STATE REGULATION OF CRIMINAL HISTORY DISCRIMINATION

Title VII’s prohibition on race discrimination in employment has been interpreted over the past several decades to restrict criminal history bans in hiring. After all, more than 60% of the people in prison today are people of color.1 And while 1 in 17 white men are expected to serve time in prison during their lifetime, this rate rises to 1 in 6 for Hispanic men and to 1 in 3 for African American men.2 These stark racial disparities in the criminal justice system provide ample support for a disparate impact claim, when criminal records are used to deny employment.

Yet mass incarceration and its collateral consequences reach beyond communities of color. The United States is notorious for incarcerating a larger percentage of its population than any country in the world.3 Since the 1990s, an average of 590,000 inmates have been released annually from state and federal prisons.4 By some estimates, there are more than 70 million people with criminal records in the country.5

In general, states and municipalities have an interest in combatting employment practices that bar individuals from opportunities simply because they have criminal records, regardless of race. Economists have estimated that reduced output of goods and services of people with felonies and prison records is estimated at $78 to $87 billion in losses to the nation’s economy in one year.6 They note that allowing people to work decreases tax contributions, boosts sales tax, and saves money by keeping people out of the criminal justice system. Moreover, employment has been found to be a significant factor in reducing re-offending. One study found that a 1 percent drop in the unemployment rate causes between a 1 to 2 percent decline in some offenses.7

States and local legislatures have accordingly taken steps to codify the factors considered under federal caselaw and also provide additional protections to individuals

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2 Id.
with criminal records, regardless of race. Below is a brief summary of the application of federal law to criminal history bans in employment, and the state-level approaches that have followed.

**Federal law: Disparate Impact Analysis**

In 1975, the Eighth Circuit found that Title VII prohibited an employer from “follow[ing] the policy of disqualifying for employment any applicant with a conviction for any crime other than a minor traffic offense.” *Green v. Missouri Pac. R.R.*, 523 F.2d. 1290, 1293 (8th Cir. 1975). The *Green* panel identified three factors (later identified as “*Green* factors”) that were relevant in the analysis of whether the exclusion was 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. *Id.* at 1297 (finding that the Iowa provision in question suffered from such narrowing criteria). More than thirty years later, the Third Circuit further developed the factors analyzed by the *Green* court. *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007).

In April 2012, the Equal Employment Opportunity Commission published guidance on employers’ use of criminal records in employment screening which discusses the *Green* factors as considerations in conducting criminal conduct screens. \(^8\) Under the EEOC guidelines, when evaluating applicants’ criminal records, employers should consider (1) the underlying facts and circumstances of the offense; (2) the number of convictions; (3) older age at the time of conviction or release; (4) evidence that the individual performed the same type of work, post-conviction, with no subsequent offenses; (5) the applicant’s prior work history; (6) evidence of rehabilitation; (7) personal and employment references; and (8) coverage by a government bonding program.

**New York State Law: Applying Multi-Factor Analysis to All Job Seekers**

Long before the EEOC guidance, New York State included the *Green* factors in a law requiring that all employers conduct an individualized assessment of applicants’ criminal convictions. New York Correction Law 23-A, passed in 1976, provides that an employer may not deny or terminate employment on the basis of prior criminal convictions, except under two narrowly defined circumstances:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an

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unreasonable risk to property or to the safety or welfare of specific individuals or the general public.⁹

Furthermore, Article 23-A adds additional relevant information to the Green factors. Employers in New York must consider:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons 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.¹⁰

Article 23-A applies to all governmental and private employers operating in New York State that employ ten or more individuals.¹¹

**The Ban the Box Movement: Regulating the Process**

More recently, states and municipalities have begun to enact legislation that restricts the timing of any inquiry into criminal history during the application process. These laws, generally characterized as “Ban the Box” policies, prohibit employers from asking about criminal convictions on the initial employment application.

Proponents of Ban the Box claim that removing information about criminal history from job applications provides ex-offenders the opportunity to be fairly evaluated based on their fitness for the job, rather than immediately excluded from consideration. At least one study has suggested that applicants who interact with employers are between 4 and 6 times more likely to receive a callback or job offer than those who do not, and personal contact reduces the effect of a criminal record by roughly 15 percent.¹²

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⁹ N.Y. Correct. Law § 752.
¹⁰ Id. § 753(1).
¹¹ Id. § 751.
¹² Statement of Devah Pager, Professor of Sociology at Princeton University, EEOC Meeting of Nov. 20, 2008; Employment discrimination Faced by Individuals with Arrest and Conviction Records, [https://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm](https://www.eeoc.gov/eeoc/meetings/11-20-08/pager.cfm).
To date, 25 states have banned the box for public sector jobs, and nine have implemented ban the box laws for private employers.13 Over 150 cities and counties have adopted these policies.14 Many policies incorporate the EEOC guidelines and, like the New York Correction Law, require individual consideration of applicants’ criminal histories. However, different laws place different restrictions about when an inquiry may be made, or when a background check may be run. Even within New York state, some localities permit inquiries to be made at the initial interview, while others forbid any background check until a conditional offer has been extended to the applicant.15

More study is needed to determine whether these laws effectively increase opportunities for applicants with criminal records. Some opponents of the policy have suggested that, if unable to see criminal history information, employers will rely on racial stereotypes to guess who has a criminal record and accordingly discriminate against Black and Hispanic applicants.16 Supporters maintain that these studies do not in fact prove what they purport to show—that Ban the Box laws are responsible for an increase in discriminatory hiring.17 As states and localities continue to adopt and implement these policies, we will have an increasing pool of data to draw from in assessing whether laws

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14 Id.
15 See § 154-25 of the City of Buffalo Code (any employer in Buffalo “shall not ask questions regarding or pertaining to an applicant’s prior criminal conviction on a preliminary employment application.”); § 63-12 of the Rochester City Code (any employer in Rochester “shall not make any inquiry regarding or pertaining to an applicant's prior criminal conviction on any initial employment application.”); § 53-4 of the Syracuse City Code (“In connection with the consideration of an application for employment with the city [of Syracuse] no criminal history inquiry may be required of an applicant during the application process...[which] shall be deemed to begin when the applicant inquires about the employment sought and shall end when an employer has determined the applicant to be qualified for employment and has extended a conditional offer of employment.”)
that restrict when and how criminal convictions are considered in hiring are in fact reducing barriers to employment for ex-offenders.