

Criminal Recidivism Reports May Provide A Defense For Employers To Ban-The-Box Exposure

As more states and cities pass laws restricting the ability of employers to conduct criminal background checks on potential hires, several recent reports highlight the importance of criminal checks and cast doubt on the wisdom of these restrictive laws.

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The United States Department of Justice recently issued a report which studied the rates at which individuals convicted of crimes go on to engage in additional criminal activity following their release from detention. In the report, the DOJ performed a **10-year** analysis of individuals released from state prisons in 2008. In the study of **73,600** formerly incarcerated individuals, the DOJ reported:

- **82%** of the individuals were arrested again over the 10-year period following their release;
- **70%** of the arrested individuals were convicted;
- **61%** committed crimes serious enough that they were sent back to prison; and
- The **73,600 individuals** accounted for **2.2 million arrests** over the following **10 years**.

These statistics are alarming but should be of particular concern to employers. Under federal and state occupational health and safety laws, employers have an obligation to provide a safe workplace for their workers and the penalties for violating these laws can be severe. Civil law imposes liability on companies who fail to properly protect their employees and customers under negligent hiring and retention doctrines and through other types of private civil actions. These laws, as well as good conscience, require businesses to ensure that the people they hire do not pose a risk to their co-workers as well as to the customers the businesses serve.

Yet lawmakers continue to pass laws to encourage and even coerce employers to hire people who have been previously convicted of serious crimes. These laws place employers in a precarious situation of having to protect their employees and clients from individuals who are highly likely to engage in further criminal activity.

While it is true that many previously convicted persons go on to lead productive and law-abiding lives, the DOJ report reveals that the vast majority do not. In fact, the study revealed that **77%** of the individuals who were incarcerated for violent crimes were arrested again, including **66%** of those who were convicted of rape and sexual assault.

In a separate report, the Federal Bureau of Justice Statistics tracked the five-year re-incarceration rate for individuals released from prison in 2012. The FBJs report showed that **71%** of those released were arrested again during the five years following their release, including two-thirds of those previously convicted of violent crimes.

On the same day the FBJs report was released, an ordinance in New York City went into effect which granted sweeping enforcement authority to the City of New York to punish employers for failing to hire convicted criminals. The law further provides for private lawsuits against employers by persons previously charged or convicted of crimes who were denied employment. The New York law creates a complex and convoluted hiring process for employers wishing to perform necessary background checks on prospective employees. The process will increase employers' costs and cause significant delays in the hiring of New York City residents and those seeking to work there.

Yet New York City is not alone in passing these laws as they have become more common in jurisdictions nationwide. For example, many states prohibit employers from considering conviction records after the passage of a certain period of time. Massachusetts prohibits the consideration of convictions of certain crimes after three years, including assault. California's prohibition extends to any conviction after seven years, including homicide, rape and aggravated assault.

In an FBJs study on individuals convicted of sex offenses, **67%** of those individuals will go on to commit additional crimes and one in five of those individuals are arrested in the eighth and ninth years following their release. Thus, a California employer who hires a convicted sex offender seven years following their conviction faces a **20%** chance that the individual will be arrested in their first two years of employment. While the statistics show that the rate of post release arrests do decline over time, an employer may still have understandable concern in thinking that a **20%** risk is still too high.

Without question, studies show that sustained employment can be an important factor in assisting formerly incarcerated individuals in leading productive lives. And assisting these individuals should be a high priority in a society with a large population of individuals with criminal records. But at what cost? The use of employment laws and regulations to attempt to provide employment opportunities to people with criminal records began over 20 years ago and recidivism rates have not improved. In fact, they have trended in the opposite direction.

While the recidivism statistics are cause for concern, they may provide employers with a defense to a lawsuit or administrative claim when the employer denies employment to a convicted criminal. Under many ban the box laws and similar statutes, employers may deny employment based upon a criminal record where they can show that the person poses a risk to the employer's people or property. Others require that there be a "substantial relationship" or a "direct relationship" to the duties of the position. The actual wording of the laws differs and should be reviewed when considering a candidate with a criminal past.

Employers may wish to use the published recidivism rates as part of their background adjudication process. The reports are quite detailed in breaking down recidivism rates for specific crimes and the percentages of individuals who re-offend at certain intervals in time. If an employer intends to take adverse action against a person based upon a criminal record, they may want to document that they reviewed the circumstances of the criminal activity and as part of that review, considered the statistical likelihood that the individual will go on engage in additional criminal activity. This will at least provide some compelling empirical data to support the decision.

Certainly, rehabilitating individuals convicted of criminal activity is a worthy and important goal for any civil society. But one must question the effectiveness of using private employment laws to achieve this important objective as opposed to other more direct means. Yet lawmakers press on in enacting unimpactful regulations that overly burden employers and expose innocent workers, customers and others to potential risks that, if understood, would not be accepted.



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