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Negative Credentials: Fair and Effective Consideration of Criminal Records

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INTRODUCTION

Employers are relying on criminal record information to screen job applicants at increasing rates.[1] This increase has been attributed to growing employer concerns about negligent hiring claims as well as technological advances that have increased the ease and reduced the costs associated with obtaining criminal record information.[2] Surprisingly little attention has been given to the rejection of applicants based on their criminal records, even though the approach of both employers and courts toward the reliance on criminal records in employment decisions has important implications for ex-offenders, organizations, and society at large.

Relying on criminal record information to preclude ex-offenders from jobs for which they are otherwise qualified directly restricts their abilities to find employment, a critical need for ex-offenders and a

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[1]*See* Alfred Blumstein & Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks*, 47 CRIMINOLOGY 327 (2009); SOC'Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS (2010) [hereinafter SHRM SURVEY], *available at* http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx (reporting that 93% of employers surveyed conduct criminal background checks for at least some positions).

[2]Blumstein & Nakamura, *supra* note 1, at 328–29.

primary predictor of recidivism.[3] Moreover, some employers' use of criminal record information sometimes results in disparate treatment or disparate impact discrimination that violate ex-offenders' legal rights.[4] For organizations, the failure to use criminal record information fairly and effectively when making employment decisions may involve the inefficient or "wasteful" use of human resources and expose the organization to legal liability. In addition, the extent to which employers use criminal record information fairly and effectively has implications for a number of societal concerns, including society's interests in promoting criminal offender rehabilitation, avoiding recidivism, and promoting equal opportunities in employment.

Despite the many important implications of how criminal record information is used in employment decisions, reported cases and other anecdotal evidence suggest that many employers give inadequate or uninformed attention to how they use criminal record information in hiring and retention decisions. For example, although the 2006 Equal Employment Opportunity Commission (EEOC) guidelines and the "best practice" advice of human resources commentators reject blanket policies that bar the hiring of all ex-offenders,[5] there is evidence that some employers continue to adopt policies that bar the hiring of any ex-offenders.[6] Many employers also fail to provide clear policies, guidelines, or training relating to the use of criminal record information in making employment decisions[7] and as a result, contribute to the risk that criminal record

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[3]*See* Sabra Micah Barnett, Commentary, *Collateral Sanctions and Civil Disabilities: The Secret Barrier to True Sentencing Reform for Legislatures and Sentencing Commissions*, 55 Ala. L. Rev. 375, 375 (2004) (noting that sanctions can inhibit reintegration and rehabilitation and can increase recidivism); Elena Saxonhouse, Note, *Unequal Protection: Comparing Former Felons' Challenges to Disenfranchisement and Employment Discrimination*, 56 Stan. L. Rev. 1597, 1611 (2004).

[4]See *infra* Part V (discussing disparate treatment and disparate impact claims for ex-offenders).

[5]*See, e.g.,* EEOC, Directives Transmittal No. 915.003, Compliance Manual § 15-VI(B)(2) (2006) [hereinafter EEOC Compliance Manual], *available at* http://www.eeoc.gov/policy/docs/race-color.pdf; Herbert G. Heneman III et al., Staffing Organizations 408 (7th ed. 2012); Glynda R. Parker et al., *Criminal Records, Social Security, Work Eligibility*, HRMagazine, Oct. 2004, at 45, 45.

[6]*See infra* Parts IV.A-B (discussing the survey of Michigan employers).

[7]*See infra* Part IV.B.

information will be used inconsistently or "disparately" across different protected groups.[8]

The purpose of this article is to promote the fair and effective use of criminal record information in the making of employment decisions. Many employers appear to believe that any information about an applicant's criminal record is useful in predicting future workplace behavior, and therefore employers are or should be unconstrained in their use of criminal information.[9] However, while in many circumstances some types of criminal records have obvious relevance in the evaluation of job applicants, there are also many circumstances in which some types of criminal records are likely to have very little or no relevance. Moreover, there are societal and individual interests that need to be balanced against the desire of some employers to eliminate any and all perceived risk associated with hiring someone with a criminal record.

Part I addresses the risks associated with hiring ex-offenders and the need to balance employer, society, and individual interests. Part II identifies and discusses the two primary "fairness and effectiveness" concerns associated with the use of criminal record information in employment decision making: consistency and job relatedness. The consideration of the science of human resource management (HRM), legal theories of employment discrimination, and available empirical evidence leads to the conclusion that the fair and effective use of criminal record information in employment decisions first requires that employers use such information in a consistent manner across all job applicants and employees. Second, where consideration of criminal record information has the effect of disproportionately screening out members of a protected group, the employer must have reasonable evidence that the specific criminal record–related criterion or standards being applied are job related, taking into account the job duties and organizational context in question.

Part III reviews empirical research examining employers' concerns about hiring ex-offenders and employers' policies and practices with regard to the use of criminal record information in employment decisions. Our review addresses the extent to which available empirical findings

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[8]Employers with fifteen or more employees are prohibited from making employment-related decisions based on an employee's race, color, religion, sex, or national origin (42 U.S.C. § 2000e-2(a) (2006)), or disability (42 U.S.C. §§ 12101–12214 (2006)). As discussed in this article, ex-offenders may be discriminated against due to their race, color, or disability.

[9]*See infra* Part IV.B, Table 2.

indicate that employer policies and practices are addressing consistency and job-relatedness concerns, and it identifies areas of limitation in the relevant research literature with regard to what it can tell us about employer policies and practices.

In Part IV, we respond to the recent call for additional empirical research investigating employers' attitudes toward ex-offenders,[10] as well as the identified need for empirical research investigating employers' actual practices with regard to the use of criminal record information,[11] by reporting and discussing the results of a new study we conducted focusing on employers in the state of Michigan. The new study makes several unique contributions to the literature. First, it extends the work of earlier research to include a more comprehensive assessment of the factors influencing the hiring of ex-offenders, allowing for more direct comparisons of the relative importance of the factors found to influence the hiring of ex-offenders in individual studies that focus more narrowly on a subset of those factors.

Second, the new study tests whether there are significant differences in the factors influencing employers that are unwilling to even consider ex-offenders versus employers who are at least willing to consider ex-offenders, taking into account both concerns and potential benefits associated with the hiring of ex-offenders. Do employers who are willing to consider hiring ex-offenders simply have fewer concerns about ex-offenders, or are they more likely to see potential benefits associated with hiring ex-offenders that tend to offset some of their concerns? Based on our review, our study is the first to examine that question.

Third, compared to previous research, the current study provides a deeper investigation of the extent to which employers have formal policies and practices that would promote the consistent and job-related use of criminal record information. The results of the employer survey provide insight into how employers in Michigan make hiring decisions about ex-offenders, and they have implications for other employers who should

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[10]Mindi N. Thompson & Devon L. Cummings, *Enhancing the Career Development of Individuals Who Have Criminal Records*, 58 Career Dev. Q. 209, 214 (2010).

[11]Michael A. Stoll & Shawn D. Bushway, *The Effect of Criminal Background Checks on Hiring Ex-Offenders*, 7 Criminology & Pub. Pol'y 371, 373 (2008); Bruce Western, *Criminal Background Checks and Employment Among Workers with Criminal Records*, 7 Criminology & Pub. Pol'y 413, 414 (2008).

be able to establish that their use of criminal record information is job related and consistent with business necessity.

Part V examines how the courts have addressed disparate treatment and disparate impact employment discrimination claims based on employers' use of criminal record information. This part reviews the standards courts have applied, and the extent to which those standards address consistency and job-relatedness concerns, thereby promoting the fair and effective use of criminal record information in employment decisions. Our analysis of relevant court decisions leads to the observation that courts apply less demanding standards to justify the reliance on criminal record information. These practices contrast sharply with courts' increasingly demanding standards for the validation of other tests and screening criteria that have a disparate impact on applicants of color.

Finally, informed by the results of our new study, and drawing on the broader behavioral science and legal literatures, Part VI provides guidance for employers, the EEOC, and the courts regarding the fair and effective use of use of criminal records in employment decisions. Although the EEOC issued revised guidelines in April 2012,[12] these guidelines do not provide employers with enough information to use criminal record information in a fair and effective way. This article's guidance should result in protection of ex-offender applicants against rejection from positions that they could perform safely and effectively, while still protecting employers' interests in the hiring process.

I. Inflated Perceptions of Risk and the Need to Balance Employer, Societal, and Individual Interests

Employers make hiring decisions based on job applicants' criminal records in reliance on their beliefs that this record provides relevant information about the applicants' trustworthiness and propensity to engage in prohibited conduct. Further, some employers may believe that they should have a right to know and act upon that information. This reliance makes some

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[12]EEOC, Enforcement Guidance No. 915.002, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (2012) [hereinafter EEOC 2012 Enforcement Guidance], *available at* http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

sense given evidence that, in general, people with criminal records are more likely to get in trouble with the law than people without criminal records.[13] The recidivism rate for some serious crimes is quite high. For example, a recent Pew Center on the States survey found that for all inmates released in 2004 in forty-one U.S states, 43.3% returned to prison within three years.[14] However, several reasons exist why reported recidivism rates may provide an inflated indication of the risk associated with hiring applicants with criminal records.

First, studies on recidivism consistently demonstrate that those who have offended in the past will have the highest probability of reoffending within several years, and the probability of further criminal offense will decline steadily thereafter.[15] In fact, researchers have found that the relationship between having some specific types of criminal records and the likelihood of committing a crime becomes attenuated over time. After relatively short periods without further criminal incident, an individual with a criminal record is no more likely than a person without any such record to get in trouble with the law again. For example, a study by Alfred Blumstein and Kiminori Nakamura assessing the recidivism probabilities of individuals arrested in New York State over a twenty-seven–year period found that eighteen-year-olds arrested for burglary had the same risk of being arrested again as individuals with no record after just 3.8 years had passed since their first offenses.[16] Additional findings varied depending on the nature of the crime for which an individual was arrested. In the case of arrests for aggravated assault, the necessary "arrest free" period was 4.3 years, and for robbery it was 7.7 years.[17] Other research has produced similar results.[18] Therefore, with the passage of time some types of criminal

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[13]Blumstein & Nakamura, *supra* note 1, at 331.

[14]Pew Ctr. on the States, State of Recidivism: The Revolving Door of America's Prisons (2011), *available at* http://www.pewcenteronthestates.org/initiatives_detail.aspx?initiativeID=85899358500.

[15]Blumstein & Nakamura, *supra* note 1, at 331–32.

[16]*Id.*

[17]*Id.*

[18]*See* Megan C. Kurlychek et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483, 483 (2006) [hereinafter *Scarlet Letters and Recidivism*] (finding that after six to seven years of crime-free conduct, ex-offenders' risk of reoffending starts to approximate the risk posed by people without convictions);

records do not effectively predict future criminal activity and should not be viewed as relevant to employers' assessments of the risks associated with job applicants.

Second, recidivism rates do not directly address the risk of future criminal conduct in the workplace. Given that criminal offenses committed in the workplace are a very small subset of all offenses, the probability of committing crimes in the workplace is likely to be even more remote than suggested by recidivism rates.[19] There is surprisingly little research examining the relationship between a criminal record and the propensity to commit workplace crimes or engage in inappropriate workplace behavior.

Our review of the literature identified only one such study. A longitudinal study of 960 New Zealand residents found that the existence of a criminal record for thirteen- to sixteen-year-olds was unrelated to engaging in a wide range of counterproductive work behaviors at age twenty-six, including tardiness, absenteeism, disciplinary problems, violence, theft, property destruction, and substance abuse in the workplace.[20] The authors even found a small negative relationship between having a past criminal conviction and fighting or stealing at work, meaning that individuals with criminal convictions were *less likely* than other workers to be involved in fighting or stealing at work.[21]

There are possible explanations for this interesting finding. Roberts et al. suggest that being caught and convicted for criminal activities acts as a "preventative buffer" against future counterproductive work behaviors—these individuals learned their lessons.[22] A second offered explanation is that the fear of losing one's job is greater for those with a criminal record, which leads those individuals to be more careful on the job to avoid being fired.[23] The referenced research does not prove that

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Megan C. Kurlychek et al., *Enduring Risk?: Old Criminal Records and Predictions of Future Criminal Involvement*, 53 Crime & Delinq. 64, 80 (2007) (finding same).

[19]Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project 7 (2011), *available at* http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1.

[20]Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. Applied Psychol. 1427, 1427–30 (2007).

[21]*Id.* at 1434.

[22]*Id.*

[23]*Id.*

past criminal offenses are never relevant to employers' hiring decisions, and it is possible that the lack of a stronger relationship between individuals' criminal records and workplace crimes or other misconduct may be due in part to the significant passage of time since the individuals' respective criminal offenses. Nonetheless, it is noteworthy that the limited available empirical evidence fails to support the assumption, made by some employers, that all criminal record information is useful in predicting workplace misbehaviors.

Third, recidivism rates are also significantly impacted by whether an ex-offender is able to find employment.[24] Specifically, ex-offenders who are unable to secure jobs are much more likely to reoffend than those who are employed.[25] Thus, to the extent that a job applicant is at risk of being a repeat offender, an employer's act of hiring the applicant significantly reduces that risk. Therefore, recidivism rates that do not distinguish between ex-offenders who are able to find employment and those who are not overstate the risk of recidivism among employed ex-offenders.

In summary, employers can more accurately assess the risk of applicants by taking into account factors such as the nature of the crime, time since the criminal activity, whether a past offense involved workplace behavior, and other relevant circumstances. Nonetheless, some employers may still conclude that they should not be required to adopt this more nuanced approach. Employers may believe that they should be free to avoid perceived risk, however slight and whether or not well founded, or that individuals with criminal records simply do not deserve consideration. However, even if these employer feelings and concerns are legitimate, they are clearly not the only concerns that warrant consideration. Rather, there are other legitimate societal and individual interests that need to be taken into account and balanced against the concerns that some employers have regarding the hiring of individuals with criminal records.

Society has an interest in promoting ex-offender rehabilitation and avoiding recidivism.[26] As discussed above, facilitating the employment of

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[24]Rodriguez & Emsellem, supra note 19, at 3; *see also* Bruce E. May, *The Character Component of Occupational Licensing Laws: A Continuing Barrier to the Ex-Felon's Employment Opportunities*, 71 N.D. L. Rev. 187, 187–88 (1995) (citing empirical research on the link between recidivism and employment).

[25]Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 Geo. J. on Poverty L. & Pol'y 283, 284 (2006).

[26]Rodriguez & Emsellem, *supra* note 19, at 3.

ex-offenders is one key to achieving those aims. Society also has an interest in promoting the wise and effective use of its human resources. This societal interest is reflected in the comments of former EEOC acting chair Commissioner Stuart J. Ishmimaru, who, in addressing the question of employers' use of criminal record information stated,

> Fears, myths and such stereotypes and biases against those with criminal records continue to be a part of the . . . decision making for many employers. Business and industry suffers as a result because it is not able to benefit fully from the skills of every potential worker. For our economy to be successful, we cannot afford to waste any available talent.[27]

To the extent that unfounded beliefs about applicants' criminal records lead some employers to overlook otherwise more qualified applicants, the unconstrained employer use of criminal record information conflicts with society's interest in promoting the effective use of human resources.[28]

Finally, employer concerns about the hiring of individuals with criminal records must be balanced against society's interest in promoting equal employment opportunity. Federal and state legislatures have embraced the equal employment opportunity principle in passing a wide range of fair employment legislation.[29] That legislation has created individual rights, the enforcement of which is intended to further the societal policy of promoting equal employment opportunities. Those individual rights, and the equal opportunity principle more generally, would not be protected under a policy that allows employers unconstrained use of criminal record information. Such a policy would permit employers to assume, for example, that black applicants who are ex-offender pose a greater risk than their white counterparts.[30]

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[27]Stuart J. Ishimaru, EEOC Commissioner, Remarks at the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), *available at* http://www.eeoc.gov/eeoc/meetings/11-20-08/transcript.cfm.

[28]To be clear, our intent is merely to point out the potential conflict between allowing employers unconstrained use of criminal record information and society's interest in promoting the effective use of human resources; we are not suggesting that the principles of effective HRM, or HRM "best practice," are or should be the sole driver of legal policy.

[29]*See infra* notes 188–89 and accompanying text (discussing the 1991 Amendments to the Civil Rights Act).

[30]*See infra* Part V.A (addressing disparate treatment discrimination).

In some situations an employer's use of criminal record information results in the screening out of a substantially greater proportion of a group that is protected against discrimination.[31] Again, a policy allowing unconstrained employer use of criminal record information would permit this employer practice to go unchallenged. However, taking into account employers' interests and societal and individual interests, current U.S. law requires that when an employer's use of criminal record information has a disparate impact on a protected group, the employer must provide evidence that the practice is "job related and consistent with a business necessity."[32]

In summary, in many circumstances certain types of criminal records have obvious relevance in the evaluation of job applicants. Sometimes the obvious relevance is due to a law or regulation that requires employers to consider certain types of applicant criminal records in specific employment situations. For example, in Michigan, any registered sex offender cannot work within 1000 feet of a school.[33] However, it is also true that there are many circumstances in which some kinds of criminal record information are likely to have very little or no relevance whatsoever, and an employer's desire to reject applications based on criminal record information may implicate competing societal and individual interests. A driving under the influence conviction, for example, may not be relevant for a position that does not involve operating a motor vehicle. When an employer's use of criminal record information involves competing interests, enforcement of nondiscrimination laws should include a thoughtful and informed approach. Such an approach balances the interests of employers, applicants, and society; is based on evidence and not stereotypes or other mere assumptions; and promotes both the fair and effective use of criminal record information by employers.

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[31]*See, e.g.*, Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937, 955 (2003) (studying applicants in Milwaukee, Wisconsin and demonstrating employers' differential treatment of white and black ex-offender job applicants). *See also infra* Part V.B (addressing disparate impact discrimination).

[32]EEOC Compliance Manual, supra note 5; El v. SEPTA, 479 F.3d 232, 245 (3d Cir. 2007); Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977). *See also infra* Part V.B (discussing disparate impact standards).

[33]Mich. Comp. Laws Ann. §§ 28.723, 733 & 734 (West 2012).

II. Primary Fairness and Effectiveness Concerns

Based on the joint consideration of the science of HRM, legal theories of employment discrimination, and available empirical evidence, there are two primary "fairness and effectiveness" concerns associated with employers' use of criminal record information: consistency and job relatedness. In this part we discuss those concerns. Guidance for addressing the concerns in employer practices and judicial standards relating to the use of criminal record information are provided subsequently in Parts V and VI.

A. Consistency of Employer Practices

Employers use various types of information in assessing job applicants and making hiring decisions, including interview scores, mental ability tests, and work sample tests, as well as criminal record information. From a science of HRM perspective, whatever the type of information used in hiring decisions, the accurate measurement and valid use of that information requires consistency in the content of what is assessed. In addition, employers should also be consistent in the assessment process, including consistent application of standards and making the same effort to identify negative information about all candidates.[34]

Consistency is important because the failure to do so with both content and process opens the door for extraneous factors, both random and systematic, to influence the assessments of candidates and the hiring decisions.[35] Such influences reduce the likelihood that the best-qualified candidates will be selected and may unfairly screen out certain types of individuals or groups.

From a legal perspective, the disparate treatment theory of employment discrimination requires the consistent treatment of job applicants and workers; there can be no disparate treatment if all individuals, across all protected groups, are treated in the same, consistent way.[36] Thus, from both the science of HRM and legal perspectives, consistency is a critical

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[34]Heneman et al., *supra* note 5, at 355–56.

[35]*Id.; see also* Ellyn Brecher et al., *The Structured Interview: Reducing Biases Toward Job Applicants with Physical Disabilities*, 18 Emp. Resps. & Rts. J. 155, 158 (2006).

[36]*See infra* Part V.A (discussing disparate treatment claims by ex-offenders).

concern whenever criminal record information is used in making hiring or other employment decisions.

Although consistency is essential, available empirical evidence indicates that employers do not treat ex-offender applications equitably. For example, a study of applicant testers in Milwaukee, Wisconsin, demonstrates employers' differential treatment of white and black ex-offender job applicants.[37] While both white ex-offender and black ex-offender applicant testers were less likely to receive callbacks from employers than applicant testers within their respective racial groups who were nonoffenders, the ratio of callbacks for nonoffenders relative to ex-offenders was 2:1 for whites but only 3:1 for blacks.[38] Thus, the effect of a criminal record on callbacks from employers was 40% larger for blacks than for whites.[39] These research findings demonstrate that at least some employers have the inclination to treat applicants with criminal records differently, depending on their race.

B. Job Relatedness of Standards That Are Applied

Hiring standards that have a disparate impact on protected groups must be job related and consistent with business necessity,[40] meaning that those standards must have some validity. In the employee selection context, validity refers to the extent to which an employer's selection practice is actually effective in identifying individuals who will be successful on the job. In other words, does the application of the selection practice result in accurate predictions about which individuals actually perform well or avoid misconduct on the job? The job-related and consistent-with-business-necessity requirement applies to any screening standard, from the use of a mental ability test to consideration of criminal records.

1. The Importance of Job Relatedness

Although application and decision consistency in hiring is necessary for fair and valid employment decisions, consistency alone is not sufficient to

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[37]Pager, *supra* note 31, at 955.

[38]*Id*. at 959.

[39]*Id*.

[40]42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

produce such decisions. For example, an employer might consistently require that to be considered for the position of janitor, all applicants must have a bachelor's degree from an accredited university. However, unless having the degree in question is associated with significantly better performance in the job of janitor, the degree requirement would not be considered job related.

Best practice in HRM provides that before a selection test or criterion can be used to assess applicants and make hiring decisions, there must be be reasonable evidence that it is a valid predictor for the job(s) in question.[41] The use of a selection test or criterion in the absence of such evidence involves an unnecessary risk that valuable human resource potential will be overlooked and costly errors in employee selection will be made. Conversely, the use of valid selection tests and criteria to improve prediction about which applicants are likely to be successful employees have been shown to have substantial utility for employers, including potentially large financial benefits relative to the costs.[42]

While using only job-related selection tests and criteria in making hiring decisions is an HRM best practice, employers are not legally required to use them. Rather, the legal requirement that an employer be able to demonstrate that a selection practice is job related and consistent with business necessity only applies once it has been shown that the practice in question is having a disparate impact on a protected group.[43] We next review research assessing the likelihood that employers' use of criminal record information will result in a disparate impact that will shift the burden to employers to demonstrate the job relatedness and business necessity of their selection practices.

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[41]Soc'y for Indus. and Org. Psychol., Principles for Validation and Use of Personnel Selection Procedures 4–5 (4th ed. 2003) [hereinafter Principles for Validation and Use], *available at* http://www.siop.org/_Principles/principles.pdf.

[42]John. W. Boudreau, *Utility Analysis for Decisions in Human Resource Management, in* 2 Handbook of Industrial and Organizational Psychology 621, 718–26 (Marvin D. Dunnette & Leaetta M. Hough eds., 2d ed. 1991).

[43]42 U.S.C. § 2000e-2(k)(1)(B)(ii). The disparate impact theory of employment discrimination, its application in cases involving an employer's use of criminal record information, and the approaches that courts have taken to the issue of demonstrating job relatedness are addressed in Part IV of this article.

2. Empirical Evidence of Disparate Impact

Significant differences in the incarceration rates across members of various protected groups raises the need for applying disparate impact analysis to the consideration of criminal records by employers. Criminal records affect the employability of many Americans. Between 2000 and 2010, the number of prisoners under state and federal correctional authority jurisdiction increased by 221,134, and the imprisonment rate increased from 478 to 500 per 100,000 residents.[44] Between 2000 and 2010, more than 7.5 million people were released from state and federal prisons, and during 2010 alone, a total of 708,677 prisoners were released from state and federal prisons.[45] Given these statistics, a significant number of job applicants will be affected negatively by employer policies that limit or even prohibit hiring ex-offenders.

Beyond the effect of incarceration on the applicants as a whole, the incarceration statistics consistently establish that employers' consideration of criminal convictions has a disparate impact on applicants of color.[46] People of color make up a disproportionate number of inmates in the United States. At the end of 2010, the number of sentenced prisoners under state and federal jurisdiction—including prisoners, probationers, and parolees—were as follows: 451,600 white males, 561,400 black males, and 327,200 Hispanic males.[47] This translates to 3074 black males per 100,000 U.S. residents, compared to 1258 Hispanic males and 459 white males per 100,000.[48] In other words, in 2010 a black male was more than 15 times more likely to be under federal or state jurisdiction than a white male, and a Hispanic male was 3.6 times more likely to be under jurisdiction than a white male.

Looking specifically at incarceration in 2010, one in eighty-seven white men were imprisoned, compared to one in thirty-six Hispanic men

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[44]Paul Guerino et al., U.S. Dep't of Justice, Prisoners in 2010, at 2 tbl.1 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (last revised Feb. 9, 2012).

[45]*Id.*

[46]Miriam J. Aukerman, *Barriers to Reentry: Legal Strategies to Reduce Recidivism and Promote the Success of Ex-Offenders*, 1 Mich. Crim. L. Ann. J. 4 (2003).

[47]Guerino et al., *supra* note 44, at 26, app. tbl.12.

[48]*Id.* at 27, app. tbl.14.

and one in twelve black men.[49] Incarceration also has a more significant impact on persons of color over a lifetime—blacks in the United States are incarcerated at 8.2 times the rate of whites.[50] This racial disparity has increased somewhat over time: in 1960, 36% of inmates were black, whereas by 2008 this percentage increased to about 39%, compared to about 15% of the noninstitutionalized population.[51]

It is also informative to compare the arrest and conviction rates across races. The arrest rates in 2009 for certain crimes,[52] along with state prisoners sentenced for the same crimes,[53] are shown below.

	Whites as % of Total Arrests	*Blacks as % of Total Arrests*	*Whites as % of Total Convictions*	*Blacks as % of Total Convictions*
Violent Crimes	63.5%	33.8%	36.9%	44.0%
Drug Abuse	65.3%	33.3%	30.1%	51.0%

These conviction and arrest statistics must be compared to participation in the labor force across racial and ethnic groups. In 2011, the Department of Labor's *Characteristics of the Employed* showed that among workers over the age of sixteen who were employed, 81.9% were white, 10.8% were black, and 14.5% were Hispanic.[54]

Research also confirms the disproportionate impact of incarceration on subgroups of color. One study using the 2000 census data found that

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[49]Pew Charitable Trusts, Collateral costs: Incarceration's Effect on Economic Mobility 6 (2010), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Economic_Mobility/Collateral%20Costs%20FINAL.pdf?n=5996.

[50]Human Rights Watch, Punishment and Prejudice: Racial Disparities in the War on Drugs 9 (2000); *see also* Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 Fordham Urb. L.J. 1501, 1502 (2002) ("African-Americans are at least seven times more likely than whites, and two times more likely than Hispanics to be incarcerated."); Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in U.S. Incarceration*, 69 Am. Soc. Rev. 151, 152 (2004).

[51]John Schmitt & Kris Warner, *Ex-Offenders and the Labor Market*, 14 J. Lab. & Soc. 87, 91–92 (2011).

[52]Howard N. Snyder, U.S. Dep't of Justice, Arrest in the United States, 1980–2009, at 2 (2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aus8009.pdf.

[53]Guerino et al., *supra* note 44, at 28–29, app. tbls.16A & 16B.

[54]Bureau of Labor Statistics, Household Data Annual Averages, Employed Persons by Occupation, Race, Hispanic or Latino Ethnicity, and Sex, *available at* http://www.bls.gov/cps/cpsaat10.pdf (last visited Nov. 3, 2012).

among men born between 1965 and 1969, 3.2% of white men would experience incarceration, whereas 22.4% of black men were or had been incarcerated by 1999.[55] A black male high school dropout born between 1965 and 1969 had nearly a 60% chance of serving time in prison by the end of the 1990s.[56] Another study found that on an average day in 1996, more than 36% of black male high school dropouts aged twenty to thirty-five were in prison or jail, whereas less than one-third of all young unskilled black men held jobs that year.[57]

Ex-offenders may also enjoy protection against disparate impact under the Americans with Disabilities Act (ADA), since 68% of criminal offenders in jail meet the criteria for substance abuse or dependence.[58] In addition, 24% of state prisoners have reported a recent history of mental illness.[59] The ADA's definition of a person with a disability entitled to bring disparate impact claims[60] includes any person with a physical or mental impairment that substantially limits a major life activity.[61] This includes those dependent on alcohol or legal substances if a major life activity is limited,[62] unless the person is a current user of a controlled substance.[63]

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[55]Pettit & Western, *supra* note 50, at 164.

[56]*Id.* at 161.

[57]Bruce Western & Becky Pettit, *Incarceration and Racial Inequality in Men's Employment,* 54 Indus. & Lab. Rel. Rev. 3, 8–9 (2000).

[58]Jennifer C. Karberg & Doris J. James, U.S. Dep't of Justice, Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002, at 2 (2005), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/sdatji02.pdf.

[59]Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice, Mental Health Problems of Prison and Jail Inmates 2 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf.

[60]42 U.S.C. § 12112(b)(6) prohibits the use of "qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the standard, test or other selection criteria . . . is shown to be job-related for the position in question and is consistent with business necessity[.]"

[61]42 U.S.C. § 12102 (Supp. 2011).

[62]Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002) ("Drug addiction that substantially limits one or more major life activities is a recognized disability under the ADA."); Miners v. Cargill Commc'ns, Inc., 113 F.3d 820, 824 n.5 (8th Cir. 1997) (noting that alcoholism qualifies as a disability for the purposes of the ADA).

[63]42 U.S.C. § 12114(a) (2006) ("For purposes of this subchapter, 'a qualified individual with a disability shall' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.").

These data establish that screening out applicants based on their felony records has the strong potential for a substantial disparate impact on applicants of color[64] as well as persons with disabilities. Consistent with that observation, the EEOC and several experts recommend allowing a presumption of disparate impact based on national or regional conviction rate statistics.[65] In its 2012 Enforcement Guidance, the EEOC concludes that national data "support[] a finding that criminal record exclusions have a disparate impact based on race and national origin."[66] At the July 2011 EEOC hearings on this issue, the executive director of the New Jersey Institute for Social Justice urged the EEOC to continue to support the presumption of disparate impact for three reasons: (1) data support the continued validity of the presumption, (2) producing more particular statistical evidence would prove prohibitively burdensome, and (3) there is no consensus that local data do not reflect national trends.[67]

In contrast, employers have argued that ex-offender applicants must base a claim of disparate impact on crime-specific or applicant pool data to carry their initial burden.[68] The Supreme Court has held that disparate impact need not always be established by the impact on actual applicants.[69] Applicant-specific data should not be required of a plaintiff alleging disparate impact since there is no consensus that local and national conviction data are not highly correlated.[70] Even if there is a lack of correlation, an employer can still present narrower data, which would demonstrate a lack

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[64]Western, *supra* note 11, at 414.

[65]EEOC, Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment (1987), *available at* http://www.eeoc.gov/policy/docs/convict2.html (last modified Sept. 20, 2006) [hereinafter EEOC Policy Statement]; Donald R. Livingston, Partner, Akin, Gump, Strauss, Hauer & Feld, Statement before the EEOC Meeting on Employment Discrimination Faced by Individuals with Arrest and Conviction Records (Nov. 20, 2008), *available at* http://www.eeoc.gov/eeoc/meetings/11-20-08/livingston.cfm.

[66]EEOC 2012 Enforcement Guidance, *supra* note 12, at 1.

[67]Cornell William Brooks, Executive Director, New Jersey Institute for Social Justice, Written Testimony Before the EEOC to Examine Arrest and Conviction Records as a Hiring Barrier (July 26, 2011), *available at* http://www.eeoc.gov/eeoc/meetings/7-26-11/brooks.cfm.

[68]Livingston, *supra* note 65.

[69]Dothard v. Rawlinson, 433 U.S. 321, 330 (1977).

[70]Brooks, *supra* note 67.

of disparate impact.[71] In addition, if variations across skill or education level exist, they would have little effect on the disparate impact on hiring for entry-level positions.

Given the strong likelihood that the use of criminal record information will result in a disparate impact against one or more protected groups, employers should not use criminal record information in hiring decisions unless they are able to demonstrate the job relatedness and consistency with business necessity of their specific work needs.

III. Empirical Evidence of Employer Criminal Record Policies and Practices: Past Research

A small group of researchers, including both economists and social scientists, have investigated employer concerns about hiring ex-offenders and employers' policies and practices with regard to the use of criminal record information in employment decisions. In this part we review and summarize relevant findings. The reviewed studies provide evidence of the extent to which available employer policies and practices regarding the use of criminal record information are addressing consistency and job-relatedness concerns. Some areas of limitation in the relevant research literature are also identified and briefly discussed.

A. Employer Attitudes and Beliefs Regarding Ex-Offenders

Relatively few studies have examined employers' attitudes toward ex-offenders.[72] One of the first reported studies investigating employer attitudes and policies toward ex-offenders, published in the *American Business Law Journal* in 1976, suggested that employers understood and sympathized with the challenges ex-offenders faced in seeking employment and found that many corporate policies deliberately encouraged, rather than discouraged, hiring individuals with criminal records.[73] In summarizing the study's findings, the authors concluded that "[b]y far the

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[71]EEOC Policy Statement, *supra* note 65.

[72]Joseph Graffam et al., *The Perceived Employability of Ex-Prisoners and Offenders*, 52 Int'l J. Offender Therapy & Comp. Criminology 673, 674 (2008).

[73]Walter Jensen, Jr. & William C. Giegold, *Finding Jobs for Ex-Offenders: A Study of Employers' Attitudes*, 14 Am. Bus. L.J. 195, 202–03 (1976).

dominant management opinion of the employment of former offenders is that it represents an opportunity to seriously contribute to the solution of the nation's crime problem without threatening corporate independence."[74] The authors further concluded that employers had not deliberately obstructed or hindered efforts by ex-offenders to obtain employment.[75] Instead, employers were found to be "engaged in a number of innovative, risk-taking steps to show their concern and absorb the flow of partially-rehabilitated ex-offenders."[76]

Since 1976, subsequent studies suggest far less employer concern for helping ex-offenders find employment and far greater employer concern about employing ex-offenders within their own organizations. In general, research indicates that many employers see a criminal record as an indication or signal that the applicant is "untrustworthy" or would be a "problematic employee."[77] Due to these concerns, employers may reject ex-offender applicants "based on a perceived increased propensity to break rules, steal, or harm customers."[78] There is also evidence that some employers view ex-offenders as less likely than the general workforce to exhibit skills and characteristics relevant to employability.[79]

A relatively recent survey conducted by the Society for Human Resource Management (SHRM) in January 2010 reflects the primary employer concerns about hiring applicants with criminal records that emerge in a review of earlier research.[80] The responding employers indicated the following reasons for conducting criminal background checks on job candidates: ensure a safe work environment for employees, 61%; legal

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[74]*Id.* at 197.

[75]*Id.*

[76]*Id.*

[77]Harry J. Holzer et al., *Will Employers Hire Former Offenders?: Employer Preferences, Background Checks, and Their Determinants*, in Imprisoning America: The Social Effects of Mass Incarceration 205, 205–06 (Mary Pattillo et al. eds., 2004); Becky Pettit & Christopher J. Lyons, *Status and the Stigma of Incarceration: The Labor-Market Effects of Incarceration, by Race, Class, and Criminal Involvement*, *in* Barriers To Reentry?: The Labor Market for Released Prisoners in Post-Industrial America 203, 205 (Shawn Bushway et al. eds., 2007) [hereinafter Barriers to Reentry].

[78]Holzer et al., *supra* note 77, at 206.

[79]Graffam et al., *supra* note 72, at 681–82.

[80]SHRM Survey, *supra* note 1.

liability for negligent hiring, 55%; reduce/prevent theft and embezzlement, 39%; comply with applicable state law, 20%; assess overall trustworthiness, 2%; and "other reasons," 4%.[81]

B. Absolute Bars to Hiring Ex-Offenders

The employer concerns outlined above have led many employers to adopt an absolute bar against hiring ex-offenders, regardless of the potential for disparate impact. EEOC regulations have interpreted an absolute ban on considering all job applicants with criminal records as a violation of Title VII.[82] Consistent with these regulations, the HRM best practice recommendations discussed below emphasize the need to evaluate the job relatedness of applicants' criminal records, taking into account characteristics of the criminal offense and characteristics of the job.[83] Based on available research and nonempirical articles addressing the use of criminal record information in hiring decisions, one researcher concluded that "[t]here is a consensus that the blanket exclusion of individuals with criminal history records makes little sense."[84] Nonetheless, the limited available research indicates that a significant number of employers remain unwilling to even consider hiring ex-offenders.

Although a firm conclusion is not possible, there is some suggestion that a growing number of employers are adopting blanket exclusions or absolute bans on the hiring of ex-offenders. Early findings from surveys conducted in the 1970s indicated a general willingness of employers to consider hiring ex-offenders. For example, of the 209 U.S. businesses responding to Jensen and Giegold's survey in 1976, only 2.4% answered that their company policies prohibited the hiring of ex-offenders.[85]

Surveys conducted in the last decade appear to suggest a greater unwillingness to hire ex-offenders on the part of employers. For example, a survey of Los Angeles–area employers found that only 9% of the employers using criminal justice methods for background checks were willing to

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[81]*Id. at* slide 7.

[82]*See* EEOC 2012 Enforcement Guidance, *supra* note 12, at 16.

[83]See supra note 41 and accompanying text (discussing best practices). *See also infra* notes 257–60 and accompanying text (discussing best practices).

[84]Kurlychek et al., *Scarlet Letters and Recidivism, supra* note 18, at 485.

[85]Jensen & Giegold, *supra* note 73, at 221.

hire ex-offenders, and only 18% of the employers using private background checks were willing.[86] Similarly, a survey of employers in four cities reported that only 38.4% of the employers probably would or definitely would hire an applicant with a criminal record, whereas 19.5% said they definitely would not, and 42.1% said they probably would not.[87]

Any increasing employer unwillingness to even consider hiring ex-offenders may be explained by growing employer concern in recent decades concerning negligent hiring liability.[88] While the pattern of survey findings over time is only suggestive, it does appear that the promulgation of EEOC regulations in 1990 addressing employers' use of criminal record information in hiring decisions has not dramatically curtailed employers' adoption of absolute bans on the hiring of ex-offenders.

In summary, although EEOC regulations have been interpreted as prohibiting absolute bans on the hiring of ex-offenders, and such bans are inconsistent with HRM best practice recommendations, there is reason to believe that a significant number of employers are unwilling to consider hiring ex-offenders under any circumstances.

C. Contingent Employer Policies and Practices

Among employers that do not adopt an absolute bar to hiring ex-offenders, many adopt a contingent approach in their consideration of applicants with criminal records. The primary contingencies demonstrated by existing empirical research are the nature of the applicant's past criminal offense, the nature of the job in question, and the relationship of the former to the latter.

Research has found that employers are most strongly averse to hiring ex-offenders who have committed crimes involving violence against a person such as homicide, sexual assault, or attempted armed robbery.[89]

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[86]Stoll & Bushway, *supra* note 11, at 395 n.14.

[87]Holzer et al., *supra* note 77, at 210.

[88]*See, e.g.,* SHRM Survey, *supra* note 1, at slide 7 (reporting that 55% of survey respondents used legal liability for negligent hiring as a justification for conducting criminal background checks on job candidates).

[89]Harry J. Holzer et al., *The Effect of an Applicant's Criminal History on Employer Hiring Decisions and Screening Practices: Evidence from Los Angeles, in* Barriers to Reentry, *supra* note 77, at 117, 127–28; R.H. Finn & Patricia A. Fontaine, *The Association Between Selected Characteristics and Perceived Employability of Offenders*, 12 Crim. Just. & Behav. 353, 360–61 (1985).

Existing research further indicates that employers are less averse to hiring applicants with convictions for property crimes, such as burglary or shoplifting, and are least averse to hiring applicants with drug-related offenses.[90]

The significance of the type of crime committed is illustrated by the results reported by Devah Pager, a leading researcher in this area, who asked employers how likely they would be to hire an applicant who had committed a drug felony compared to an applicant who was convicted of a property crime like burglary.[91] Forty-nine percent of the employers were "probably" or "definitely" likely to hire an applicant with any criminal record, whereas 62% of those same employers were somewhat or very likely to hire an applicant with a drug felony.[92] If the applicant participated in a drug treatment program rather than going to prison, employers' willingness to hire jumped to 73%.[93] In contrast to drug offenders, only 31% of the employers surveyed were somewhat or very likely to consider an applicant who had committed a property crime.[94] Not surprisingly, only 23.6% were somewhat or very likely to consider an applicant who had committed a violent crime.[95]

The specific duties of the position being filled also have an impact on how some employers view an applicant's criminal record. A review of several studies indicates that, in general, employers are less likely to consider ex-offenders for positions involving customer contact,[96] public safety,[97] the handling of money or other significant fiduciary responsibilities,[98] or working with vulnerable populations.[99] Research also demonstrates that some employers jointly consider the nature of applicants' past

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[90]Holzer et al., *supra* note 89, at 127–28*;* Finn & Fontaine, *supra* note 89, at 360–61.

[91]Devah Pager, Marked: Race, Crime, and Finding Work in an Era of Mass Incarceration 123 (2007).

[92]*Id.* at 122–23.

[93]*Id.* at 125.

[94]*Id.* at 123–24.

[95]*Id.*

[96]Holzer et al., supra note 89, at 142; s*ee also* Stoll & Bushway, *supra* note 11, at 375.

[97]Mary L. Connerley et al., *Criminal Background Checks for Prospective and Current Employees: Current Practices Among Municipal Agencies*, 30 Pub. Personnel Mgmt. 173, 175 (2001).

[98]Holzer et al., *supra* note 89, at 142; Connerley et al., *supra* note 97, at 175.

[99]Holzer et al., *supra* note 89, at 140–41; Connerley et al., *supra* note 97, at 175.

criminal histories in light of specific job requirements. Thus, the applicants' criminal records may preclude them from being considered for one position, but the applicants may still apply and be considered for other positions for which their criminal convictions would not be disqualifying factors. This approach is reflected in the results of a survey conducted by the SHRM in January 2010 with 433 U.S. employer respondents.[100] The survey found that while the nature of the applicant's offense was the most influential consideration, the relevance of the applicant's criminal offense to the job in question was rated "very influential" by 73% of the responding employers.[101]

Finally, research suggests that the length of time since conviction is something that most employers who are at least willing to consider ex-offenders take into account to at least some extent. For example, the SHRM Survey found that 56% of the responding employers rated length of time since criminal activity as "very influential," and only 2% rated it as "not at all influential."[102] What is not clear from available research is the extent to which employers recognize the relatively rapid rate at which the risk of recidivism diminishes for individuals with a criminal record who remain arrest and conviction free, and adapt their screening policies accordingly. For example, available research does not tell us the extent to which employers who are at least willing to consider ex-offenders would, consistent with expert recommendations to the EEOC,[103] view an applicant's criminal record irrelevant if the applicant's only conviction was for a crime not directly relevant to the job applied for, and the applicant had no new arrests or convictions in the past seven years.

D. Employers' Adoption of Formal Policies

The extent and nature of employer policies regarding the use of criminal record information in hiring decisions is another area that has been the

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[100]SHRM Survey, *supra* note 1.

[101]Id. at slide 6 (reporting also that 81% of respondents rated the severity of the criminal activity as "very influential"); *see also id*. at slide 5 (reporting that 95% of respondents reported that whether the applicant's crime involved a violent felony had a "very influential" impact on hiring decision).

[102]*Id*. at slide 6.

[103]*See* Brooks, *supra* note 67.

subject of relatively little research—a significant omission given the importance of policies in standardizing or "structuring" employer practices.[104] Jensen and Giegold's 1976 survey found that more than 82% of responding companies did not have formal company-wide policies regarding the hiring of ex-offenders, and of the remaining that had formal policies, many of the policies "deliberately encourage, rather than discourage, hiring individuals with criminal records."[105]

The Jensen and Giegold survey of employer policies focused narrowly on policies addressing the following considerations: unexplained breaks in continuity of employer a disqualifier, 1.9%; hiring of ex-offenders forbidden, 2.4%; nature of offense considered, 17.2%; other factors considered, 14.3%; and policy actively seeks out ex-offenders, 4.8%.[106] The authors recommended that employers adopt formalized policies addressing the hiring of ex-offenders.[107]

Little research since 1976 has focused on the extent to which employers have adopted policies regarding factors considered in hiring ex-offenders. The new study reported in Part IV provides evidence of the extent to which employers have responded to Jensen and Giegold's call over the past thirty-five years, and significantly expands the range of employers' policies that are related to hiring ex-offenders that are examined.

IV. Results of New Study of Michigan Employers' Criminal Records Policies and Practices

The existing research outlined above provides informative findings but leaves significant gaps in what is known about employers' attitudes toward ex-offenders[108] and their actual practices with regard to the use of criminal record information.[109] Responding to the need for additional research in

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[104]*See infra* Part VI.

[105]Jensen & Giegold, *supra* note 73, at 202–03.

[106]*Id.* at 221 (reflecting percent of employers with such a policy).

[107]*Id.* at 217.

[108]Thompson & Cummings, *supra* note 10, at 214.

[109]Stoll & Bushway, *supra* note 11, at 373; Western, *supra* note 11, at 414.

this area, we developed a survey assessing current Michigan employer attitudes, policies, and practices with regard to the use of criminal record information and sent it to a diverse group of approximately 2900 Michigan employers. The results are based on survey responses from seventy-two employers, including a wide range of private sector employers, representing 54% of total respondents (including hospitals, a research laboratory, manufacturers, a landscaper, security firms, and rehabilitation services), and public sector employers (including public schools, city and county governments, and public universities).

The responses to the survey provide information about how employers assess applicants with a criminal record and validate that it is possible for employers to establish a business necessity or reason for relying on a criminal record. But to do so, these employers have looked beyond the convictions themselves to determine whether the particular crimes are related to the jobs being filled and whether other information about the applicants might show that the criminal record is not a clear indicator of their lack of qualifications for the positions.

Given issues regarding the response rate and the representativeness of the respondent group, the study is best viewed as exploratory in nature. Nonetheless, it makes several unique contributions to the literature. First, we extend the work of earlier research to include a more comprehensive assessment of the factors influencing the hiring of ex-offenders, allowing for more direct comparisons of the relative importance of the factors found to influence the hiring of ex-offenders in individual studies that focus more narrowly on a subset of those factors. The comprehensive list of factors, listed in Table 1 and Table 2, was developed for the present study based on a review of the various narrower sets of factors investigated in earlier studies such as the nature of crimes committed,[110] potential for customer contact,[111] public safety implications,[112] and positions involving a fiduciary duty.[113]

Second, we examine whether there are significant differences in the factors influencing employers that are unwilling to even consider

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[110]Finn & Fontaine, *supra* note 89, at 360–61; Jensen & Giegold, *supra* note 73, at 221; Holzer, *supra* note 89, at 127–28; Pager, *supra* note 91, at 122–23.

[111]Holzer et al., *supra* note 89, at 142; Stoll & Bushway, *supra* note 11, at 375.

[112]Connerley et al., *supra* note 97, at 175

[113]*Id.*; Holzer et al., *supra* note 89, at 142.

ex-offenders versus employers who are at least willing to consider ex-offenders, taking into account both concerns and potential benefits associated with the hiring of ex-offenders. Among employers who are willing to consider hiring ex-offenders, we measure whether they simply have fewer concerns about ex-offenders or whether they are more likely to see potential benefits associated with hiring ex-offenders that tend to offset some of their concerns.

Third, compared to previous research, the current study provides a more in-depth investigation of the extent to which employers are standardizing or structuring their policies and practices regarding use of criminal record information in hiring decisions—a key to enhancing consistency and job relatedness, and thus, promoting the fair and effective use of criminal record information.

Finally, we provide an empirical assessment of the extent to which employers willing to hire ex-offenders consider all three factors required by EEOC regulations: the nature and gravity of the offense, the nature of the job, and the time since prison.

The results can help employers address legal concerns associated with the use of criminal record information and justify their practices when claims arise. The results show how criminal records influence employers' hiring attitudes and decision-making processes. They also show the factors employers consider important in assessing ex-offenders. The results also provide useful information that could be communicated to ex-offenders, vocational counselors who assist them, and policy makers.

A. Reluctance of Employers to Hire Job Applicants with Criminal Records

The survey first asked about employers' willingness to hire applicants with a criminal record generally. Twenty-four percent of the responding employers indicated that they were "not at all" willing to consider ex-offenders for employment, and only 8% indicated that they were "often willing" to do so. This finding is consistent with our earlier observation that compared to survey results from the 1970s, more recent studies of employer attitudes appear to suggest a greater unwillingness to consider hiring ex-offenders.

The survey then solicited the factors that would establish legitimate employer concerns about hiring an applicant with a criminal record. A list of potential concerns was identified based on a review of the academic and

Table 1: Importance of Employer Concerns Regarding the Hiring of Ex-Offenders

Employer Concern	*Unwilling to Consider Ex-Offenders (Mean Rating)*	*Willing to Consider Ex-Offenders (Mean Rating)*
Potential harm to customers or other third parties	4.80	4.44
Sex offender (CSC) registry restrictions	4.79	4.51
Lack of necessary license	4.62	3.60*
Potential harm to coworkers	4.60	4.30
Property loss/theft	4.53	3.98
General lack of trustworthiness	4.50	3.54*
Lack of identification/proof of eligibility to work in United States	3.86	3.76
Lack of training/skills	3.50	3.00
Lack of education	3.43	2.85
Lack of general work experience	3.29	2.73

* Mean differences for items assessing these two concerns were statistically significant, with $p < 0.05$.

practitioner literature.[114] Survey respondents were then asked to rate the importance of each concern to their organization using a five-point scale, from 1 equaling "not at all concerned" to 5 equaling "very or critically important." The importance ratings were analyzed by employer group—those who indicated they are unwilling to consider ex-offenders and those who are willing to do so. The relevant findings are summarized in Table 1.

Compared to employers who were willing to consider hiring ex-offenders, employers who were unwilling to consider hiring ex-offenders placed greater importance on each of the ten identified concerns. The greatest mean difference between the two groups is found with regard to the concern that ex-offenders lack the ability to obtain necessary licenses and the concern about their presumed general lack of trustworthiness.

B. Factors Considered in Deciding Whether to Hire Particular Ex-Offenders

The survey asked responding employers about the factors that they actually consider in making hiring decisions among applicants with a criminal

[114] *See supra* notes 111–13. Many of the same concerns were also identified in SHRM's 2010 survey. *See* SHRM, SHRM Survey, *supra* note 1.

Table 2: Extent to Which Employers Consider Specific Factors in Deciding Whether to Hire a Particular Ex-Offender

Specific Factors	*Rating*	*% Giving at Least Some Consideration*
Violence associated with crime	4.85	98.1
Sex offender (CSC) registration restrictions	4.69	98.0
Level of offense (felony, misdemeanor)	4.60	96.1
Relationship of crime to ability, capacity, or fitness to perform job duties and responsibilities	4.58	98.0
Total number of crimes committed by the individual	4.40	98.1
Connection to potential to cause property loss/theft	4.33	98.0
Time since conviction	4.30	98.1
Evidence of rehabilitation since conviction	4.16	96.0
Level of responsibility with position	3.94	96.0
Time since release from prison	3.92	91.1
General lack of trustworthiness	3.87	96.1
Age at time of committing the crime(s)	3.75	94.2
Level of involvement in crime committed (e.g., aiding and abetting)	3.67	94.0
Amount of time in prison	3.56	92.3
Lack of training/skills needed	3.50	94.1
Lack of education	3.42	94.1
Belief that crime shows unfavorable character traits	3.37	93.7

record. A list of specific factors employers might take into account in deciding whether to hire a particular ex-offender, rather than concerns about hiring ex-offenders in general, was identified based on a review of the academic and practitioner literature.[115] Survey respondents were asked to rate the extent to which their organization considers each factor in deciding whether to hire a particular ex-offender using a five-point scale, from 1 equaling "not at all concerned" to 5 equaling "very important." A substantial number of employers in the survey sample—24%—adopt absolute bans on the hiring of ex-offenders in apparent disregard of EEOC regulations and guidelines, and therefore their ranking of the various factors was not included in the following table. The relevant findings based on the responses of those employers that indicated at least some willingness to consider ex-offenders are summarized in Table 2.

This rating of factors actually considered in individual hiring decisions is generally consistent with employer responses regarding concerns in hiring ex-offenders. That is, when considering individual applicants

[115] *See supra* notes 111–13.

with criminal records, as reflected in Table 2, employers were most likely to consider factors closely related to the most significant concerns they had about hiring ex-offenders in general, as reflected in Table 1.

Of the employers who reported that they were at least willing to consider hiring ex-offenders, 98% also reported that when considering individual applicants with criminal records, at least some weight is given to all of the following considerations: nature of the offense, nature of the job, and time since release from prison. Further, 96% of these employers reported considering those three factors and evidence of the applicant's rehabilitation. Thus, among those employers at least willing to consider hiring ex-offenders, the factors that the EEOC regulations require be taken into account are being considered.

The survey also examines whether employers have formal policies regarding the review of applicants who have criminal records. For each of the factors considered by employers, listed above in Table 2, employers were asked to rate the extent to which their organization has a formal policy that requires the factor to be considered when evaluating job applicants who are ex-offenders. Ratings were based on a five-point scale with 1 equaling "not related to any policy," 3 equaling some general reference to the consideration in the employer's policy, and 5 equaling a formal policy that clearly requires its consideration. The relevant findings are summarized in Table 3. The middle column indicates the average rating for the item using the above scale. The far-right column reports the percent of responding employers who have a formal policy that clearly requires consideration of the factor in question.

At a general level, there was significant convergence between Table 2 and Table 3. That is, the findings indicate that employers most often had policies regarding those factors that they reported as using most frequently in the hiring of particular ex-offenders. However, the survey findings also indicate that despite the benefits of providing decision makers with clear guidance, many employers consider the factors related to the crime committed, without having a formal policy about the consideration of those factors. Most notably, despite the importance that EEOC regulations and case law place on the nature of the crime, the nature of the job, the time since release from prison, and the evidence of rehabilitation, the only one of those four factors addressed by a majority of the employers is the nature of the crime. Only 36.4% of the responding employers have formal policies requiring consideration of the crime in relation to the applicant's ability to perform the job duties in question. Less than 15% had

Table 3: Extent to Which Responding Employers Have a Policy Addressing the Specific Factors Used in Deciding Whether to Hire a Particular Ex-Offender

Specific Factors	*Mean Rating*	*% With a Formal Policy Requiring Consideration*
Level of offense	3.7	55.4
Violence associated with crime	3.5	48.2
Sex offender (CSC) registration restrictions	3.5	50.9
Relationship of crime to ability, capacity, or fitness to perform job duties and responsibilities	3.3	36.4
Connection to potential to cause property loss/theft	3.1	29.6
Lack of training/skills needed	2.6	24.1
Time since conviction	2.6	25.5
Lack of education	2.5	24.5
Level of responsibility with the position	2.4	12.7
Total number of crimes committed	2.2	13.2
General lack of trustworthiness	2.1	5.7
Lack of general work experience	2.1	13.5
Level of involvement in crime committed (e.g., aiding)	2.1	10.9
Time since release from prison	2.0	14.5
Belief that crime shows unfavorable character traits	2.0	9.3
Evidence of rehabilitation since conviction	1.9	9.3
Amount of time in prison	1.8	7.5

formal policies requiring consideration of time since release from prison or evidence of rehabilitation.

Without a formal policy, employers are free to place varying weight on criminal history across applicants. As with any decision where considerable discretion is involved, this variability may open the door to discrimination, intentional or as a result of unconscious bias, against applicants of color.

C. Further Insights from the Survey

The survey asked Michigan employers about perceived potential benefits of hiring ex-offenders. Table 4 includes responses to this question: "Please rate the extent to which your organization has seen each of the following potential benefits from hiring ex-offenders," with respondents using a 1–5 scale—1 being "not at all beneficial," 2 being "of some benefit," 3 being "in some circumstances," 4 being "fairly helpful," and 5 being "extremely

Table 4: Potential Employer Benefits from Hiring Ex-Offenders

Positive Characteristic of Ex-Offender	*Of Some Benefit or More*	*Mean Rating Among Unwilling Employers*	*Mean Rating Among Willing Employers*
Work experience in prison	24.5%	1.0	1.49
Training or skills from prison	25.5%	1.0	1.51
Ability to follow directions	40.4%	1.0	2.22*
Work ethic	41.7%	1.0	2.26*

* Mean differences for items assessing the "ability to follow directions" and "work ethic" potential benefits were statistically significant, with $p < 0.05$.

beneficial." The second column reports the percentage of employers who indicated that the characteristics listed were at least "of some benefit."

The remaining columns report the mean rating for each of the characteristics for two employer groups, those employers who indicated they were unwilling to hire ex-offenders and those willing to hire ex-offenders. The mean ratings of 1.0, the lowest possible rating on the five-point scale, means that none of the employers in the "unwilling to hire" group viewed the hiring of ex-offenders as involving any of the listed benefits. Combined, the results reported in Table 1 and those reported in Table 4 indicate that employers who are willing to consider hiring ex-offenders see both fewer potential negatives and more positive benefits associated with hiring ex-offenders. Alternatively stated, based on the present sample, employers who adopt an absolute bar against hiring ex-offenders have greater concerns associated with hiring ex-offenders and do not see any potential benefits associated with hiring ex-offenders.

Several open-ended questions provided survey respondents an opportunity to offer unstructured, narrative comments. The analysis of those open-ended comments leads to additional exploratory findings regarding employer attitudes, policies, and practices. First, our content coding of the narrative comments revealed that 62.5% of all respondents offered comments about statutory restrictions on hiring ex-offenders, and further, the percent mentioning statutory restrictions did not vary significantly between employers willing to consider ex-offenders and those who were not. One surprising finding was that several respondents overstated the state restrictions on ex-offender hiring. These two comments are typical of the responses received from long-term care facilities: "State regulated—no felons can work in long term care[;]" and "Nursing Home regulation prohibits hiring those with criminal history[.]" In reality,

Michigan state law only requires a waiting period before long-term care facilities can hire many applicants with felony convictions.[116]

Similarly, some schools responded that they did not or could not hire any ex-offenders. While state law prohibits the hiring of sex offenders by schools,[117] any other felons can be hired by a school district with the approval of the district's superintendent.[118] These comments exemplify the approach of schools that responded to the survey:

> Michigan School Employee Safety Legislation prohibits us from employing people with certain convictions without specific approval of our Board of Education. We tend not to present these candidates to our Board.
>
> We generally do not consider individuals with felony violations due to MI's requirements to take to Board of Education and large number of other applicants without criminal backgrounds deemed more appropriate.
>
> State law strictly prohibits us from hiring ex-offenders.

These comments suggest that inaccurate perceptions of the law contribute to some employers' unwillingness to even consider hiring ex-offenders. To examine that question in greater depth, we further content coded the narrative responses mentioning legal considerations based on whether the employers' narrative response reflected an inaccurate overstatement of the legal restrictions on hiring ex-offenders in the state of Michigan and then compared the frequency with which overstatements of the legal restrictions appeared in the two employer groups. We found that 3.6% of the employers willing to consider ex-offenders and 29.4% of the employers unwilling to consider hiring ex-offenders overstated the legal restrictions in Michigan.[119] This statistically significant finding[120] is consistent with the observations of an expert at the EEOC's July 2011 hearings, outlining the "confusing hodgepodge" of state and local restrictions on the hiring of ex-offenders.[121] Although additional

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[116]Mich. Comp. Laws Ann. §§ 333.20173a, 330.1134a (West 2012).

[117]Mich. Comp. Laws Ann. § 380.1230 (West 2012).

[118]*Id.*; Mich. Admin. Code r. § 390.1201 (2012).

[119]Based on analyses performed by the authors; additional details available upon request.

[120]Based on a cross-tabulation of frequencies and a Chi square test, with $p < 0.05$.

[121]EEOC to Examine Arrest and Conviction Records as a Hiring Barrier, Written Testimony of Barry A. Hartstein, Shareholder, Littler Mendelson, P.C. (July 26, 2011), *available at* http://www.eeoc.gov/eeoc/meetings/7-26-11/hartstein.cfm.

research is warranted to generalize the present findings, anecdotal reports and available empirical evidence strongly suggest that inaccurate beliefs about the law may be a contributing factor in adopting an absolute bar to hiring ex-offenders.

The survey responses also gave some insight into how applicants with a criminal record should present themselves during the hiring process. Without a specific question on this topic, 29.2% of the survey respondents noted the importance of the forthright disclosure of convictions on an application when it is requested. Even if an employer would consider hiring an ex-offender, "dishonesty" shown by lack of disclosure of such a conviction was perceived as a definite bar to employment. In addition, without a question prompting the advice, 18.1% of the responding employers advised that on applications and in interviews, applicants should provide additional information to explain the circumstances of their criminal offenses. These responses imply that, for employers willing to consider an ex-offender, honesty and extenuating circumstances connected to the criminal activity may be given consideration during the hiring process.

V. Discrimination Claims by Ex-Offenders

Ex-offenders of color have challenged employer hiring decisions that appear to be based on race or national origin under the theories of disparate treatment and disparate impact. Despite research demonstrating that some employers are influenced by an ex-offender applicant's race,[122] disparate treatment claims are often dismissed, either because the plaintiff cannot show that he or she meets the minimum qualifications for the position, or because the court finds that the plaintiff and the white comparator who was alleged to have been treated more favorably were not similarly situated. Even if an ex-offender cannot prove disparate treatment, a disparate impact claim may be available if the employer's decision, which is based on criminal records, has a disparate impact on a protected class, if the basis for the decision is not job related, and if it is not consistent with business necessity.

This part will consider both disparate treatment and disparate impact claims by ex-offenders. Under either theory of discrimination,

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[122]*See supra* text accompanying notes 37–39.

most courts have been lenient in imposing any requirement that an employer show either a legitimate reason or a business necessity for relying on criminal record information. Unlike discrimination claims involving the application of selection tests or other screening criteria—for example, height or education requirements—most courts have allowed employers making decisions based on criminal records to rely on general concerns or even broad assumptions about the potential risks posed by these applicants.

A. Disparate Treatment Claims

Having a criminal record is generally not a protected characteristic, and therefore taking adverse action against an applicant or employee solely because of his or her criminal record does not involve disparate treatment.[123] Yet an employer's purported reliance on criminal record information is sometimes relevant to claims alleging disparate treatment based on protected characteristics such as race or disability. For example, a black plaintiff with a criminal record may allege that an employer was not consistent in its consideration of criminal record information, treating black individuals with a criminal record more harshly than their white counterparts, and as a result of this disparate treatment, he or she was not hired or was terminated from a job he or she held. The research outlined previously in Part II demonstrates that at least some employers engage in this type of race-based differential behavior.

An employer's purported use of criminal record information also becomes relevant to race-based or other disparate treatment claims when the employer points to the plaintiff's criminal record as a legitimate nondiscriminatory reason for its adverse action. No doubt, in many circumstances, such a defense may be well founded. However, there is also little doubt that relatively easy access to criminal record information and the prevalence of arrests and convictions among members of protected groups allow employers to consciously use an applicant's criminal record as a mere

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[123]Some state laws limit the use of arrest and conviction records by prospective employers, and in those states one's status as an arrestee or ex-offender might be viewed as a limited form of protected characteristic. For a listing of states with such laws, see *State Laws on Use of Arrests and Convictions in Employment*, Nolo, http://www.nolo.com/legal-encyclopedia/state-laws-use-arrests-convictions-employment.html (last visited June 12, 2012).

pretext for racial discrimination both at the time of the employment decision as an after-the-fact justification when the basis for the decision is challenged as discriminatory.[124]

This section will review how courts have approached and decided cases alleging disparate treatment employment discrimination in which the plaintiff's criminal record played a significant role. All of these cases have been litigated under the three-step proof process established by *McDonnell Douglas v. Green*.[125] First, the plaintiff-ex-offender is required to establish a prima facie case of discrimination based on race or some other protected characteristic. Second, if the plaintiff establishes a prima facie claim, the employer must then produce evidence that it had a legitimate, nondiscriminatory reason for the adverse action it took against the plaintiff.[126] Third, if the employer meets its burden of production, the applicant can still prove intent to discriminate by a "preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination."[127]

While the discussion is organized around these three steps, there are several issues that have been the focus of the courts' attention. Most notably, courts have examined the issue of whether the plaintiff is able to identify a similarly situated comparator when deciding whether a prima facie case has been established and when analyzing whether the plaintiff has created a genuine issue as to pretext.

1. Criminal Record Information and a Plaintiff's Prima Facie Case

A plaintiff satisfies his or her burden of establishing a prima facie case of employment discrimination if evidence is introduced that raises a reasonable inference that action taken by the employer was based on a protected characteristic. Absent convincing direct evidence of a discriminatory motive, ordinarily a plaintiff must establish a prima facie case of disparate treatment discrimination by showing that (1) he or she is a member of a

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[124]For a discussion of possible implicit bias in hiring decisions, see Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 Berkeley J. Afr.-Am. L. & Pol'y 2, 18 (2012).

[125]411 U.S. 792 (1973).

[126]Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

[127]*Id*. at 253.

protected class; (2) he or she is qualified to perform the job or is performing the job duties satisfactorily; (3) he or she suffered an adverse employment decision or action; and (4) the decision or action occurred under circumstances giving rise to an inference of discrimination based on his or her membership in the protected class.[128]

A plaintiff's criminal record may have relevance in the consideration of the second and fourth prongs of a prima facie case. In cases involving denied job applicants, evidence that the employer had a consistently applied policy prohibiting the hiring of individuals with the plaintiff's criminal record have prevented some plaintiffs from establishing the second prong—that they are qualified to perform the job. For example, in 2010 the Eighth Circuit Court of Appeals held that an employer was justified in rejecting the application of a woman with several theft-related convictions.[129] The employer's consistently applied policy was enough to justify the dismissal of the claim despite race-related statements by a manager during the hiring process.[130]

More commonly, a plaintiff's criminal record is relevant to his or her effort to establish the fourth prong of the prima facie case, that the challenged decision or action occurred under circumstances giving rise to an inference of discrimination based on membership in the protected class. This occurs when a plaintiff with a criminal record attempts to show that one or more individuals with criminal records arguably comparable to his or her own, and who are not members of his or her protected group, were treated more favorably by the defendant-employer, thereby creating an inference that the employer was motivated by an intent to discriminate and not genuine concern about the plaintiff's criminal record. In such cases, the plaintiff has the burden of establishing that the identified comparator is "similarly situated" to the plaintiff.

Courts have adopted an approach that takes into account multiple factors in determining whether the plaintiff can establish that the proffered comparators are similarly situated. Some of the factors have been described as "rules of law" that have been applied by courts across a wide range of cases in determining whether a comparator is similarly

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[128]Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008); Bryant v. Verizon Commc'ns, 550 F. Supp. 2d 513, 534 (S.D.N.Y. 2008).

[129]EEOC v. Con-Way Freight, Inc., 622 F.3d 933, 938 (8th Cir. 2010).

[130]*Id.* at 935.

situated.[131] For example, based on the reasoning that the intent of the decision maker is the focus of concern in disparate treatment cases, it is well established that a comparator must have the same supervisor who terminated the plaintiff.[132]

In addition to the same decision-maker rule, courts have taken into account a number of EEOC factors in determining whether a plaintiff with a criminal record and the identified comparator(s) with a criminal record are similarly situated. The following selected cases illustrate the range of factors that the courts consider in determining whether two individuals with criminal records are similarly situated and the ways in which the courts consider the various factors in conjunction with each other. The illustrative cases discussed below demonstrate that courts typically take the following factors into account: the nature of the crime that was the basis for the arrest or conviction;[133] the number of arrests or convictions;[134] time since the arrest(s) or conviction(s) occurred;[135] the nature of the job in question;[136] whether an established employer policy treats the criminal record of the plaintiff and the comparator(s) the same;[137] whether the decision maker had knowledge of the comparator's criminal record at the time the challenged decision was made;[138] and the expected reaction of external stakeholders, including accrediting institutions, customers, or the public.[139]

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[131]Charles A. Sullivan, *The Phoenix from the* Ash*: Proving Discrimination by Comparators*, 60 Ala. L. Rev. 191, 217 (2009).

[132]*Id.*

[133]See, e.g. Ricks v. Riverwood Int'l Corp., 38 F.3d 1016, 1019 (8th Cir. 1994); Noble v. Career Educ. Corp., No. 07-CV-5832 (KMK), 2009 U.S. Dist. LEXIS 68318, at *2–9 (S.D.N.Y. Aug. 4, 2009), aff'd, 375 F. App'x 102 (2d Cir. 2010); Craig v. Dep't of Health Educ. and Welfare, 508 F. Supp. 1055 (W.D. Mo. 1981). *See also* Harwin, *supra* note 124, at 17 (disparate treatment claims tend to fail because courts distinguish the crimes involved).

[134]Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253, 1259 (11th Cir. 2001)

[135]*Id.* at 1259–60.

[136]Ricks, 38 F.3d at 1019 (describing dangerous equipment used by person alleging discrimination).

[137]Ahmad v. Kmart, No. 08-CV-10454, 2008 U.S. Dist. LEXIS 114937, at *13–14 (E.D. Mich. Oct. 2), *adopted by*, 2008 U.S. Dist. LEXIS 84893 (E.D. Mich. Oct. 21, 2008).

[138]*Id.* at *12–13.

[139]Noble, 2009 U.S. Dist. LEXIS 68318, at *28; Silvera, 244 F.3d at 1262.

In *Noble v. Career Education Corp.*, a Hispanic plaintiff was fired from his position as director of admissions after the defendant school learned of a recent grand larceny conviction.[140] The plaintiff sought to create an inference of race discrimination by establishing that the school had not terminated the employment of a white employee who also had a conviction for grand larceny.[141] The court found that the comparator was not similarly situated.[142] As a result, the plaintiff failed to make a prima facie case of discrimination, and the defendant was entitled to summary judgment as a matter of law.[143]

The court's finding was based on several of the factors identified above. First, the comparator's low-level job was not comparable to the plaintiff's job, a high-level position with responsibilities that included the supervision of others, developing a departmental budget, compliance with company policies and legal standards, and handling money.[144] Second, the employer was concerned that the plaintiff's conviction would have a negative effect on its academic accreditation, a concern that did not apply to the comparator because of his lower-level position.[145] Third, the plaintiff's conviction was very recent, whereas the comparator's conviction was nine years earlier.[146] The employer had an established policy of only considering convictions within the past seven years, and based on that policy, the comparator's conviction did not require her termination.[147] Although useful for illustrating the range of factors that have been viewed as relevant in determining whether a comparator is similarly situated, *Noble* is unusual in the number of factors that were taken into account by the court.

The court's opinion in *Craig v. Department of Health Education and Welfare*, however, represents a more typical determination of the similarly situated issue, one that focuses of the nature of the two employees' respective criminal convictions and how those convictions relate to their job

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[140]Noble, 2009 U.S. Dist. LEXIS 68318, at *2.

[141]*Id.* at *30.

[142]*Id.*

[143]*Id.*

[144]*Id.* at *27.

[145]*Id.* at *28.

[146]*Id.* at *28–29.

[147]*Id.* at *29.

responsibilities.[148] The plaintiff in *Craig* was a black woman who had been working for several months in the mail room of a social security office when her prior conviction for possession of a stolen government check came to light, whereupon she was discharged.[149] She sought to establish a prima facie case by showing that a white employee who worked in the file room also had a criminal record and was nonetheless retained by the employer.[150] Based on its finding that the white employee's conviction for possession of marijuana did not constitute a record of dishonesty and that the plaintiff's conviction presented greater risks to an employer processing funds, the court concluded that a prima facie case had not been established.[151]

A third case addressing the similarly situated issue at the prima facie stage highlights the significance that an employer's policy regarding the type of criminal record information it considers may play in a court's decision. The plaintiff in *Ahmad v. Kmart*, a black male, had worked as a "stocker" in one of defendant's stores for approximately five months when his conviction for misdemeanor domestic violence several years earlier was brought to management's attention.[152] The defendant's employment policy prohibited hiring persons who had been convicted of violent crimes or theft crimes in the past seven years.[153] The plaintiff sought to create an inference of discrimination based on race by pointing to a white coworker who was not discharged despite a prior conviction for filing a false police report.[154] The court found that that the comparator and the plaintiff were not similarly situated because the defendant was unaware of the comparator's criminal record at the time it discharged the plaintiff.[155]

The *Ahmad* court also held that even if the employer had been aware of the comparator's past conviction, the two employees were not similarly

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[148]508 F. Supp. 1055 (W.D. Mo. 1981).

[149]*Id.* at 1056.

[150]*Id.* at 1057.

[151]*Id.*

[152]No. 08-CV-10454, 2008 U.S. Dist. LEXIS 114937, at *5 (E.D. Mich. Oct. 2), *adopted by*, 2008 U.S. Dist. LEXIS 84893 (E.D. Mich. Oct. 21, 2008).

[153]*Id.* at *2.

[154]*Id.* at *5.

[155]*Id.* at *12–13.

situated because the plaintiff's conviction involved violent behavior, and as a result, his retention violated the employer's policy.[156] In contrast, the white coworker's conviction for falsifying a police report did not involve violence or theft.[157] Although many employer policies also take into account convictions for crimes involving dishonesty, such as filing a false police report, the court accepted without question the legitimacy of the employer's policy of only considering convictions for violent crimes and theft.

As suggested by the highlighted cases, and consistent with decisions in cases involving plaintiffs who do not have any kind of criminal record, courts have had little difficulty finding that the comparators are not similarly situated. As a result, plaintiffs often fail to establish the fourth prong of their prima facie case.

2. Challenging a Defendant's Legitimate Nondiscriminatory Reason as Pretext

If the plaintiff establishes a prima facie claim, the employer must then produce evidence that it had a legitimate, nondiscriminatory reason for the adverse action it took against the plaintiff. The courts have consistently held that not hiring an applicant or terminating an employee because of the individual's criminal record is a legitimate nondiscriminatory reason.[158] Courts typically reach this conclusion with little or no discussion.

In order to prove discrimination, the plaintiff must show that the employer-articulated reasons were not their true motivation and were merely a pretext for discrimination. To show that employer-articulated reasons for an employment decision were not the true motivation, the plaintiff must show that such reasons were a mere pretext for discrimination through direct or circumstantial evidence.[159] The court will not determine "whether the employer's proffered reasons were wise, fair or correct, but whether it honestly believed those reasons and acted in good faith

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[156]*Id.* at *13–14.

[157]*Id.*

[158]*See*, *e.g.*, Chism v. Curtner, 619 F.3d 979, 984 (8th Cir. 2010), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011); Noble v. Career Educ. Corp., No. 07-CV-5832 (KMK), 2009 U.S. Dist. LEXIS 68318, at *30 (S.D.N.Y. Aug. 4, 2009), *aff'd*, 375 F. App'x 102 (2d Cir. 2010).

[159]*See* Sheridan v. E.I. DuPont de Nemours & Co., 100 F.3d 1061, 1067 (3d Cir. 1996).

upon those beliefs."[160] Evidence of pretext may be direct or indirect, and there is no requirement that the plaintiff provide comparator evidence. However, a recent analysis of pretext cases reveals that the "court tends to find comparators critical for pretext proof."[161]

We found only one reported case involving a plaintiff who successfully challenged the defendant's nondiscriminatory criminal record rationale, and in that case the plaintiff was able to point to several comparators who were treated more favorably.[162] More typically, courts addressing the similarly situated issue at the pretext stage, like courts addressing the issue at the prima facie stage, have little trouble finding that the identified comparators are not similarly situated.[163]

3. Summary Observations Regarding Disparate Treatment Claims

Employer policies regarding criminal record information have potential relevance during all three steps of *McDonnell Douglas*. Such policies have been used to prevent plaintiffs from establishing the second and fourth prongs of a prima facie case, provide employers with a legitimate nondiscriminatory reason for their adverse actions, and prevent plaintiffs from creating a genuine issue as to whether the employers' offered reasons were a pretext of illegal motives. While in theory an employer could adopt a

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[160]Nguyen v. Gambro BCT, Inc., 242 F. App'x 483, 489 (10th Cir. 2007) (quoting Rivera v. City & Cnty. of Denver, 365 F.3d 912, 924–25 (10th Cir. 2004) (internal quotation marks omitted).

[161]Sullivan, *supra* note 131, at 208.

[162]*See* Barrow v. Terminix Int'l Co., No. 3:07-cv-324, 2009 U.S. Dist. LEXIS 6433 (S.D. Ohio Jan. 29, 2009) (accepting employer's policy of not hiring convicted felons as a legitimate nondiscriminatory reason for the termination of a black ex-convicted felon and finding genuine issue of material fact about whether the plaintiff's felony convictions were used as a pretext for rejection because of his race).

[163]See Ricks v. Riverwood Int'l Corp., 38 F.3d 1016, 1018–19 (8th Cir. 1994) (considering the similarly situated issue at the pretext stage because the defendant did not dispute that the plaintiff proved a prima facie case of discrimination and readily accepting that the plaintiff's criminal record was a legitimate reason for the discharge). *See also* Silvera v. Orange Cnty. Sch. Bd., 244 F.3d 1253 (11th Cir. 2001) (involving a race-based discrimination claim after the defendant terminated a black school employee who was convicted of child molestation while knowingly continuing to employ a white school employee who had also been convicted of child molestation). In holding that no reasonable fact finder could disbelieve the defendant's nondiscriminatory reason for terminating the plaintiff (i.e., the conviction for child molestation), the *Silvera* court found that the white employee was not similarly situated because (1) the plaintiff had more arrests, (2) the plaintiff's conviction was more recent, and (3) there was greater public attention surrounding the plaintiff's conviction. *Id*. at 1258–62.

criminal records policy and consistently apply it to weed out protected groups that it otherwise might be required to hire based on job-related screening tools, we were unable to identify any reported cases where such employer intent was found by the court. Thus, so long as an employer acts consistently with an established policy that does not differentiate among protected groups on its face, the employer's use of criminal record information in hiring or termination decisions will not be the basis for a successful disparate treatment claim.

Comparator evidence plays a central role in the vast majority of the reviewed cases. In determining whether the comparator is similarly situated, the factors considered by the courts include, but are not limited to, the factors that research and the EEOC Compliance Manual identify as relevant to assessing the risk associated with employing someone with a criminal record: the nature of crimes that were the basis for the arrests or convictions, the nature of the job, the amount of time since the arrest or conviction, and the number of convictions.[164] The crimes for which the plaintiff and comparator have been arrested or convicted, considered in light of the nature of the jobs in question, appear to be given greatest importance in most cases. Differences in how much time has passed since plaintiffs' and comparators' respective convictions were also an important factor in many of the cases, highlighting what empirical research demonstrates: the relevance of a criminal conviction diminishes significantly over the passage of time.[165]

Finally, given empirical evidence that at least some employers are harsher in their treatment of black ex-offenders,[166] it might be argued that the courts are too quick to accept employers' explanations and find that there are no genuine issues of fact requiring a trial. It is difficult to assess whether the willingness of the courts to accept employers' explanations in the reviewed cases reflects a general tendency of courts in disparate treatment cases, for which they have been criticized elsewhere,[167] or whether

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[164]EEOC Compliance Manual, *supra* note 5.

[165]*See supra* text accompanying notes 15–17.

[166]*See supra* text accompanying notes 37–39.

[167]*See, e.g.,* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. Rev. 203, 203–06 (1993); Kerri Lynn Stone, *Shortcuts in Employment Discrimination Law*, 56 St. Louis U. L.J. 111, 114, 123 (2011); Sullivan, *supra* note 131, at 216 n.93.

the courts are particularly deferential to employers when the plaintiff is someone with a criminal record.

B. Disparate Impact Claims

Claims of discrimination by ex-offenders may arise if the employer refuses to hire ex-offenders, and that refusal has a greater impact on black job applicants or other groups protected against discrimination. The risk is that employers' use of criminal record information to screen applicants is well documented. As described in Part III, applicants of color or with a disability are much more likely to have a criminal record than other applicants.[168] To sustain a claim of disparate impact discrimination, the ex-offender applicant must produce statistical evidence showing that the exclusion of applicants based on a criminal record caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.[169] In addition, that statistical disparity must be substantial enough to raise an inference of causation based on the applicant's protected class.[170] This disparity would show that the policy or practice has a disparate impact on a protected class. Of course, ex-offenders would still need to show that without this restriction, their presence in the relevant labor market would lead to a greater number of hires of members of the protected group.[171]

This section will first address the question of whether disparate impact analysis should apply to ex-offenders, even though their potential employers are relying on their criminal records rather than directly acting with discriminatory intent. It then discusses the general standard for defending hiring criteria with a disparate impact both before and after the 1991 amendments to the Civil Rights Act and the Supreme Court's decisions defining job relatedness and business necessity. This review will establish that the 1991 amendments and the Supreme Court have firmed up the proof necessary for an employer to justify the use of screening

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[168]*See supra* notes 46–63 and accompanying text (discussing disparate impact on ex-offenders of color and with disabilities).

[169]Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988).

[170]*Id.* at 995.

[171]*See, e.g.*, Meditz v. City of Newark, 658 F.3d 364, 370 (3d Cir. 2011) (noting that courts should consider the relevant labor market in determining whether screening criteria cause disparate impact).

criteria with a disparate impact by establishing that the challenged practice was job related and consistent with business necessity.

The Supreme Court has not heard a disparate impact claim by an ex-offender since the 1991 amendments. During this time, lower-court requirements for establishing that defense have been less rigorous in claims by ex-offenders, compared to claims by applicants excluded by tests or other selection criteria with a disparate impact.

1. Disparate Impact Claims by a Blameworthy Plaintiff

Courts have uniformly recognized that a disparate impact claim may be based on an employer's use of criminal record information in hiring decisions, and they have done so with good reason. In recognizing the disparate impact theory of employment discrimination in *Griggs v. Duke Power Co.*,[172] the Supreme Court expressed concern about the ability and potential motivation of employers to identify and implement outwardly or facially neutral criteria that would have the foreseeable effect of screening out a substantially greater proportion of applicants from protected groups.[173]

The Supreme Court has consistently applied disparate impact analysis to employer selection criteria that screens out members of a protected group at a disproportionate rate, even if that screen is based on voluntary behavior by the applicant. As early as 1979, the Court applied disparate impact analysis in a claim reviewing an employer's rejection of methadone users who applied for transportation jobs.[174] Even though the Court made it relatively easy for employers to defend disparate impact claims during this period, the Court did not reject claims of disparate impact brought by applicants who were rejected based on their previous voluntary behavior, such as illegal drug use.

The appellate court in *Green v. Missouri Pacific Railroad Co.* ordered an injunction preventing the employer from using convictions as an absolute bar to employment.[175] On remand, the trial court issued that injunction

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[172]401 U.S. 424 (1971).

[173]*Id.* at 431–32.

[174]New York Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979).

[175]549 F.2d 1158 (8th Cir. 1977).

but also pointed out that employers could still consider criminal records if they consider "the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied."[176] This relief was approved by the court of appeals.[177] This case illustrates that even shortly after the Supreme Court's decision in *Griggs*, an employer could not avoid hiring ex-offenders because they were "blameworthy," but instead the employer must consider other factors as well.[178]

More recently, federal trial and appellate courts have consistently applied disparate impact analysis to ex-offenders seeking employment or avoiding discharge. The most extensive review of an employer's practice of screening based on criminal records occurred in *El v. Southeastern Pennsylvania Transit Authority* (SEPTA).[179] SEPTA, the mass transit authority in Philadelphia, excluded certain applicants who had a record of any felony or a misdemeanor for a "crime of moral turpitude or of violence against any person(s)."[180] Douglas El was not hired by SEPTA based on a forty-year-old conviction for second degree murder.[181] While the court eventually allowed SEPTA's practice based on expert testimony regarding the job relatedness of the criminal record screen, there was no question that protection against discrimination extended to ex-offender applicants where the screen had a disparate impact.[182] Trial courts have also

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[176]*Id.* at 1160.

[177]*Id.; see also* Marshall v. Klassen, No. IP 75-306-C, 1977 U.S. Dist. LEXIS 17375, at *6 (S.D. Ind. Feb. 14, 1977) (requiring a showing of business necessity for postal service policy of discharging employees convicted of felonies).

[178]*Green*, 549 F.2d at 1160; see also Washam v. J.C. Penney Co., 519 F. Supp. 554, 561 (D. Del. 1981) (noting that other courts have held that an absolute refusal to hire persons with convictions or a number of arrests is inconsistent with Title VII); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519, 521 (E.D. La. 1971), *aff'd*, 468 F.2d 951 (5th Cir. 1972) ("It is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes.").

[179]479 F.3d 232 (3d Cir. 2007).

[180]*Id.* at 235–36.

[181]*Id.* at 235.

[182]*See id.* at 240–41.

consistently applied disparate impact analysis to ex-offender applicants and employees.[183]

Professor Siegelman has argued that if an applicant is somehow responsible for his or her exclusion based on hiring criteria, then disparate impact protection should not apply.[184]

However, unlike the "underachievers" discussed by Professor Siegelman,[185] ex-offenders cannot "try harder" to overcome their criminal records. Unless that record can be expunged, the applicant who is an ex-offender is stuck with that record just like an applicant with limited intelligence or size. Further, ex-offenders may not be as blameworthy as they seem. Like the applicant in *El*, the ex-offender may not have engaged in any criminal behavior for many years and, as research indicates, may have no enhanced propensity to engage in criminal behavior in the future.[186] This research has led experts to recommend that criminal records more than seven years old should be deemed irrelevant in the hiring process.[187] The EEOC has referenced studies in its revised guidelines suggesting that a determination of whether the consideration of applicants' criminal records is "sufficiently tailored to satisfy the business necessity standard will depend on the particular facts and circumstances of each case."[188]

Finally, presumably the ex-offender has already been punished under the criminal justice system for the crime he or she committed. Thus, at the time of the application, the ex-offender has already served that punishment and may be no more blameworthy than those applicants without a criminal record. For all of the above reasons, disparate impact

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[183]*See* Field v. Orkin Exterminating Co., No. 00-5913, 2002 U.S. Dist. LEXIS 11828 (E.D. Pa. Feb. 21, 2002) (holding that a blanket policy of denying employment to any person having a criminal conviction is a violation of Title VII)*;* Foxworth v. Pa. State Police, 402 F. Supp. 2d 523, 535–36 (E.D. Pa. 2005), *aff'd,* 228 Fed. App'x 151 (3d Cir. 2007) (holding refusal to hire based on criminal record warranted based on job duties and nature of crime).

[184]Peter Siegelman, *Contributory Disparate Impacts In Employment Discrimination Law*, 49 Wm. & Mary L. Rev. 515, 519–21 (2007).

[185]*Id.*

[186]Kurlychek et al., *Scarlet Letters and Recidivism, supra* note 18.

[187]Brooks, *supra* note 67.

[188]EEOC 2012 Enforcement Guidance, *supra* note 12, at n.118.

claims by ex-offenders should continue to be recognized by the courts despite this notion of blameworthiness.

2. Standards for Establishing Job Relatedness

After adopting the disparate impact model in *Griggs v. Duke Power Co.*,[189] the Supreme Court has consistently barred employer screening that disproportionately screens out applicants who are protected against discrimination.[190] These decisions explain how employers can establish that screening applicants based on a criminal record is job related and consistent with business necessity, and whether excluded applicants can show that an alternative employment practice would serve that same necessity.

This subsection will review the standards developed by the Supreme Court and the applications of those standards by lower courts. A review of disparate impact analysis as applied to noncriminal selection criteria by employers that has a disparate impact reveals a fairly rigorous standard that employers must meet in order to justify using a test with a disparate impact. In contrast, lower courts applying these same standards to claims of disparate impact by applicants and employees with a criminal record shows a much less rigorous review of employers' justifications for rejecting ex-offender applicants. In addition, courts reviewing testing with disparate impact have considered whether the employer could use an alternative test with less disparate impact,[191] whereas employers screening based on criminal records have not been required to consider alternative means of screening applicants who might cause concerns for employers.[192]

The Supreme Court established in *Griggs* that an employer's practice with a disparate impact must be "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[193] In other words, the job requirement must have "a manifest relationship to the employment in question."[194]

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[189]401 U.S. 424 (1971).

[190]*See* Ricci v. DeStefano, 557 U.S. 557 (2009).

[191]*Id.* at 588–92.

[192]El v. SEPTA, 418 F. Supp. 2d 659, 672 (E.D. Pa. 2005).

[193]Griggs, 401 U.S. at 431.

[194]*Id.* at 431–32.

The 1991 amendments to the Civil Rights Act prevent an employer from defending hiring practices with a disparate impact based only on an employer's business goals. Instead, the 1991 amendments make it clear that an employer must prove that a practice with disparate impact is "job related for the position in question and consistent with business necessity[.]"[195] Under the 1991 amendments, an employer's practice with disparate impact remains discriminatory despite a business necessity if the plaintiff establishes that an alternative employment practice exists, and the employer refuses to adopt it.[196]

The Supreme Court provided additional guidance on establishing a business necessity for a practice that has a disparate impact in its 2009 decision in *Ricci v. DeStefano*.[197] That Court reviewed the City of New Haven's administration of an examination to decide which firefighters should be promoted.[198] Based on the results of the examination, a group of white firefighters were more likely to be promoted than minority candidates.[199] Because the city was concerned that the minority candidates would bring a claim of disparate impact, it disregarded the test results.[200] The white and Hispanic firefighters who would have been promoted based on the examination results then filed suit against the city for reverse discrimination.[201]

The *Ricci* Court held that an employer can only adopt an affirmative action plan that considers membership in some protected class in hiring or promotion decisions if there is "strong basis in evidence" that such an action is necessary to remedy past discrimination.[202] To justify disregarding the examination results, the Court held that the city would only have been justified in disregarding the examination results if the examination was

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[195]42 U.S.C. § 2000e-2(k)(1)(A)(i) (2006).

[196]*Id.* § 2000e-2(k)(1)(A)(ii).

[197]557 U.S. 557 (2009).

[198]*Id.* at 561.

[199]*Id.* at 566.

[200]*Id.* at 566–74.

[201]*Id.* at 574.

[202]*Id.* at 583.

not job related and consistent with business necessity, or if there was an equally valid selection method that did not have the same disparate impact.[203]

In a later claim against New York City, the city was found to have taken "significantly fewer steps than New Haven took in validating its examination."[204] Under *Ricci*, the Court concluded, the design of employment examinations requires "consultation with experts and careful consideration of accepted testing standards."[205] In contrast to the extensive validation process in *Ricci*, New York City failed to ensure that passage of its examination would actually result in hiring better firefighters."[206] New York City had conducted a "comprehensive" job analysis by determining the tasks and abilities most relevant to the job of firefighter, the relative importance of these tasks and abilities, matching up clusters of tasks with the abilities needed to perform them, and creating a test to evaluate the identified abilities.[207] A focus group reviewed the ranked list of tasks compiled by incumbents, and then a panel linked those tasks to abilities.[208] Yet the report was inadequate because it did not "explain how or why particular tasks were matched with particular abilities."[209]

In addition, the city failed to establish a relationship between the exam and the "abstract, unobservable mental constructs" that it sought.[210] The extensive task list based on panels and job questionnaires with incumbent firefighters was not connected to the abilities measured by the examination.[211] The city also failed to establish that its examinations identified candidates who "possessed the 18 abilities and characteristics that the City

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[203]*Id.* at 586.

[204]United States v. City of New York, 637 F. Supp. 2d 77, 83 (E.D.N.Y. 2009) [hereinafter *New York I*].

[205]*Id.*

[206]*Id.* at 84.

[207]*Id.* at 100–01.

[208]*Id.* at 101.

[209]*Id.* at 104.

[210]United States v. City of New York, 731 F. Supp. 2d 291, 310 (E.D.N.Y. 2010).

[211]*Id.* at 305.

deemed necessary to the job of entry-level firefighter"[212] or that the cognitive abilities tested on the examinations were the most important abilities for the job of firefighter.[213]

Furthermore, the cut-off score used in the New York City firefighter test was not shown to be related to job performance so as to be "reasonable and consistent with normal expectations of acceptable proficiency within the work force."[214] Lastly, the use of rank ordering was not shown to be job related.[215] The city thus failed to demonstrate a sufficient relationship between the tasks of a firefighter and the abilities it intended to test on its examinations, and the court granted summary judgment for the applicants who challenged the city's use of the examinations.[216] Eventually the city was permanently enjoined from using the disputed test.[217] This case demonstrates the willingness of lower courts to require substantial proof to justify the use of an examination that causes disparate impact.[218]

These cases demonstrate that when the administration of an allegedly job-related employer screening practice has a disparate impact on applicants protected against discrimination, employers have been required to establish the validity of that test. Not only does the employer need to establish that the test itself is job related, but the employer must also

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[212]*Id.* at 312.

[213]*Id.* at 307; *see also* Easterling v. State of Connecticut, 783 F. Supp. 2d 323, 343–44 (D. Conn. 2011) (holding that 1.5 mile run test was not a business necessity where corrections officers being tested were not expected to run that distance).

[214]*New York I*, 637 F. Supp. 2d 77, 123–24 (E.D.N.Y. 2009) (quoting Guardians Ass'n N.Y. Police Dep't, Inc. v. Civil Serv. Comm'n of the City of N.Y., 630 F.2d 79, 105 (2d Cir. 1980) (quoting 29 C.F.R. § 1607.5(H) (2012))) (internal quotation marks omitted).

[215]*Id.* at 129.

[216]*Id.*

[217]United States v. City of New York, No. 07-cv-2067 (NGG) (RLM), 2010 U.S. Dist. LEXIS 111064, at *33 (E.D.N.Y. Oct. 19, 2010). The court later approved a revised test without a significant disparate impact. *See* United States v. City of New York, 2012 U.S. Dist. LEXIS 140766 at *15–17 (E.D.N.Y. Sept. 28, 2012); Bazile v. City of Houston, 858 F. Supp. 2d 718, 742–60 (S.D. Tex. 2012) (approving only some portions of promotion exam based on several experts' reports).

[218]*See also* Gulino et al. v. Board of Educ. of the City Sch. Dist. of the City of New York, 460 F.3d 361, 383–88 (2d Cir. 2006) (finding that test for public school teachers not job related), *on remand*, No. 96 CV 8414, 2012 U.S. Dist. LEXIS 172687 (S.D.NY. Dec. 5, 2012) (finding Board of Education liable for use of exam).

establish that the cut-off score it has used to screen applicants is sufficiently related to the anticipated success of applicants on the job. Only after establishing these criteria can the employer carry its burden of proving job relatedness and consistency with business necessity.

In addition, courts sometimes apply a less rigorous standard to screening based on a criminal record, in contrast to the requirements to establish the validity of performance-related screening tests with a disparate impact. Many employers are not required to provide expert or research-based evidence of a conviction record's job relatedness. Despite guidance from both the EEOC and some appellate courts,[219] trial courts rarely require that employers provide specific, individualized assessment showing why a previous conviction is job related.

More often, the courts only require minimal evidence of the job relatedness of applicants' criminal record, even if that screening mechanism has a disparate impact. In a second Pennsylvania decision, for example, a black male applicant was denied employment with the Pennsylvania State Police after admitting commission of a theft when he was eighteen, five years prior to the time of his application.[220] Even though his criminal record had been expunged, the state rejected him based on his criminal conduct, not on his criminal record, but under its policy of rejecting any applicant who had engaged in criminal behavior that would be graded as a misdemeanor-1 or higher.[221] The state's automatic disqualification based on past criminal behavior was assumed to serve "important purposes: ensuring both public safety and that police officers do not disregard, nor are perceived as disregarding, the law."[222] The state was not required to consider only convictions, and no proof of validation was required of the employer.

Under the EEOC regulations and the Supreme Court's guidance, some of these claims may have been dismissed even if the court applied

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[219]EEOC Compliance Manual, *supra* note 5; El v. SEPTA, 479 F.3d 232, 245 (3d Cir. 2007); Green v. Mo. Pac. R.R. Co., 549 F.2d 1158, 1160 (8th Cir. 1977).

[220]Foxworth v. Pa. State Police, 402 F. Supp. 2d 523, 535–36 (E.D. Pa. 2005), *aff'd,* 228 Fed. App'x 151 (3d Cir. 2007).

[221]*Id.* at 528.

[222]Id. at 536 (citing El v. SEPTA, 418 F. Supp. 2d 659, 674 (E.D. Pa. 2005)); *see also* Clinkscale v. City of Philadelphia, No. 97-2165, 1998 U.S. Dist. LEXIS 9644 (E.D. Pa. June 15, 1998) (upholding denial of employment with police department based on two arrests, where charges were dismissed).

a more rigorous burden on the employers who rejected applicants or discharged current employees based on their criminal records. But instead of requiring extensive proof of job relatedness, including the time since the conviction and the nature of the job duties, these courts allow an employer to assert the nature of the crime as sufficient proof of its job relatedness.

The most extensive review of an employer's practice of screening based on criminal records since the 1991 amendments came in *El v. SEPTA*.[223] SEPTA, the mass transit authority in Philadelphia, excluded certain applicants based on convictions for violent crimes.[224] SEPTA disallowed one of its subcontractors from hiring Douglas El based on his forty-year-old conviction for second degree murder, under SEPTA's policy of not hiring applicants who had a record of any felony or a misdemeanor for a "crime of moral turpitude or of violence against any person(s)."[225] The policy did not distinguish these particular types of convictions based on the time passed since they occurred.[226]

SEPTA justified its policy in part based on these characteristics of the paratransit driver position: (1) drivers were in very close contact with passengers, (2) drivers were often required to be alone with passengers, and (3) paratransit passengers were vulnerable because they typically had physical or mental disabilities.[227]

SEPTA also relied on its conclusions that sexual and violent criminals disproportionately target disabled people.[228] These specific job duties justified an absolute ban on hiring paratransit driver applicants who had committed certain, arguably job-related offenses, even though SEPTA's own practice did not automatically preclude an ex-offender applicant for a fixed route position.[229] Applicants for a fixed route position were reviewed on a case-by-case basis to determine whether any criminal

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[223]479 F.3d 232 (3d Cir. 2007).

[224]*Id.* at 235.

[225]*Id.* at 235–36.

[226]*Id.* at 236.

[227]*Id.* at 245.

[228]*Id.*

[229]El v. SEPTA, 418 F. Supp. 2d 659, 671–72 (E.D. Pa. 2005).

conviction was "sufficient to find that candidate unsuitable for the position for which he or she has applied."[230]

In contrast to the minimal requirements imposed on other employers in recent challenges to screening based on criminal records, SEPTA provided some evidence of job relatedness and business necessity based on the propensities of ex-offender applicants to recidivate. An expert in the *El* case reported "that the criminological discipline is incapable of distinguishing accurately between violent criminals who are and are not likely to commit future violent crimes."[231] Another expert testified, "that the strength of violent criminal activity as a predictor of future criminal activity moderates over time but remains regardless of how much time passes."[232]

SEPTA's expert recognized "that an individual's propensity to commit a future violent crime decreases as that individual's crime-free duration increases" and explained that someone with a prior violent conviction who has been crime free in the community for twenty years is less likely to commit a future crime than one who has been crime free in the community for only ten years.[233] At the same time, the expert acknowledged that neither of these individuals can be judged to be less or equally likely to commit a future violent act than someone who has no prior violent history, and the expert admitted that predictions of comparable low probability may not be correct.[234] The court interpreted this testimony to mean "that former violent criminals who have been crime free for many years are at least somewhat more likely than members of the general population to commit a future violent act."[235] The court also noted that SEPTA relied too heavily on the impossibility of predicting which criminal will recidivate, since the court found that it was also difficult, or even impossible, to predict if someone will commit a crime for the first time.[236] The *El* court

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[230]*Id.*

[231]*El*, 479 F.3d at 247.

[232]*Id.* (internal quotation marks omitted).

[233]*Id.* at 246.

[234]*Id.*

[235]*Id.*

[236]*Id.* at 246 n.16.

suggested focusing on "the risk that the individual presents, taking into account whatever aspects of the person's criminal history are relevant."[237]

In light of this testimony, SEPTA admitted the extreme difficulty of predicting with any accuracy which criminals will recidivate.[238] Despite a lack of support from the experts, SEPTA assumed that someone with a conviction for a violent crime is more likely than others to commit a future violent crime, regardless of the amount of time since the conviction, and that its policy was the most accurate way to screen out applicants who present an unacceptable risk.[239] This evidence was enough to support SEPTA's argument that the paratransit positions were extraordinarily sensitive and that screening out individuals with violent convictions—no matter how remote—is appropriate.[240]

Even though the court did consider the evidence regarding the job relatedness of the convictions for particular crimes, the *El* court did not go so far as to require that employers review each applicant to judge his or her propensity to commit a crime in the future. Instead, the *El* court approved SEPTA's policy of excluding ex-offenders from the driver position in part because it "only prevents consideration of people with certain types of convictions—those that it argues have the highest and most unpredictable rates of recidivism and thus present the greatest danger to its passengers."[241] An employer can use a "bright line policy" to screen applicants, if that policy still makes a distinction between individual applicants based on level of risk, but that criteria used by an employer "must distinguish with sufficient accuracy between those who pose that minimal level of risk and those who pose a higher level."[242] SEPTA's policy was upheld based on expert testimony that the policy accurately screened out applicants who were expected to commit acts of violence against SEPTA's passengers.[243]

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[237]*Id.*

[238]*Id.*

[239]*Id.* at 245.

[240]*Id.* at 247.

[241]*Id.* at 243.

[242]*Id.* at 245 n.13.

[243]*Id.* at 245.

In line with the reasoning of the Eighth Circuit Court of Appeals' review of an absolute bar on hiring ex-offenders, the *El* court comes closer than some previous decisions in requiring that employers establish the relevance of applicants' criminal histories. *El* suggests that even where the employer only refused to hire certain ex-offenders based on the nature of the crime, that employer should present evidence that the nature of the crime and the position being filled have some connection that would make the ex-offender unqualified for that position.

In its 2012 Enforcement Guidance, the EEOC draws heavily on the *El* court's analysis by requiring an individualized analysis of ex-offender applicants.[244] The EEOC specifically states that an employer considering an applicant's criminal record must show a link between "specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."[245] An employer can rely on formal validation techniques. However, if such techniques are not possible, the employer should, at a minimum, consider the nature of the crime, the time elapsed, and the nature of the job, and then conduct an individualized assessment to determine job relatedness that would consist of

> notice to the individual that he has been screened out because of a criminal conviction; an opportunity for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.[246]

The job-relatedness factors highlighted in *El* and the EEOC 2012 Enforcement Guidance parallel the factors that at least some Michigan employers consider when reviewing applications from ex-offenders, as

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[244]EEOC 2012 Enforcement Guidance, *supra* note 12, at § V.B.

[245]*Id.* at 14.

[246]*Id.* Relevant individualized evidence should include the following: facts or circumstances surrounding the offense or conduct; number of offenses for which the individual was convicted; older age at the time of conviction, or release from prison; evidence that the individual performed the same type of work, postconviction, with the same or a different employer, with no known incidents of criminal conduct; length and consistency of employment history before and after the offense or conduct; rehabilitation efforts—for example, education/training; employment or character references and any other information regarding fitness for the particular position; and bonding under a federal, state, or local bonding program. EEOC 2012 Enforcement Guidance, *supra* note 12, at 18.

described in Part IV. Responding employers have often considered the nature of the crime committed and its relationship to the position sought, as well as evidence of the applicant's rehabilitation since that conviction, in deciding whether to hire a particular ex-offender. The study of Michigan employers suggests that employers who receive applications from ex-offenders can conduct the analysis seemingly required by the El court.

Despite this apparent call for stronger proof of job relatedness, trial court decisions since *El* have not placed a heavy burden on employers to justify the exclusion of ex-offenders. These decisions demonstrate courts' unwillingness to require employers to validate their reliance on applicants' criminal histories like they would if an employer's use of a different screening device had a disparate impact on applicants who are protected against discrimination.

While the nature of the crime committed is often considered and even used to limit the employer's conviction hiring bar, employers have not often been required to establish the relationship between that conviction and the specific job duties, and may not require that employers consider the relevance of the time since the conviction.[247] At the same time, other employer hiring practices, such as testing for job-related skills, have received closer scrutiny and have not been shown to have a business necessity. Instead, most employers who have rejected applicants based on their criminal record have been allowed to justify that practice based on broad assumptions about the risks that ex-offenders pose in the workplace.

3. Considering Alternative Criteria Without Disparate Impact

Even if an employer establishes that a hiring screen with a disparate impact is job related and consistent with business necessity, that screen should not be used if an alternative screening method would meet the employer's purposes without having a disparate impact.[248] As early as 1975, the Supreme Court explained that if an employer met its burden by showing that its practice was job related, the plaintiff was required to show a

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[247]*See* Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP, 537 F. Supp. 2d 1028 (W.D. Mo. 2008) (ruling that duties of black law firm employee sufficiently supported his dismissal based on his single thirty-year-old conviction as a sex offender).

[248]42 U.S.C. § 2000e-2(k)(1)(A)(ii) (2006).

legitimate alternative that would have resulted in less discrimination.[249] In line with this requirement to consider alternative screening mechanisms, the *Ricci* Court discussed possible alternative selection processes that would not have a disparate impact.[250] *Ricci* allows a plaintiff's claim to succeed "by showing that the employer refuses to adopt an available alternative employment practice that has less disparate impact and serves the employer's legitimate needs."[251]

The *Ricci* majority considered but rejected three possibilities as alternatives to the test used by the city.[252] Because those alternatives could not validly determine whether the candidates possessed the necessary job knowledge and skills to warrant promotion, the employer could not be expected to use those alternative selection methods.[253] Even though the city could not be required to use an alternative selection method in that case, the consideration of those alternatives points to the importance of an employer's consideration of selection methods without a disparate impact.

Ricci demonstrates the importance of employers' consideration of other nondiscriminatory means of selection and the extent to which employers are required to justify practices with a disparate impact of criteria other than a criminal record. Job relatedness is not only required, but employers must engage in extensive study and analysis to establish that the screening criteria are sufficiently job related to justify their impact on a protected group. In addition, employers should not use a screening criterion with a disparate impact if some other screening factor will achieve the same purpose without having a disparate impact.

In contrast to disparate impact claims both before and after *Ricci*, ex-offender applicants have not been successful in showing that the employer could have used some alternative screening mechanism without a disparate impact to achieve its purposes. In *El*, the court was concerned that no witness explained "why this particular policy was chosen from

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[249]Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

[250]Ricci v. DeStefano, 557 U.S. 557, 588–92 (2009).

[251]*Id*. at 577–78.

[252]*Id*. at 588–92.

[253]*Id*. at 591–92.

among myriad possibilities."[254] The court suggested that SEPTA should "explain how it decided which crimes to place into each category, how the seven-year number was selected, and why SEPTA thought a lifetime ban was appropriate for a crime like simple assault."[255] The court did not require a showing that there was no alternative selection criteria, which would not have a disparate impact, but did note that there was no evidence that individual consideration under SEPTA's policy for fixed route drivers would have had any less of a disparate impact on ex-offenders of color.[256]

Despite the *El* court's acknowledgment that alternative selection criteria may be more appropriate and less discriminatory against ex-offenders who are protected against disparate impact, this same type of rigorous proof that a practice is job related and consistent with business necessity has not yet been required in claims of disparate impact by ex-offenders. At the same time, the survey of Michigan employers demonstrates that some employers are already considering the details regarding an applicant's criminal conviction during the hiring process. In addition, many are considering other factors, which have been shown to be directly relevant to predicting recidivism, such as evidence of rehabilitation. This study demonstrates that employers can be held to a more rigorous job-relatedness standard in considering applicants' criminal histories. Such rigor would ensure that applicants are denied employment based on criminal records only if those records are significantly related to the duties of the positions.

VI. Guidance for Promoting Fair and Effective Use of Criminal Record Information

As discussed earlier, the way many employers use criminal record information poses a threat of disparate impact and disparate treatment discrimination against ex-offenders who are protected against discrimination based on race, national origin, or disability. Most notably, a significant

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[254]El v. SEPTA, 479 F.3d 232, 247–48 (3d Cir. 2007) (citing Dothard v. Rawlinson, 433 U.S. 321, 331 (1977)).

[255]*Id.* at 248.

[256]El v. SEPTA, 418 F. Supp. 2d 659, 672 (E.D. Pa. 2005).

number of employers continue to adopt an absolute bar to hiring ex-offenders.[257] Also, among those employers at least willing to consider ex-offenders, there is a lack of formal policies and practices that are necessary to ensure the job-related and consistent use of criminal record information.[258] This part provides guidance for addressing the risk of discrimination by promoting the fair and effective use of criminal record information in employment settings. The guidance takes into account the empirical findings that have been reviewed and reported, relevant case law and EEOC guidance, and well-established principles from the field of HRM.

A. Carefully Structure Practices Related to Employer Use of Criminal Record Information

Given the significant risk that the use of criminal record information may result in unfair or illegal discrimination, employers should adopt a structured approach for considering criminal records of applicants. Bias in employment decisions, such as hiring and promotion, most likely manifests when employment practices are informal, unstructured, and rely on relatively subjective judgments.[259] In hiring decisions, disparate treatment claims by an ex-offender appear to arise where the employer has not articulated an explicit policy that would clearly exclude the ex-offender who is alleging discrimination, even if the employer is actually applying that policy consistently based on some unwritten criteria.[260] Thus, greater structure reduces bias in employment practices.[261]

The "structuring" of specific employment practices involves adding characteristics that (1) focus decision makers on information that is job or organizationally relevant, (2) promote consistency in how decisions are

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[257]*See supra* Part IV.A.

[258]*See supra* Table 3.

[259]*See* Brecher et al., *supra* note 35, at 158 (noting that structured interviews can mitigate the effects of stereotypes and biases).

[260]*See supra* Part V.A (discussing disparate treatment cases).

[261]Brecher et al., supra note 35, at 158; *see also* Marlene Dixon et al., *The Panel Interview: A Review of Empirical Research and Guidelines for Practice*, 31 Pub. Personnel Mgmt. 397, 421 (2002) (noting that panel interviews are potentially one way of reducing bias in the selection process).

made, and (3) increase accountability.[262] Elements of structure associated with common employment practices, such as hiring and promotion decisions, include (1) explicit criteria based on a job or organization analysis, (2) established processes to be followed for all candidates and employees, (3) evaluation tools or guidelines that focus decision makers on established criteria and record their assessments, (4) training for decision makers, and (5) providing routine oversight.[263]

Increased structure reduces the manifestation of unintentional or implicit biases by ensuring that criteria used in employment decisions are relevant to the job or organizational fit. Reliance on relevant criteria focuses decision makers on relevant information, ensures that applicants or employees are treated consistently, and increases accountability. Greater accountability associated with increased structure of employment decisions also deters more overt or intentional forms of discrimination.[264]

A structured approach to using criminal record information in hiring decisions requires that employment should be denied based on an applicant's criminal record only if there is reasonable evidence supporting the conclusion that the conviction is job related. This is not to suggest that an employer must hire an applicant despite his or her criminal record. But if consideration of criminal records has a disparate impact, then employers should establish the job relatedness of that record and the business necessity of considering that record in the hiring process.

There are several ways in which job relatedness can be established under the standards required to justify other types of hiring criteria with a disparate impact. Federal or state laws or regulations restricting the hiring of ex-offenders for a position would, quite obviously, establish the job relatedness of criminal record information. Absent such laws or

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[262]Michael Campion et al., *A Review of Structure in the Selection Interview*, 50 Personnel Psychol. 655, 659–90 (1997) (discussing in detail elements of structure with regard to employment interviews).

[263]*Id.*

[264]Mark Roehling et al., *Unfair Discrimination Issues*, in The Employment Interview Handbook 49, 63 (Robert W. Eder & Michael M. Harris eds., 1999); *see also* Thomas E. Ford et al., *The Role of Accountability in Suppressing Managers' Preinterview Bias Against African American Sales Job Applicants*, 24 J. Pers. Selling & Sales Mgmt. 113, 114–15 (2004) (describing the role of accountability in reducing bias); *id.* at 120 (suggesting employers increase accountability and reduce bias in their hiring processes by adding elements of structure such as standard formal checklists, rating forms, multiple raters, and training).

regulations, "reasonable evidence" will typically require a job analysis and expert judgment that convictions of the kind in question are relevant to the job in question.

Further, in many circumstances, adherence to the principle that employment should be denied based on an applicant's criminal record, only if there is reasonable evidence of job relatedness, will require an individualized approach to evaluating whether a conviction is sufficiently job related to warrant denial of employment. Based on EEOC regulations and guidelines, case law, and relevant research,[265] the following factors should be taken in account when an individualized approach is called for: the nature or gravity of the offense or offenses; the bearing, if any, of the offense(s) on any specific responsibilities of the job or position; the time that has elapsed since the offense; the age of the applicant or employee at the time of the offense; and any evidence of rehabilitation.

Consideration of the above factors will often require asking applicants about the circumstances surrounding the crime as well as information about their behavior since the time of the offense—relevant inquiries that research indicates few employers are currently making.[266] Thus, in those situations when an individualized approach to assessing the job relatedness of applicants' criminal records is called for, employers should not screen applicants based on a criminal record at the application stage, before otherwise qualified applicants with criminal records are afforded an opportunity to provide the relevant information. To ensure that decision makers consider other information about the applicant, criminal record information should be gathered after the job interview stage. Other important elements of a structured approach to the use of criminal record information in hiring decisions include developing policies on how different criminal records will affect hiring decisions for different jobs, providing decision makers specific written guidelines for identifying what constitutes a disqualifying criminal record for relevant jobs or job categories, providing decision makers training regarding relevant law and the application of established policies and execution of established procedures, and establishing a mechanism for oversight of the use of criminal record information.

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[265]*See* Blumstein & Nakamura, *supra* note 1, at 337–44.

[266]*See* SHRM Survey, *supra* note 1, at slide 8 (reporting that only 63% of the surveyed employers allow applicants the opportunity to explain the results of their criminal background check prior to the hiring decision).

Oversight should typically include assigning a person or office to monitor and evaluate the use of criminal record information. This oversight should determine whether established guidelines are being consistently followed throughout the organization. The employer should also monitor any evidence that the application of established guidelines is resulting in a disparate impact and, if so, determine if alternative selection tools, such as integrity tests, would address the disparate impact.

By taking these steps, employers will use criminal record information more consistently, reducing the likelihood of disparate treatment discrimination. These steps will also help ensure that employers use criminal records in a manner that is effective from an HRM perspective, using that information only when there is reasonable evidence that the information is job related. Finally, these steps will allow employers to be more confident that if claims of disparate impact or disparate treatment are brought against them, they will not be successful because the employers will be able to establish a job-related and consistent-with-business-necessity defense or a legitimate reason for their consideration of applicants' criminal records during the hiring process.

Rather than simply using criminal record information as an indicator of important applicant traits, employers interested in the fair and effective HRM practices should also adopt alternative ways of measuring those traits. In particular, the reviewed research indicates that many employers use criminal record information to assess applicants' honesty or trustworthiness. There are, however, numerous readily available and relatively inexpensive measures of those traits.

Referred to as "honesty" or "integrity" tests, extensive empirical validation has demonstrated that these measures predict the type of employee behaviors that many employers are concerned about in rejecting applicants based on their past criminal offenses: theft, rule-breaking, and other counterproductive work behaviors.[267] It should be noted that some forms of overt honesty tests include, among numerous items, questions about past behaviors that might be characterized as criminal activity. However, those tests do not ask about past arrests or criminal convictions

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[267]*See* Christopher M. Berry et al., *A Review of Recent Developments in Integrity Test Research*, 60 Personnel Psychol. 271 (2007); Paul R. Sackett & James E. Wanek, *New Developments in the Use of Measures of Honesty, Integrity, Conscientiousness, Dependability, Trustworthiness, and Reliability for Personnel Selection*, 49 Personnel Psychol. 787, 792–94 (1996).

per se, and unlike screening applicants based on criminal records, honesty tests have not been shown to result in a disparate impact against any protected group.[268]

While these tests have been validated in employment settings, research has not demonstrated that criminal record information is as effective as these validated measures in assessing applicants' trustworthiness and predicting the associated counterproductive work behaviors. Moreover, unlike the use of criminal record information, research has demonstrated that the use of honesty and integrity tests in employee selection does not have an adverse impact on black applicants or other protected groups.[269]

B. The Need for Comparable Standards for Establishing Job Relatedness

EEOC investigators and courts hearing claims of discrimination brought by ex-offenders should apply standards that promote, if not require, employers' adoption of the aforementioned principles and practices. Most importantly, in disparate impact cases, courts should require employers to meet standards comparable to those regularly required in non–ex-offender disparate impact cases involving other types of selection practices, both before and after the Supreme Court's decision in *Ricci*. Unless the practice is specifically barred, courts should require employers to validate their specific use of criminal record information by providing empirical evidence or informed expert opinion establishing a practically significant relationship between the record of criminal offense in question and job performance or other important employment outcomes such as risk of injury to customers or coworkers.

This level of proof is appropriate since, in other types of disparate impact cases, employers have not been allowed to invoke stereotypes or lay beliefs regarding how a characteristic of an applicant relates to his or her performance on the job. In addition, employers have not been able to merely articulate general concerns that establishe the job relatedness and business necessity of a selection practice shown to have a disparate impact.

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[268]Berry et al., *supra* note 267, at 289–90.

[269]Deniz S. Ones & Chockalingam Viswesvaran, *Gender, Age, and Race Differences on Overt Integrity Tests:* Results Across Four Large-Scale Job Applicant Data Sets, 83 J. Applied Psychol. 35, 41 (1998).

Neither the theory of disparate impact discrimination nor the science of HRM supports making an exception in cases involving the disparate screening out of African Americans or other protected groups as a result of the use of criminal record information in hiring decisions.

1. When Criterion-Related Validation Evidence Should Be Required to Establish Job Relatedness

The law may sometimes prohibit employers from hiring ex-offenders. When federal or state laws or regulations, or occupational licensing provisions, bar the hiring of applicants based on past criminal offenses, such information is directly and obviously job related. However, the reviewed research and the Michigan survey results indicate that employers often view and use criminal record information as an indicator of one or more underlying general traits of ex-offenders that, it is believed, predict workplace behaviors, even when they are not barred from hiring people with criminal records. For example, many employers view criminal records as an indication that the people are lacking in the trait "trustworthiness," and, therefore, it is believed, individuals with criminal records are likely, or at least significantly more likely, to engage in workplace misconduct or otherwise fail to conduct themselves in a trustworthy manner. In addition, an employer may consider a conviction for an offense involving violence as an indicator of an applicant's general propensity for violence, which, in turn, is believed to be a predictor of the likelihood that the applicant will act violently toward customers or coworkers (see Figure 1).

Prior to 2012, the EEOC provided general guidance regarding the type of validation evidence required under the 1991 amendments in its

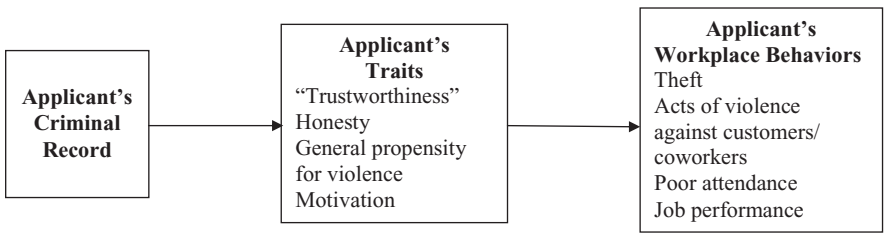

Figure 1. Use of Criminal Record Information to Assess Traits Thought to Predict Workplace Misconduct.

regulations on disparate impact.[270] The two most common types of validation studies are criterion-related validation and content validation.[271] Both have potential relevance to the present discussion.[272]

Criterion-related validation involves demonstrating the job relatedness of predictors, which could be tests or other information used in selecting employees, by empirically examining whether the predictors actually predict applicants' success with regard to one or more important job outcomes. Examples of common job outcomes that employers seek to predict when hiring include employee performance, counterproductive work behaviors, and turnover.[273]

Content validation involves making informed judgments about the job relatedness of a predictor. The relationship between scores on the predictor and actual performance on the job, or other criterion measures, is not directly assessed using data. Rather, individuals with relevant expertise, such as industrial-organizational psychologists, trained job analysts, or other HRM professionals, should conduct a job analysis to identify important tasks, task dimensions and the traits necessary to perform those tasks, and make judgments regarding the extent to which the predictor in question adequately assesses the identified trait.[274] Whereas criterion-related validation empirically assesses the correlation between scores on a predictor and scores on a measured criterion, content validation involves expert judgments about the probable correlation had there been a measured criterion.[275]

Scientific standards adopted in the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines) provide that when a selection

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[270]29 C.F.R. § 1607.5(B) (2012).

[271]Heneman et al., *supra* note 5, at 337.

[272]The third type of validation study identified by the EEOC, construct validation, is a more complicated undertaking that includes aspects of the other two types of studies. Construct validation has not been involved in relevant cases or advocated in relevant legal commentary, and therefore will not be discussed here.

[273]Principles for Validation and Use, supra note 41, at 9–13; *see also* Chad Van Iddekinge et al., *The Criterion-Related Validity of Integrity Tests: An Updated Meta-Analysis*, 97 J. Applied Psychol. 499 (2012) (discussing criterion-related validation evidence establishing the validity of integrity tests used to predict counterproductive work behaviors).

[274]Heneman et al., *supra* note 5, at 344–46.

[275]*See id.* at 344.

test is used as an indicator of intangible traits, such as intelligence, aptitude, personality, commonsense, or judgment, and employers then rely on the test to predict job outcomes, the most appropriate approach to validating the job relatedness of the test is the criterion-related approach.[276] As noted earlier, that approach requires the empirical demonstration of statistically and practically significant relationships between the predictor, such as an applicant's past criminal convictions, and job performance or other important employment outcome. However, where employers use predictors that do not assess intangible traits, but directly assess knowledge, skills, or abilities closely related to a job, scientific guidelines also consider the more subjective judgmental or content validation appropriate for establishing job relatedness.[277]

Ideally, where criminal record information is having a disparate impact on a protected group, courts should require evidence of job relatedness provided by a criterion-related validation study. This approach would be superior to a scientific perspective and is advocated by some legal commentators.[278] However, it is not always feasible to conduct a criterion-related validation study. The Uniform Guidelines and the subsequent EEOC 2012 Enforcement Guidance recognize that "[t]here are circumstances in which a user cannot or need not utilize" formal validation techniques.[279] In those circumstances, an employer "should utilize selection procedures which are as job related as possible and which will minimize or eliminate adverse impact."[280]

There are several limitations that may constrain or preclude the feasibility of the criterion-related approach. First, research has demonstrated that one may need a sample size that is difficult to obtain in many instances to have sufficient statistical power to test.[281] In contrast, the

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[276]29 C.F.R. § 1607.5.

[277]*Id.* at § 1607.14.

[278]Allan G. King & Rod M. Fliegel, *Conviction Records and Disparate Impact*, 26 J. Lab. & Emp. L. 405, 422–23 (2011) (arguing that employers should be prepared to demonstrate the materiality of criterion measures).

[279]EEOC 2012 Enforcement Guidance, *supra* note 12, at 14–15 (quoting 29 C.F.R. § 1607.6B).

[280]*Id.*

[281]Principles for Validation and Use, *supra* note 41, at 19.

content validation approach is not constrained by the need to have a sample of a certain size.[282]

Second, a competent criterion-related validation study needs to be based on a sample that is reasonably representative of the work and applicant pool.[283] Meeting this requirement is a significant challenge when seeking to validate the use of criminal record information because it requires actual performance data from individuals with the type of criminal records in question. The most rigorous type of criterion-related validation, the predictive criterion approach, would require that an employer hire applicants with a range of criminal offenses, put them to work, and after a sufficient length of time, collect job performance and other relevant data such as absenteeism and discipline data.

The concurrent criterion-related validation approach would involve an empirical examination of the relationship between criminal records and job outcomes among current employees. Neither of these approaches is likely to be available if the employer has screened applicants on criminal records in the past, since there will be an obvious issue of the representativeness of the sample. That is, current employees would not include the sampling of ex-offenders that would be found in the general population. Unless an employer had hired ex-offenders in the past, their performance could not be measured.

Third, cost may limit the feasibility of conducting a criterion-related validation study. Just as there may be circumstances in which some requested accommodations may, by objective standards, impose an undue hardship on employers, there may be circumstances where the cost of conducting a criterion-related validation would make it reasonable for employers to utilize other less costly approaches to validating the use of criminal record information to screen applicants.

In circumstances where conducting an original criterion-related validation is not feasible, there is a potential alternative that builds on the evidence provided by relevant existing validation studies. This general approach, referred to as "validity generalization," has been recognized as acceptable in appropriate circumstances by the scientific community,[284] the

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[282]Heneman et al., *supra* note 5, at 344.

[283]Principles for Validation and Use, *supra* note 41, at 14.

[284]*Id.* at 27.

Uniform Guidelines,[285] and by courts in disparate impact cases not involving an employer's use of criminal record information.[286] There are different types of validity generalization procedures that would allow employers to validate their reliance on criminal record information.

The most rigorous form of validity generalization, which involves the meta-analytic study of numerous individual original validation studies, is currently not a realistic option for employers, given the lack of reported studies investigating the relationship between applicant criminal records and job outcomes. The "transportability" approach to validity generalization provides for the use of a selection procedure in a new situation based on the results of a single validation research study conducted elsewhere, if certain conditions are met, and appears to be a more feasible option for employers.[287] Using a policy of screening applicants based on their criminal records as an example, an employer using the transportability approach would first need to provide evidence from a previous validation study that meets professional standards and clearly demonstrates that a record of having the specific criminal offenses identified in the policy is a valid predictor for a specific job—for example, the job of head nurse at a large urban hospital. Second, the employer would then need to provide evidence from a job analysis that the job for which it is using the criminal record policy to screen applicants—for example, the job of head nurse at a small rural hospital—is similar in all major respects to the job for which the record of criminal offense was validated elsewhere.[288]

While this appears to be a promising approach to validating the use of criminal record information, as indicated above, currently there is a lack of relevant validation study findings that may be adapted from their original settings to justify the use of criminal record information in other settings.

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[285]29 C.F.R. §§ 1607.6(B), 1607.7.

[286]M.O.C.H.A. Soc'y, Inc. v. City of Buffalo, No. 98-CV-99C, 2009 U.S. Dist. LEXIS 20070, at *10, 21–22, 45 (W.D.N.Y. March 4, 2009).

[287]Principles for Validation and Use, *supra* note 41, at 27.

[288]*Id*.

2. Other Reasonable Evidence of Job Relatedness

For the reasons outlined above,[289] criterion-related validation studies should be required to establish the job-relatedness of selection criteria based on applicants' criminal records that have been shown to have an adverse impact on a protected group. However, due to small sample size and other reasons,[290] this may not be feasible in many situations, and, at present, the lack of available existing criterion-related validation studies severely constrains employers' abilities to use a validity generalization approach. Some have largely dismissed the practical constraints many employers face when attempting to obtain validation evidence, arguing that "validation need not be easy, it need only be *possible*."[291] We would propose a more balanced response on the part of the courts, one that recognizes the challenges associated with validating the use of criminal record information to select employees, while not excusing employers from providing "reasonable validation evidence" in light of those challenges and other relevant circumstances.

From the start of disparate impact analysis, the Supreme Court has criticized employers for adopting a selection procedure "without meaningful study" of its job relatedness.[292] A meaningful study implies a systematic, informed assessment of a selection procedure's job relatedness. A meaningful study does not mean reliance on stereotypes about ex-offenders or other mere lay assumptions about the correlation between a criminal record and workplace behavior. Leading experts on the effective selection of employees have advocated that, at a minimum, all predictors should routinely be subjected to some form of judgmental or content validation to establish their job relatedness.[293]

Therefore, we propose that employers must produce certain evidence when their use of criminal record information to screen employees has been shown to have a disparate impact, and the job relatedness of employers' screening practices cannot be established by criterion-related

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[289]*See supra* text accompanying notes 269–271.

[290]*See supra* text accompanying notes 274–76.

[291]Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. Rev. 1479, 1531 (1996).

[292]Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[293]Heneman et al., *supra* note 5, at 335–38.

validation or other direct evidence such as evidence that a law or regulation requires rejection of ex-offenders. Given such impact, the employer must produce evidence establishing that (1) an appropriate job analysis was conducted, (2) a substantial relationship was found between the crime committed and the position being filled, and (3) such a relationship is supported by factors known to affect recidivism. With respect to job analysis, an employer should systematically and thoughtfully consider the duties of the job in question and what it takes to perform the job successfully—as recommended by HRM best practice even when there is no issue of disparate impact.[294] To this end, professional standards should be followed to identify the major tasks performed in the job in question, and the traits, including knowledge, skill, abilities, personality traits, or other characteristics, needed to perform those major tasks.

Employers' reliance on job analysts or other experts' judgments to establish the relationship between these job duties and the specific type(s) of criminal record(s) deemed relevant under the employers' hiring policies is also a recommended HRM best practice, even when there is no issue of disparate impact.[295]

Finally, the job analyst's or other expert's judgment offered in support of an employer's challenged use of criminal record information must be consistent with what is known in the research literature about recidivism; the relationship between categories of past criminal offenses and relevance, if any, to workplace behaviors; and the extent to which those relationships may become attenuated over time. That is, to be considered "well informed," the expert's judgment must reflect, and not be at odds with, well-established research findings. Although this approach is not required by current legal standards, it has the effect of promoting the fair and effective use of criminal record information in employment decisions.

C. Continuing Need for More Detailed Practical Guidance from the EEOC

An expert at the EEOC's July 2011 hearings observed that "there has been a lot of misinformation and/or misunderstandings by various employers"

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[294]Wayne F. Cascio & Herman Aguinis, Applied Psychology in Human Resource Management 194 (7th ed. 2011) (discussing the characteristics of individual jobs and their behavioral requirements through the process of job analysis).

[295]Heneman et al., *supra* note 5, at 356–57.

regarding hiring applicants with criminal records.[296] This observation is supported by our findings that, among the responding employers who were unwilling to even consider hiring ex-offenders, 29.4% offered comments demonstrating a misunderstanding of the legal constraints on hiring ex-offenders.[297]

The existence of significant employer misunderstanding about the hiring of applicants with criminal records should not be surprising. The need to simultaneously consider multiple relevant factors, technical validation standards often expressed in scientific terms, and the lack of clear and consistent court-enunciated standards create considerable complexity and uncertainty in this area of law and employer practice. The recently issued EEOC 2012 Enforcement Guidance provides revised and more specific guidelines regarding the consideration of criminal records, and both employers and the courts enforcing nondiscrimination statutes should give due deference to the EEOC's guidance.[298] Unfortunately, in at least three areas, the new guidance has not gone far enough in providing employers and courts practically useful guidelines regarding the use of criminal record information.

1. Time Since Conviction or Release from Prison

Should an individual who is otherwise qualified for a job be denied employment based on a forty-year-old conviction?[299] Although the new EEOC 2012 Enforcement Guidance reaffirms that temporal distance between conviction and job application is relevant to assessing job relatedness,[300] it does not provide additional guidance. In the absence of additional guidance, some employers and courts may indeed still agree that a forty-year-old conviction is a justifiable reason to refuse to hire.

The practical ability and value of providing clear temporal constraints on the consideration of an individual's criminal record is well established by the Federal Rules of Evidence (FRE). FRE Rule 609 addresses the use of prior convictions to impeach a witness's character for

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[296]Hartstein, *supra* note 121.

[297]*See supra* note 119 and accompanying text.

[298]EEOC 2012 Enforcement Guidance, *supra* note 12, at 13–20.

[299]*See* El v. SEPTA, 479 F.3d 232 (3d Cir. 2007).

[300]EEOC 2012 Enforcement Guidance, *supra* note 12, at § V.B.6.b.

truthfulness, dividing the type of prior crimes with which a witness may be impeached into two categories: (1) felonies and (2) any crimes involving dishonesty or false statement.[301] Although Rule 609 allows the use of prior convictions to impeach witness character, it also provides clear limits on how old a conviction can be and still be used for this purpose. Subdivision (b) provides that under Rule 609 evidence of conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, *unless* (1) the court determines that its probative value, supportive by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives to the adverse party reasonable written notice of intent to use it so that the party has a fair opportunity to contest its use. [302]

According to the Notes of Advisory Committee on Rules, the subdivision (b) time limit on the use of prior convictions was adopted because "practical considerations of fairness and relevance demand that some boundary be recognized."[303] While there has been disagreement about the type of crimes that fall into the second "dishonesty and false statement" category of prior convictions,[304] and some objection to the application of Rule 609 to criminal defendants testifying in their own trials,[305] section 609(b)'s clear constraint on using more distant convictions for impeachment purposes has not been controversial.

Similar to FRE Rule 609, the EEOC should provide clear and more specific guidance limiting how old an applicant's criminal convictions can be and still be taken into account by employers in the hiring process. Like Rule 609, the time limits should be in the nature of a default rule, allowing for some flexibility if an employer can, prior to implementing its policy, convincingly demonstrate the fairness and relevance of considering older convictions, given the job in question or the employer's unique circumstances.

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[301]Fed. R. Evid. 609.

[302]Fed. R. Evid. 609(b).

[303]Fed. R. Evid. 609(b) Advisory Committee Notes.

[304]Aviva Orenstein, *Insisting that Judges Employ a Balancing Test Before Admitting the Accused's Convictions Under Federal Rule of Evidence* 609(A)*(2)*, 75 Brook. L. Rev. 1291, 1297 n.19 (2010).

[305]*Id*. at 1294.

The specific time limits that would apply should be based on what is known about the decreasing relevance of prior convictions in predicting future behavior over time, including research on changes in recidivism rates as a function of the time since conviction or release. Studies indicating that once a person has gone seven years without committing a new offense, the odds of that person committing another offense are essentially the same as someone who has never been convicted of committing a criminal offense,[306] suggesting that a time limit shorter than the ten-year limit in Rule 609 is probably warranted.

Further, relevance and fairness considerations would seem to suggest a need for different time limits on the consideration of felony versus misdemeanor convictions, a distinction not made in FRE Rule 609. This distinction is recognized, for example, in Michigan's statute limiting the hiring of ex-offenders by long-term care facilities, which requires a longer waiting period for felons than for those who have only committed a misdemeanor.[307] Similarly, the SHRM Survey indicates that employers place less importance on the commission of misdemeanors,[308] suggesting that more distant misdemeanors would be even less relevant than recent misdemeanors. The important point is that more specific guidance regarding the age of the convictions that employers may consider can and should be provided by the EEOC.

2. Identifying "Safe Harbor" Employer Uses of Criminal Record Information

There are circumstances when reasonable people would agree that an applicant's criminal conviction has clear and direct relevance to the job he or she is seeking. However, both our survey results and court decisions suggest that an individual employer's subjective judgment about whether a criminal record is job related often fails to meet objective "reasonable person" standards. The EEOC 2012 Enforcement Guidance provides some additional guidance regarding when an employer's use of criminal

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[306]*See* Blumstein & Nakamura, *supra* note 1, at 339–44; Kurlychek et al., *Scarlet Letters and Recidivism, supra* note 18, at 499.

[307]*See* Mich. Comp. Laws §§ 333.20173a, 330.1134a.

[308]SHRM Survey, *supra* note 1, at slide 5.

record will be viewed as reasonable or acceptable.[309] For example, the guidance addresses the job relatedness of employer practices necessary to comply with federal laws or regulations, and provides examples of what the EEOC considers reasonable and unreasonable use of criminal record information.[310]

To more effectively promote employers' practical understanding of the job relatedness of criminal records, the EEOC should provide greater guidance for identifying common situations, or "safe harbors," in which an employer's criminal record use for a category of jobs would be presumptively job related.[311] More specifically, we propose that the EEOC provide guidance recognizing a presumption of job relatedness for an employer's use of criminal record information in hiring decisions in the following circumstances: (1) existing federal laws or regulations require the rejection of an applicant based on a criminal record of the specific kind in question; (2) bona fide occupational licensing requirements or industry standards require the rejection of an applicant based on a criminal record of the specific kind in question; (3) felony convictions involving theft or dishonesty, provided they were committed within a time specified by the EEOC—for example, within the past seven or ten years—and the job(s) in question involve(s) the handling of money or other fiduciary responsibilities; (4) felony convictions involving violence, provided they were committed within a time specified by the EEOC—for example, within the past seven or ten years—and the job(s) in question involve(s) interacting with vulnerable populations; and (5) felony convictions involving violence in the workplace, provided they were committed within a time specified by the EEOC—for example, within the past seven or ten years. If an employer's reliance on an applicant's criminal record falls into one of these categories, then no further validation would be required to show job relatedness in employment litigation. The burden would then shift to the plaintiff to produce evidence that rebuts the presumption of job relatedness.

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[309]EEOC 2012 Enforcement Guidance, *supra* note 12, at 13–20.

[310]*Id.* at 21–22.

[311]*Id.* at 21–24. The 2012 Enforcement Guidance discusses hiring in certain industries, but only with respect to federal or state laws that might limit employment of ex-offenders.

3. Nature of Validation Evidence Required to Establish Job Relatedness

The EEOC 2012 Enforcement Guidance acknowledges that formal validation need not always be utilized[312] and presents an alternative "individualized assessment" process that can establish the job relatedness of excluding applicants with criminal records.[313] However, instead of providing specific guidance regarding formal validation approaches, the revised EEOC guidance merely references the Uniform Selection Guidelines.[314] These guidelines strongly endorse the formal validation of employee selection practices and are themselves vague on when formal validation is not needed.[315]

In the discussion of an individualized assessment process, the revised EEOC guidance fails to address key issues. For example, although the EEOC guidance identifies various factors that might be relevant,[316] guidance regarding the level of rigor that must be involved in selecting and applying those factors is not provided. The EEOC guidance does not instruct whether individualized assessments be based entirely on subjective assessments, so long as they are in good faith. The EEOC guidance also does not state whether there is still a need for a systematic analysis of requirements of the job in question, expert input, or some kind of data supporting the employer's conclusion that specific types of criminal records are job related and consistent with business necessity with regard to the position in question. Further development of the EEOC guidance is therefore necessary to clarify these issues.

Although numerous issues do remain insufficiently addressed, the EEOC 2012 Enforcement Guidance does provide one example of when an employer appropriately uses the individualized assessment process. In that example, dealing with a fictional facility rental center that prohibits individuals with recent theft crime convictions from working in certain positions, the employer's individualized assessment process was adopted by the employer "based on data from the County Corrections Department,

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[312]*Id.* at § V.B.5.

[313]*Id.* at § V.B.9.

[314]*Id.* at § V.B.5.

[315]*See* 29 C.F.R. § 1607.6B (2012).

[316]EEOC 2012 Enforcement Guidance, *supra* note 12, at §§ V.B.6 & V.B.9.

national criminal data, and recent recidivism research for theft crimes."[317] Despite the appropriateness of this example, without supporting explanation in the text, employers may feel free to continue to make subjective assumptions about applicants' criminal history.

In summary, although the EEOC 2012 Enforcement Guidance provides additional guidance regarding the types of evidence it will require from employers to establish the job relatedness of criminal records exclusion practices shown to result in an adverse impact, the EEOC should provide courts and employers with more detailed guidance. The Uniform Selection Guidelines are intended to apply to the wide range of employment selection practices, from assessments of abstract mental abilities to tests of physical strength, and they are drafted accordingly. Rather than merely referencing the Uniform Selection Guidelines, the EEOC should provide more specific guidance that is narrowly tailored to the use of criminal record information. For example, building on the Uniform Selection Guidelines, we have proposed specific guidance regarding when criterion-related validation should be required to establish the job relatedness of an employer's use of criminal record information as a predictor in employee selection.[318] We would encourage the EEOC to provide courts and employers similar guidance.

There is also a need for the EEOC to provide specific guidance regarding when validity generalization is acceptable as an approach to establishing that an employer's use of criminal record information is job related. As noted earlier, the scientific community, Uniform Selection Guidelines, and courts have accepted this general approach to validation "in appropriate circumstances."[319] The EEOC 2012 Enforcement Guidance does not make it clear whether the EEOC embraces a validity generalization approach to establishing the job relatedness of criminal record exclusion rules and, if so, under what circumstances.

Finally, as suggested above, there is a need for clear and more detailed EEOC guidance regarding when formal validation is not needed. Adopting the proposed "safe harbors" discussed above would address this need to some extent. The EEOC should provide employers with some other circumstances where it is appropriate for an employer to use

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[317]EEOC 2012 Enforcement Guidance, *supra* note 12, at 19.

[318]*See supra* Part VI.B.1.

[319]*See supra* notes 277–79.

criminal record information in making employment decisions without being able to validate its practice using one of the approaches identified in the Uniform Selection Guidelines. For example, even if the content validation approach is technically feasible, the EEOC could excuse a small employer with limited resources and relatively few people in any given position, based on cost versus benefit considerations or some showing by the employer of undue financial hardship.

4. Timing of Inquiry About Criminal Backgrounds

Concern about the potential undue influence of criminal record information at earlier stages of the hiring process, when a relative lack of candidate information facilitates utilization of negative stereotypes, has led to calls for an unqualified ban on soliciting criminal record information until after a job interview has been conducted.[320] Some states have responded to this concern by adopting laws that require employers to wait until later in the selection process to ask about or base decisions on convictions.[321] While this concern appears to be well founded in general, there are two situations where employers should be allowed to make inquiries about applicant criminal records early in the hiring process, including on employment application forms. The first situation is when there is a clearly identifiable federal law, regulation, occupational licensing requirements, or other bona fide industry standards that preclude the hiring of individuals with a record of certain offenses for the job(s) in question. The second situation is when early inquiry into criminal backgrounds may also be warranted when evidence provided by a legitimate validation study supports the conclusion that individuals with a record of certain offenses should not be considered for the job(s) in question.

In both of these situations, there is reasonable justification for the use of criminal record information in the hiring decision, and allowing inquiry

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[320]Emily J. Carson, *Off the Record: Why the EEOC Should Change Its Guidelines Regarding Employers' Consideration of Employees' Criminal Records During the Hiring Process*, 36 J. Corp. L. 221, 235 (2010).

[321]*See, e.g.*, Conn. Gen. Stat. § 46a-80(b) (2012) ("[N]o employer . . . shall inquire about a prospective employee's past convictions until such prospective employee has been deemed otherwise qualified for the position."); Minn. Stat. § 364.021(a) (2012) ("A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer.").

at early stages of the hiring process will allow both applicants and employers to use their time and resources more efficiently. The EEOC 2012 Enforcement Guidance merely recommends as a "best practice" that employers not ask about convictions on job applications.[322] Based on the foregoing considerations, we urge the EEOC to provide stronger guidance. The EEOC should explicitly identify the two situations discussed above in which it would be permissible to ask about criminal convictions on job applications and take the position that employers should otherwise not make any inquiry into an applicant's criminal record until after the interview process has been completed.

Conclusion

The results of the Michigan survey indicate that, although a substantial majority of the state's employers are willing to consider hiring applicants with criminal convictions, and despite EEOC regulations and HRM best practice recommendations, a significant number of Michigan employers refuse to consider hiring ex-offenders. Three factors appear to be contributing to this unwillingness: greater concerns about ex-offenders as employees compared to employers willing to consider ex-offenders, no perceived potential benefits associated with hiring ex-offenders, and inaccurate knowledge of legal constraints on the hiring of ex-offenders.

The substantial majority of employers who are willing to consider hiring ex-offenders report that they go far beyond just asking whether the applicant has a conviction. Instead, they consider the nature of the crime(s) committed, how those criminal acts relate to the job being filled, and the time passed since the applicant was released from prison. They also look beyond the applicant's conviction to determine whether the negative characteristics associated with the criminal act have either been corrected or are disproved by the applicant's more recent behavior. In short, these employers report undertaking the type of assessment that, if effectively executed, would establish a job-related and consistent-with-business-necessity defense or a legitimate business reason for considering the criminal records of applicants.

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[322]EEOC 2012 Enforcement Guidance, *supra* note 12, at § V.B.3.

The EEOC has just provided additional guidance regarding employers' consideration of criminal records among applicants. However, as discussed above, from both the science of HRM and legal perspectives, this guidance is insufficient. There is still more that most employers, the EEOC, and the courts could and should do to promote the fair and effective use of criminal record information in the hiring process. With such practices in place, ex-offenders who are qualified to work will become employed and will be less likely to recidivate, while employers will still be able to promote their interests of hiring qualified employees who will contribute to a productive and safe working environment.