statistics more readily available.

Unfortunately, Wisconsin and Hawaii do not compile information about employment rates of parolees. New York had a parolee employment rate of 45% in 2006.⁵³ According to the Pennsylvania Board of Probation and Parole House Appropriations Committee for Fiscal Year 2009/2010 Budget Hearing Presentation, published on February 26, 2009, Pennsylvania has an employment rate of 73% among parolees.⁵⁴ California lands on the other end of the spectrum. The Little Hoover Commission prepared a report in November of 2003 predicting an unemployment rate of 70-90% for California parolees, based on budget estimate statistics provided by Sharon Jackson, Assistant Deputy Director, Parole & Community Services Division, Department of Corrections.⁵⁵

Other Help for Ex-Offenders

Community-Based Organizations

Another noteworthy influence on the employment of ex-offenders is the presence of community-based organizations which prepare ex-offenders with life and employment skills and assist them in finding employment.

One example is Delancey Street Foundation, which started in San Francisco in 1971. The program, which now has five locations around the country, provides residents with food, housing, clothing, education, and entertainment without cost. There is no staff at the facilities – residents run everything. Residents learn interpersonal skills and work habits. They enter vocational training schools to learn skills to work in one of the several enterprises that Delancey

⁵³ Offender Re-Entry: 2006 Crimestat Update, accessible at: <http://criminaljustice.state.ny.us/pio/annualreport/re-entry.pdf>

⁵⁴ Pennsylvania Board of Probation and Parole House Appropriations Committee FY 09/10 Budget Hearing Presentation. 29 Feb. 2009. 30 Nov. 2009. Accessible at: < <http://www.docstoc.com/docs/5310502/Pennsylvania-Board-of-Probation-and-Parole-House-Appropriations-Committee>>

⁵⁵ See Little Hoover Commission, n75., accessible at: <http://www.lhc.ca.gov/lhcdir/172/report172.pdf>

has and/or to help out with the facility operations. Such enterprises include a café, a catering and event planning service, a private car service, a digital print shop, handcrafted furniture and crafts, landscaping, moving and trucking, paratransit van and bus services, a restaurant, a screening room, specialty advertising and Christmas tree sales and decorating. Residents stay in the program for a minimum of two years (with an average stay of four years) learning, working, and then teaching to others what they've learned. When residents are ready to graduate from the program, they obtain a job and continue to live in the facility, paying rent, until they are able to move out and support themselves.⁵⁶ This model has been so successful that Delancey formed the Delancey CIRCLE (Coalition to Implement Revitalized Communities, Lives, Education and Economies).⁵⁷

Another example is Rubicon Programs, Inc. in Richmond, California. Rubicon builds and operates affordable housing and assists with employment, mental health, job training, and other support services for individuals with disabilities or who are economically disadvantaged.⁵⁸ Rubicon is similar to Delancey Street in that it has enterprises that employ its program participants - a bakery and landscaping service.⁵⁹ In addition to the job placement assistance, Rubicon has a legal services division, The Hawkins Center, which provides legal representation in matters such as petitions for expungement.

While these programs are without a doubt a great help to the ex-offender participants in their attempts at successful reentry, the problem is that they are still working within the legal framework and system which does not shield job seekers from discrimination based on their

⁵⁶ Delancey Street Foundation Website – About Us – How We Work. 2007. 15 Nov. 2009. <<http://www.delanceystreetfoundation.org/hww.php>>

⁵⁷ Delancey Street Foundation Website - About Us – Our President. 2007. 15 Nov. 2009. <<http://www.delanceystreetfoundation.org/president.php>>

⁵⁸ Rubicon Programs, Inc. Website. 12 Nov 2009. <http://www.rubiconprograms.org/about_us.html>

⁵⁹ Rubicon Programs, Inc. Website. 12 Nov 2009. <<http://www.rubiconprograms.org/businesses.html>>

prior convictions. Even where the employers want to help someone get back onto their feet, perhaps take advantage of the Work Opportunity Tax Credit, or just happen to find the ex-offender the most qualified for the position, there are considerations that the employer must take into account.

Employers Who Care

Similar to the desire to help people back on their feet that non-profits like Delancey Street and Rubicon, some private employers have made it a prerogative to hire individuals with criminal histories. Goodwill Industries of San Francisco, San Mateo, and Marin has made hiring ex-offenders a major goal. Their staff is comprised 51% of individuals with felony convictions.⁶⁰ The CEO of Goodwill, Deborah Alvarez-Rodriguez, sees this more as a charitable mission, stating at an employment forum in Oakland, “We take people’s discarded and unwanted goods, and we take society’s discarded and unwanted people.”⁶¹ But in addition to the charitable mission, some employers recognize the benefits of tax credits offered by the federal and state government. Mike Hannigan, who runs a for-profit office supply company, Give Something Back, notes the benefit of hiring from this labor pool, but mentions that other employers fear, among other things, the prospect of onerous paperwork the tax credits entail.⁶² In Union City, a recycling company called Tri-CED Community Recycling, has made it a goal to hire individuals with felony records and other high-risk individuals.

These stories are scarce. Even if employer’s could overcome their biases and prejudices about working with “ex-cons,” or if they were forced to statutorily, and even if employers

⁶⁰ Myrow, Rachael. “Calif. Companies Help ExCons Get Back On Track.” 13 Nov. 2009. 1 Dec. 2009. <<http://prisonmovement.wordpress.com/2009/11/16/calif-companies-help-ex-cons-get-back-on-track/>>.

⁶¹ *Calif. Companies Help ExCons Get Back On Track*, supra.

⁶² *Calif. Companies Help ExCons Get Back On Track*, supra.

wanted to take advantage of the incentives, such as tax credits and subsidies, there are still legitimate business considerations that the employer must take into account when hiring an individual with a criminal conviction.

Employer's Considerations

Employers must consider vicarious liability, negligence in hiring, and safety to the business or public. Because “undue risk” to public safety and property is a justifiable ground for denial under New York’s law, I will focus on vicarious liability and negligence in hiring.

A. Vicarious Liability

Under tort law, the theory of *respondeat superior*, which attaches “vicarious liability”, attaches liability to the employer for the tortious conduct of an employee who is acting within the scope of employment.

California has departed from other jurisdictions in its interpretation of when vicarious liability attaches. California tends to inquire into the scope of employment, considering the matter of reasonable foreseeability, whereas other states, such as New York, tend to inquire into the scope of employment as a matter of furthering the interests of the employer.

In *Williams v. Community Drive-In Theater*, the Kansas Supreme Court held that a legitimate question of fact exists to determine whether a drive-in theater employee, in shooting a patron who would not comply with her orders to leave, was acting with a motivation to further the theater’s interest or personal reasons such as malice or spite.⁶³ The court held that the employee would be acting within the scope of employment if she was attempting to further the

⁶³ *Williams v. Community Drive-In Theater*, 214 Kan. 359, 366 (Kan. 1974)

theater's interest. However, if she was acting for personal reasons, her behavior would exceed the scope of employment and vicarious liability would not attach.

New York relies on the test that provides that an employer is not liable for acts unrelated to the furtherance of the employer's interests.⁶⁴ In *Heindel v. Bowery Savings Bank*,⁶⁵ the Supreme Court of New York, Appellate Division, determined that a security guard's on duty sexual assault of the plaintiff was "in no way incidental to the furtherance of [the employer's] interest. The acts were committed for personal motives and were a complete departure from the normal duties of a security guard."⁶⁶

As for the question of assault, New York has a long line of jurisprudence that arrives at the opposite conclusion from California. In *Adams v. New York City Transit Auth.*,⁶⁷ the court determined as a matter of law that the employer of an employee who worked at a tollbooth, became angry with a customer and exited to the tollbooth to assault and choke the customer, was not vicariously liable for those actions. The court noted that "the modern justification for the doctrine lies in the view that '[t]he losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise,' are most fairly allocated to the employer 'as a required cost of doing business' ... It follows from this rationale that the torts which are outside the scope of employment are therefore not part of the 'conduct of the employer's enterprise' should not be made the responsibility of the employer."⁶⁸ This case was preceded by *Sauter v. New York Tribune*,⁶⁹ where the court held that an employee driver who hit

⁶⁴ See, *Murray v. Watervliet City School Dist.*, 130 A.D.2d 830, 831.

⁶⁵ 525 N.Y.S.2d 428 (1988).

⁶⁶ *Heindel* 525 N.Y.S.2d at 428-429.

⁶⁷ 88 N.Y.2d 116 (N.Y. 1996).

⁶⁸ *Id.* at 119.

⁶⁹ 305 N.Y. 442 (N.Y. 1953).

a bus, then punched the bus driver and kicked him in the face, was acting maliciously and exited the scope of his employment, therefore relieving the employer from vicarious liability.

In Pennsylvania, the state Supreme Court articulated the general rule in *Cherillo v. Steinberg* that an employer is liable for the tortious acts of its employees if done in the course of employment, but not for the willful and separate trespasses outside of the line of the employee's duties.⁷⁰ Here, the court held that the supervisor's assault of the minor supervisee for insubordination was outside of the course of employment and crossed over to the line of personal motivation, for which vicarious liability does not attach.

California

California's jurisprudence has differed from each of these above mentioned states which have implemented anti-discrimination statutes. For California, "[t]he question turns on whether or not the act performed was either required by or incident to an employee's duties, or the employee's misconduct could be reasonably foreseen by the employer in any event."⁷¹ "If an employee substantially deviates from his duties for personal purposes, the employer is not vicariously liable for the employee's actions." *Alma W. v. Oakland Unified School Dist.*⁷²

California has articulated three reasons for applying the doctrine of *respondeat superior*: (1) to prevent recurrence of the tortious conduct; (2) to give greater assurance of compensation

⁷⁰ *Cherillo v. Steinberg*, 118 Pa. Super. 485 (Pa. Super. Ct. 1935)

⁷¹ *Clark Equipment Co. v. Wheat* 92 Cal.App.3d 503, 520; 154 Cal.Rptr. 874 (1979).

⁷² 123 Cal.App.3d 133, 139 (Cal App. 1st Dist. 1981).

for the victim; and (3) to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury.⁷³

Ordinarily, the question of whether the employee was acting within the scope of employment is a question of fact. However, the court may determine as a matter of law that no such finding is possible. “In some cases, the relationship between an employee’s work and wrongful conduct is so attenuated that a jury could not reasonably conclude that the act was within the scope of employment.”⁷⁴ In *Maria D. v. Westec*, the court found as a matter of law that the nexus between the scope of employment, being a security guard, and the conduct, on-duty rape of plaintiff, was too attenuated for a trier of fact to determine that the conduct was within the scope of employment.⁷⁵ Similarly, in *John R. v. Oakland Unified School Dist.*,⁷⁶ the California Supreme Court affirmed the trial court’s demurrer where a student sued the school district after a teacher allegedly molested him at an officially sanctioned extra-curricular event at the teacher’s apartment.⁷⁷ Although tort law recognizes the spread of loss through the employer’s liability, courts have generally refused to hold employers to be insurers for their agents’ conduct.

While California courts have often been willing to find as a matter of law that malicious tortious actions are out of the scope of employment, they have been generally unsympathetic when the tortious action is battery. In 1904, the California Supreme Court reversed a verdict against a defendant employer when their employee attacked and beat the plaintiff, who was a

⁷³ *Perez v. Van Groningen & Sons, Inc.* 41 Cal.3d at p. 967.

⁷⁴ *Maria D. v. Westec Residential Sec.*, 85 Cal.App. 4th 125, 137.

⁷⁵ *Westec*, 84 Cal.App.4th at 137.

⁷⁶ 48 Cal. 3d 438 (Cal. 1989).

⁷⁷ *Id.* at 441.

patron in their hotel's restaurant.⁷⁸ The trial court found liability on the ground that "a master is liable for the torts of his servant committed in the course of his ... real or supposed scope of duties." Upon review, the court found it "clear that the defendant incurred no liability on [this] ground."⁷⁹

Since then, however, courts have commonly left the determination up to the jury. In *Fields v. Sanders*,⁸⁰ the California Supreme Court upheld the jury decision to impose vicarious liability on the employer of a truck driver who assaulted a driver after being confronted about hitting the driver's vehicle.⁸¹ The court noted that when considering whether vicarious liability is proper, "[t]he inquiry is not whether the wrongful act itself was authorized, but whether it was committed in the course of a series of acts of the agent which were authorized by the principal."⁸² The court found that this was the case here, as the truck driver was in route to his destination.⁸³ Similarly, in *Hiroshima v. Pacific Gas & Elec. Co.*,⁸⁴ the California Supreme Court held that vicarious liability was properly attached when the agent assaulted the customer while collecting a bill. In *Andrews v. Seidner*,⁸⁵ vicarious liability was proper when a bartender struck a patron while collecting drinks, and in *Flores v. AutoZone West, Inc.*,⁸⁶ the appellate court reversed summary judgment for the defendant employer, when the employee hit a customer after a dispute in a retail establishment.

⁷⁸ *Rahmel v. Lehdorff*, 142 Cal.681 (1904).

⁷⁹ *Rahmel*, 142 Cal. at 683.

⁸⁰ 29 Cal. 2d 834 (1947).

⁸¹ *Fields v. Sanders*, 29 Cal.2d. at 836-37.

⁸² *Fields v. Sanders*, 29 Cal.2d. at 839.

⁸³ *Fields v. Sanders*, 29 Cal.2d. at 839-40.

⁸⁴ 18 Cal.App.2d 24.

⁸⁵ 49 Cal.App.2d 427 (Cal. App. 2nd Dist. 1942).

⁸⁶ 161 Cal.App. 4th 373 (Cal. App. 4th Dist. 2008).

In rare circumstances, the courts have upheld a finding of vicarious liability where the individuals assaulted were not patrons, but were other individuals with whom it was foreseeable that the employees would encounter. In *Rodgers v. Kemper Const. Co.*,⁸⁷ the appellate court upheld a jury verdict finding vicarious liability where a group of construction workers attacked a group of heavy equipment operators at a common job site after work. The court held that the after-hours attack at the job site was incident to the employment relationship that could be reasonably expected.⁸⁸

Where California and other jurisdictions differ so greatly is the reasonable foreseeability standard that California uses to attach vicarious liability, essentially creating a negligence standard for the employer, for any tortious conduct of the employee. While each of the other jurisdictions would not attach vicarious liability to an employer whose employee departed from the scope of their duty to personal motivations, such as malice, California would do so if the actions based on personal motivation could be reasonably foreseen by the employer. California courts have determined that assaulting patrons of a retail establishment and tavern,⁸⁹ assaulting drivers while en route to make a delivery,⁹⁰ and assaulting customers while collecting bills, are all conduct which is within the scope of employment,⁹¹ by virtue of being required or incident to employment or reasonably foreseeable by the employer.

B. Negligent Hiring, Retention, and Supervision Cases

Although these are separate causes of action, they are very related and, in practice, are often pled as separate causes of action in the same suit for the same conduct.

⁸⁷ 50 Cal. App. 3d 608 (Cal App. 4th Dist. 1975).

⁸⁸ *Id.* at 619, 622..

⁸⁹ *Flores v. AutoZone West, Inc.*, 161 Cal.App. 4th 373 (Cal. App. 4th Dist. 2008); *Andrews v. Seidner*, 49 Cal.App.2d 427 (Cal. App. 2nd Dist. 1942).

⁹⁰ *Fields v. Sanders*, 29 Cal. 2d 834 (1947)

⁹¹ *Hiroshima v. Pacific Gas & Elec. Co.*, 18 Cal.App.2d 24

When injuries to parties occur by an employee outside of the scope of employment, plaintiffs have tried to proceed on a negligent hiring theory. There is a lack of uniformity across states in recognizing and the treatment of a negligent hiring theory. This has been a contentious issue, including within the context of hiring ex-offenders.⁹² The actual or perceived risk of liability tends to dissuade employers from partaking in the goal of rehabilitation.

All of the five states with anti-discrimination statutes and California have a negligent hiring cause of action. To establish a prima facie case of negligent hiring, there would need to be (1) a duty to use reasonable care in hiring, (2) breach of that duty, and (3) proximate cause between the breach and (4) the plaintiff's injury. Unlike the vicarious liability theory, where the employer is liable for actions of their employee, direct liability for negligent hiring belongs to the employer themselves; it is not vicarious liability for their actions. If the employee did engage in injurious behavior which was a proximate cause of the employer's negligence, then the injury caused by that employee would be due to the negligence of the employer. The Restatement Second of Agency says the following:

The principal may be negligent because he has reason to know that the servant . . . , because of his qualities, is likely to harm others in view of the work . . . entrusted to him . . . An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act

⁹² See Creed, Tim. *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts Yet Avoiding Liability*, accessible at http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=tim_creed (arguing that clear uniform standards are necessary for employers to evaluate risk of liability and that such an evaluation will make them more likely to hire ex-offenders).

which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. . . ."⁹³

The Hawaii Supreme Court held that a sexual assault of a co-worker was not a reasonably foreseeable result of hiring an individual, as a chef, who was recently released from prison for a homosexual assault.⁹⁴ Here, a civilian chef met an inmate chef who was finishing a prison sentence at San Quentin Prison.⁹⁵ The civilian recommended the inmate, upon his release, to work for American Hawaii Cruises, and he was indeed hired.⁹⁶ During his employment, the ship sustained damage and was docked for repairs.⁹⁷ To minimize expenses, the plaintiff waiter, Janssen, asked the former inmate to share a hotel room while the ship was docked.⁹⁸ The former inmate sexually assaulted the plaintiff.⁹⁹ The Hawaii Supreme Court held as a matter of law that it was not reasonably foreseeable that hiring an individual as a sous chef would lead to a sexual assault of those he came into contact with. The court further noted that while, in hindsight, the former inmate may have posed a threat to anyone he came into contact with, "that potential risk of harm was in no way magnified by the fact of his employment on the ship."¹⁰⁰

On the other hand, where a school reinstated a teacher with an extensive history of pedophilia after he was acquitted of molestation charges by current students, the Hawaii Supreme Court held the Department of Education liable under theories of negligent hiring and

⁹³ *Monty v. Orlandi*, 169 Cal.App. 2d 620, 625 (Cal. App. 3d Dist. 1959) (citing Restatement Second of Agency § 213 comment D).

⁹⁴ *Janssen v. American Hawaii Cruises*, 69 Haw. 31, 38 (Haw. 1987).

⁹⁵ *Id.* at 32.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 36.

retention, though rejecting the vicarious liability theory.¹⁰¹ The court held that the failure to investigate the allegations after acquittal was unreasonable, breaching their duty owed, and resulting in the damages sustained by the plaintiffs.¹⁰²

California

“As the court in *Roman Catholic Bishop v. Superior Court*... explained, an employer's duty, as defined by California authority and the Restatement, is breached only when the employer knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in *light of the particular work to be performed.*” *Federico v. Superior Court.*¹⁰³ In *Federico*, the court ruled as a matter of law that no duty was breached when the employer hired the employee without running a background check, therefore missing the fact that the employee had two prior convictions for sexual misconduct with minors, and the employee later molested a student's minor child. The court held that even if the employer had run the check, “nothing in [the employee's] history would have indicated to the defendant that he posed a threat of harm to minors he might encounter in the course of his work.”¹⁰⁴

In *Nigg v. Patterson*,¹⁰⁵ the California Court of Appeal reversed the trial court's grant of summary judgment for the defendant employer whose employee assaulted a patron. Patterson ran a Laundromat and worked with the directors of Stepping Stones, a program which assisted juveniles from troubled backgrounds in getting their lives together, to get some of the guys from the program to help out at the Laundromat. Stepping Stones conducted its own analysis of

¹⁰¹ *Doe Parents No. 1 v. Dep't of Educ.*, 100 Haw. 34, 67 (Haw. 2002); *Id.* at 93.

¹⁰² *Id.* at 66-67.

¹⁰³ 59 Cal. App. 4th 1207 (Cal. App. 3d Dist. 1997) (internal citation omitted).

¹⁰⁴ *Federico*, 59 Cal. App. 4th at 1215.

¹⁰⁵ 233 Cal. App. 3d 171, 181 (Cal. App. 3d Dist. 1990).

suitability to be employed and the defendant made the final decision of who he would like to employ. The money tendered for the services was divided among the residents of the program. While at work, the employee that the defendant selected beat a customer, which was the basis of this suit. In its decision, the court recognized that there is a recognized public policy in rehabilitation.¹⁰⁶ “To effectuate these interests, the burden is placed on the community in general to absorb, without recourse, the risk that the rehabilitative effort will fail.”¹⁰⁷ The court went on to note that the interest in rehabilitation does not trump the private employer’s duty to protect its business patrons and invitees.¹⁰⁸

New York

New York case law has often found as a matter of law that the tortious conduct of employees was not foreseeable by the employer. In *Ford v. Gildin*,¹⁰⁹ where the ex-offender, hired as a porter, molested a child 27 years after the commission of manslaughter. Similarly, in a negligent retention case, the court held as a matter of law that three nonviolent convictions and one robbery conviction did not give the employer reason to know that the employee had a propensity for violence.¹¹⁰

Even with this law disfavoring liability for employers who employ ex-offenders, then Governor of New York, Paterson, recognized that N.Y. Correct. Law §752 could potentially increase an employer’s risk of liability under a negligent hiring theory. Governor Paterson signed into law, on September 4th, 2008, an amendment to the Human Rights Law that creates a “rebuttable presumption in favor of excluding from evidence the prior incarceration or

¹⁰⁶ See generally, *Cardenas v. Eggleston Youth Ctr.*, 193 Cal.App. 3d 331.

¹⁰⁷ *Nigg v. Patterson*, 233 Cal. App. 3d at 182.

¹⁰⁸ *Nigg v. Patterson*, 233 Cal. App. 3d at 183.

¹⁰⁹ 200 A.D.2d 224 (N.Y. App. Div. 1st Dep’t 1994).

¹¹⁰ *Givens v. New York City Hous. Auth.* (N.Y. App. Div. 1st Dep’t 1998).

conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee...., if after learning about [the] criminal conviction history, such employer ...made a reasonable, good faith determination.”¹¹¹

Discussion of Interests

Nigg v. Patterson examined some important policy questions that perhaps deserve reconsideration by a legislative body. The case examined, on the one hand, the public policy supporting rehabilitation with the resulting burden “placed on the general community to absorb, without recourse, that the rehabilitative effort will fail,” and on the other hand, the “employer’s duty to exercise care in the selection of its employees based on an established public policy designed business patrons and invitees.”¹¹² Perhaps recent studies, which tend to show that unemployment greatly increases an ex-offender’s likelihood of reoffending, should tilt the scales of this policy weighing.

If, by ascribing greater weight to the policy of employee selection, ex-offenders who are willing and able to work remain unemployed, studies suggest that those individuals will be three times more likely to reoffend.¹¹³ If that is the case, the contrasting public policy of rehabilitation and its resulting burden will be weighted in the wrong direction. If, for instance, an individual is assaulted in a grocery store by a clerk with a prior conviction of carjacking, under current California law, that individual is not without recourse. Indeed, they may sue and introduce the prior conviction as evidence of negligent hiring. However, the more likely circumstance of that same ex-offender not being able to acquire employment, and as a result, committing a string of

¹¹¹ N.Y. EXEC. L. § 296.

¹¹² *Nigg v. Patterson*, 233 Cal. App. 3d 171, 182-83 (Cal. App. 3d Dist. 1990)

¹¹³ *Rebuilding Lives. Restoring Hope. Strengthening Communities: Breaking the Cycle of Incarceration and Building Brighter Futures in Chicago*, final Report of the Mayoral Policy Caucus on Prisoner Reentry at 15 (2006).

armed robberies, seems to increase the overall burden that society faces and, assuming the ex-offender does not have the money to settle a civil tort action, the affected individuals would be without recourse.

As mentioned above, when an employee seeks a job that, because of their prior convictions, would place them in contact with individuals they will likely reoffend with, such as convicted child molesters applying for daycare counselors, or would otherwise *increase* their propensity to reoffend, both the interests of rehabilitation and safety to patrons would be served by rejecting the job applicants. But when an employer assists in the rehabilitation of an ex-offender by employing them with a job that does not increase their likelihood to reoffend, that employer should not be penalized by incurring liability.

As associate justice Rick Sims noted in his dissent to *Nigg*, “[t]his much is clear to me: if the majority's view remains the law, no employer with a good lawyer will ever take a chance on hiring a kid with problems. How are they to support themselves? What is to become of them?”¹¹⁴

How Should California’s Statute Look?

A review of the five states that have enacted anti-discrimination statutes shows that each allows an employer to reject a candidate with criminal convictions that are related to the job duties. Two of the states, New York and Kansas also have provisions which allow discrimination against those who would pose a threat to others or the public.

A public safety provision does not make sense. As the Hawaii Supreme Court mentioned in *Jannsenn v. American Hawaii Cruises*, an ex-offender may have posed a threat to anyone he came into contact with, but “that potential risk of harm was in no way magnified by the fact of

¹¹⁴ *Nigg v. Patterson*, 233 Cal. App. 3d 171, 191 (Cal. App. 3d Dist. 1990)

his employment.”¹¹⁵ All of the pertinent studies mentioned in this paper have listed employment as one of, if not, the most important factor in the successful reentry of an ex-offender, which includes their propensity to reoffend. If our statute includes a provision that allows rejection of a job applicant due to public safety concerns, it would have the ironic effect of increasing the threat to public safety.

Instead, the standard of the connection between the prior offenses and the job duties should govern the public safety concerns. Similar to the rationale used in *Jannsens*, where the potential risk of harm is magnified by employment, employment should rightfully be rejected. For instance, if a convicted child molester sought a job at a daycare center, it would be sufficient to say that the prior convictions are substantially related to the job duties. In situations like this, it would be superfluous to include an additional provision regarding public safety and in other situations would only lead to uncertainty and unnecessary litigation.

The political feasibility of any such statute may hinge upon the employer’s burden of implementing procedures and the penalties for failing to comply with the statute. If the burden or the potential liability for failure to comply is too high, the bill would most likely face serious opposition by business groups.

A regular employment discrimination case in California, such as failing to hire someone because of their race, would fall into the protection of federal laws such as Title VII, Americans with Disabilities Act, or Age Discrimination in Employment Act and California’s Fair Employment and Housing Act (FEHA). While the damages available for these cases depend on the circumstances of the case and the statutory provision used to bring suit, the general categories

¹¹⁵ *Jannsens v. American Hawaii Cruises*, 69 Haw. 31, 36 (Haw. 1987).

of damages are “back pay,” compensation from lost wages from the time of the violation to the time of trial, “front pay,” compensation for future wages lost from the discrimination (for rare situations), compensatory damages such as emotional distress, punitive damages, attorney’s fees and costs. While the federal statutes typically provide statutory caps on recoverable damages, FEHA typically does not. With attorney’s fees and emotional distress damages, even discrimination from low salary jobs can easily rise into the six and seven figure settlement and judgment range.

The best solution for this is a conditional offer, as the Hawaii statute and Boston ordinance use. That way no employer is charged with discriminating against an ex-offender who would not have otherwise received the job. Only in a situation where an individual receives a job offer and that offer is subsequently revoked due to the findings of their criminal background check, would there be a triable issue of whether the offenses are substantially related to the job duties.

Perhaps the practical aspect of designing the legislation for these ideals is more difficult than the ideals themselves. The most applicable part of the California Code that deals with employment discrimination is the Fair Employment and Housing Act, Government Code §§ 12900-12996. The problem is that the remedies for an unlawful discriminatory practice by an employer are the same regardless of the basis of discrimination. In other words, an employer will face the same liability for rejecting an applicant for being of a certain race as they will for rejecting an applicant because of their age or religion. As mentioned above, these damages may be very burdensome for businesses, and a bill to include “ex-offender” status into regular FEHA protection will most likely be met with heavy opposition.

On the other hand, the Department of Fair Employment and Housing (DFEH) is an agency which is amply equipped to help enforce any new employment discrimination law. Therefore, it makes sense to include the new statutory language in this Part of the Government Code. However, the section should fall outside of the regular discrimination statute and so should the enforcement procedures. The legislation should read as follows:

CALIFORNIA GOVERNMENT CODE, TITLE 2, DIVISION 3, PART 2.8, CHAPTER 6,
Article 1, Section 129##:

- (1) It shall be an unlawful employment practice, unless based upon a prior conviction that is substantially related to the job or job duties for which the applicant is applying, or, except where based upon applicable security regulations established by the United States or the State of California:
 - (a) For an employer, because of a prior conviction of the applicant, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.
- (2) An employer shall offer a conditional offer of employment to the applicant. Subsequent to the conditional offer an employer may make an inquiry into the criminal background of an applicant and may only rescind that offer where the applicant's prior conviction(s) are substantially related to the job or job duties for which they are applying.
- (3) Enforcement of this statute shall be pursuant to Chapter 7, Article 1, Section 129## of this Part.

The enforcement statute should read as follows:

CALIFORNIA GOVERNMENT CODE, TITLE 2, DIVISION 3, PART 2.8, CHAPTER 7,
Article 1, Section 129##:

Notwithstanding any other provisions of law, damages for emotional distress and damages for punitive damages in a civil action to enforce section 129## of Chapter 6, Article 1 may not exceed twenty-five thousand dollars (\$25,000) each.

In addition to these provisions, one affecting the admissibility of evidence of criminal convictions must be available to insulate employers who comply with the statute from liability for doing so.

CALIFORNIA EVIDENCE CODE, DIVISION 9, CHAPTER 3, Section 1161:

When an employer has made a good faith, reasonable determination that an employee's prior criminal convictions are not substantially related to the job or job duties for which the employer hired the employee, evidence of those convictions or of the employee's prior incarceration may not be introduced to prove negligent hiring, retention or supervision.

Finally, to ensure that employers are not held vicariously liable for actions of employees *outside* of the scope of employment, a statute should be implemented to limit the liability, as a matter of law, under the theory of *respondeat superior* to actions that were taken in furthering the interests of the employer, superseding the holding in *Clark Equipment Co. v. Wheat*,¹¹⁶ a California Court of Appeals case and bringing it back in line with *Rahmel v. Lehdorff*,¹¹⁷ a California Supreme Court case. The statute should read:

An employer may be held vicariously liable for the acts of its agents only when the acts performed are required by or incident to the employee's duties. An employer is not vicariously liable simply because those acts could be reasonably foreseen by the employer if they were not required or incident to the employee's duties.

¹¹⁶ 92 Cal.App.3d 503, 520; 154 Cal.Rptr. 874 (1979)

¹¹⁷ 142 Cal.681 (1904).