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NOTE

FINDING A BALANCE BETWEEN HIRING  
EX-OFFENDERS AND PROTECTING PRIVATE  
EMPLOYERS IN OKLAHOMA—THE NEED TO  
REFORM THE NEGLIGENT-HIRING STANDARD,  
ENACT A FAIR-CHANCE POLICY, AND ESTABLISH  
A STATUTORY PRESUMPTION AGAINST  
NEGLIGENT HIRING

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I. INTRODUCTION ..... 441

II. IDENTIFYING THE UNDERLYING ISSUE..... 444

    A. *Pre-Employment Screening* ..... 444

    B. *Policies Supporting the Hiring of Ex-Offenders*..... 446

    C. *Policies Supporting the Use of Criminal Records in  
        Hiring Decisions*..... 448

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\* Juris Doctor candidate, May 2017. The author first and foremost thanks God for each life experience that shaped the motivation for this Note. Next, she thanks Professors Arthur G. LeFrancois, Paula J. Dalley, and Vicki Lawrence MacDougall for their guidance and input while writing this Note. Last, the author thanks her family and friends for their support and encouragement during the note-writing process.

**440** *Oklahoma City University Law Review* [Vol. 41]

III. FEDERAL EFFORTS AND INCENTIVES OFFERED TO HELP  
ESTABLISH A BALANCE BETWEEN EMPLOYING  
EX-OFFENDERS AND PROTECTING EMPLOYERS ..... 449

A. *The EEOC’s Guidance for Employers*..... 450

B. *Ban-the-Box Movement as an Influence on Nationwide  
Legislation* ..... 452

C. *The Fair Credit Reporting Act’s Guidance for Employers* .. 454

D. *The Work Opportunity Tax Credit: An Incentive to Hire  
Ex-Offenders* ..... 456

E. *The Federal Bonding Program: An Additional Incentive  
to Hire Ex-Offenders and an Effort to Rehabilitate  
Ex-Offenders* ..... 457

F. *The Second Chance Act: An Effort to Rehabilitate  
Ex-Offenders* ..... 458

IV. OKLAHOMA’S LAW ON THE USE OF CRIMINAL RECORDS IN  
HIRING DECISIONS ..... 459

A. *Oklahoma Statutes Governing Private Employment  
Practices* ..... 459

B. *Respondeat Superior vs. Negligent Hiring in Oklahoma* .... 460

1. *Respondeat Superior*..... 461

2. *Negligent Hiring* ..... 462

3. *The Development of the Negligent-Hiring Doctrine  
in Oklahoma*..... 462

V. AN ALTERNATIVE SOLUTION FOR OKLAHOMA ..... 466

A. *The Need to Reform Oklahoma’s Negligent-Hiring  
Standard*..... 467

B. *The Need to Enact a Fair-Chance Policy for Private  
Employers* ..... 468

1. *Impose a Duty*..... 470

2. *Ban the Box* ..... 470

3. *Connect a Job with the Crime:  
Is the Prior Crime Job Related?* ..... 471

4. *Arrest vs. Conviction Records*..... 473

5. *Certificate of Employability* ..... 474

C. *Establishing a Statutory Presumption Against  
Negligent Hiring* ..... 477

VI. CONCLUSION..... 480

## I. INTRODUCTION

Regina owns and operates a rig-moving company in Oklahoma.<sup>1</sup> She wants to hire ten new tandem truck drivers. She contacts Lance, who is the recruiter responsible for hiring the drivers. They discuss ways to fill the positions quickly, ultimately deciding to hold a small career fair, which is a success. Over twenty-five candidates apply. However, after the selection process narrows the list to twelve qualified applicants, Lance conducts criminal background checks and discovers that nine of the twelve have prior criminal records, and seven of the nine applicants are minorities. Regina—who is in dire need of filling the positions quickly—is now concerned about whether she can hire the seven candidates with criminal records since employers can be held liable for negligent hiring if they hire an applicant who has a propensity to harm others and the employer had prior knowledge of such risk.<sup>2</sup> Furthermore, if Regina decides not to hire the minority applicants with a criminal record, she could be subject to a discrimination suit if the refusal to hire results in a disparate impact on a protected class, such as race.<sup>3</sup>

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1. This is a fictional hypothetical and solely the author's work used to demonstrate issues presented in this Note. Other writers have also illustrated policy concerns surrounding the hiring of ex-offenders. *See, e.g.*, Kristen A. Williams, Comment, *Employing Ex-Offenders: Shifting the Evaluations of Workplace Risks and Opportunities from Employers to Corrections*, 55 UCLA L. REV. 521, 522–23 (2007); Sarah K. Starnes, Note, *Interviewing Stripes Instead of Suits: Addressing the Inadequacy of Indiana's Current Legislation and How to Assist Employers in Effectively Hiring Convicted Felons*, 49 VAL. U. L. REV. 311, 311–12 (2014).

2. *See Thornton v. Ford Motor Co.*, 2013 OK CIV APP 7, ¶ 50, 297 P.3d 413, 427 (“[E]mployers are held liable for their prior knowledge of the servant’s propensity to commit the very harm for which damages are sought.” (quoting *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 20, 998 P.2d 592, 600)).

3. U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1 (2012) [hereinafter EEOC GUIDANCE], [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) [<https://perma.cc/LAS5-AAK3>]. The EEOC Guidance provides:

An employer’s use of an individual’s criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended. . . . The Guidance focuses on employment discrimination based on race and national origin . . . [and] discusses disparate treatment and disparate impact analysis under Title VII.

*Id.*

Regina and Lance look to Oklahoma's law for guidance and find that they are prohibited from asking applicants with sealed records about information within those records.<sup>4</sup> They also learn that under Oklahoma law, employers can be sued for discrimination if they "fail or refuse to hire" an applicant because of "race, color, religion, sex, national origin, age, genetic information, or disability."<sup>5</sup> After reviewing Oklahoma's law governing private employment, Regina is still torn about whether to hire the applicants with criminal records because the antidiscrimination statute makes no mention of ex-offenders, and the sealed-record statute offers little guidance as to ex-offenders whose records aren't sealed. In addition,

Title VII of the Civil Rights Act of 1964 ("Title VII") and its enforcer, the Equal Employment Opportunity Commission ("EEOC"), prohibits employment discrimination based on race, color, sex, and religion, as well as precluding facially neutral practices that may have a disparate impact on one of Title VII's protected classes.<sup>6</sup>

This scenario illustrates a dilemma that private employers in Oklahoma face when deciding whether to hire job applicants with a criminal record and the role that race can play in those decisions. It also depicts the barriers ex-offenders face when seeking employment once released. While the EEOC provides some measure of guidance to employers considering whether to hire ex-offenders,<sup>7</sup> many states, including Oklahoma, "rel[y] on the limited and selective protections" instead of "enacting [their] own legislation" governing the use of criminal records when hiring.<sup>8</sup> Consequently, some employers make genuine efforts to help ex-offenders gain employment, but these would-be employers lack sufficient guidance (like Regina in the illustration above). Other employers "discriminate against ex-offenders on the basis of criminal records no matter how unrelated to the position sought and

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4. OKLA. STAT. tit. 22, § 19(F) (2011 & Supp. I 2015).

5. OKLA. STAT. tit. 25, § 1302(A)(1) (2011).

6. Starnes, *supra* note 1, at 313; *see also* Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2012).

7. *See* Starnes, *supra* note 1, at 313.

8. Irina Kashcheyeva, Comment, *Reaching a Compromise: How to Save Michigan Ex-Offenders from Unemployment and Michigan Employers from Negligent Hiring Liability*, 2007 MICH. ST. L. REV. 1051, 1053.

regardless of the gravity of offenses.”<sup>9</sup> Nothing prohibits them from doing so.

That is not to say that employers should always hire an applicant with a criminal record.<sup>10</sup> For example, when a background check reveals that a prior crime relates to a position’s duties, the offense is recent,<sup>11</sup> and the applicant does not possess a Certificate of Employability,<sup>12</sup> an employer refusing to hire the applicant should not be liable for discrimination. Due to limited federal guidance and the lack of state legislation addressing this issue, Oklahoma’s legislature and courts should seek a balance between employing ex-offenders and protecting private employers by focusing on three things: (1) reforming the negligent-hiring standard; (2) adopting a fair-chance policy for private employers;<sup>13</sup> and (3) establishing a statutory presumption against negligent hiring.

This Note’s purpose is to highlight problems ex-offenders face when seeking employment and the vulnerability employers face when deciding whether to hire ex-offenders. It explores the lack of legislation governing the use of criminal records in hiring decisions for Oklahoma’s private employers, compares Oklahoma’s laws with those of other states, and provides an alternative solution for Oklahoma. Part II begins by identifying the underlying issue—the use of criminal records in hiring decisions. It then discusses the policy concerns surrounding the use of criminal records for the employer and the ex-offender. Part III provides an overview of federal efforts and incentives offered to help establish a balance between employing ex-offenders and protecting employers. It pays special attention to the EEOC’s Enforcement Guidance on the use of arrest and conviction records in hiring decisions;<sup>14</sup> the additional

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9. *Id.*

10. See Ian B. Petersen, Note, *Toward True Fair-Chance Hiring: Balancing Stakeholder Interests and Reality in Regulating Criminal Background Checks*, 94 TEX. L. REV. 175, 175–76 (2015) (“[E]mployers do sometimes have a legitimate interest in examining a candidate’s background.”).

11. See *id.*; EEOC GUIDANCE, *supra* note 3, at 10–12.

12. See generally Heather J. Garretson, *Legislating Forgiveness: A Study of Post-Conviction Certificates as Policy to Address the Employment Consequences of a Conviction*, 25 B.U. PUB. INT. L.J. 1, 1 (2016) (providing “insight[] into the use of certificates [and] their challenges,” and explaining “how legislating more of the same can effectively address the employment paradox”).

13. Fair-chance policies are synonymous with ban-the-box policies. Petersen, *supra* note 10, at 176.

14. EEOC GUIDANCE, *supra* note 3.

requirements of the Fair Credit Reporting Act (FCRA);<sup>15</sup> and the incentives of the ban-the-box movements,<sup>16</sup> the Work Opportunity Tax Credit (WOTC),<sup>17</sup> the Second Chance Act (SCA),<sup>18</sup> and the Federal Bonding Program (FBP).<sup>19</sup> Part IV discusses Oklahoma's law on the use of criminal records in hiring decisions as well as the development of the negligent-hiring doctrine. Then, Part V provides an alternative solution for Oklahoma, placing emphasis on reforming the negligent-hiring standard, adopting a fair-chance policy, and establishing a statutory presumption against negligent hiring. Finally, Part VI concludes by reiterating the need for employing ex-offenders, protecting employers, and finding a balance between the two.

## II. IDENTIFYING THE UNDERLYING ISSUE

### A. Pre-Employment Screening

Increasingly, “employers are conducting criminal background checks” on potential job candidates and then using the results to justify rejecting applicants.<sup>20</sup> This is evidenced by a 2012 Society of Human Resource

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15. Fair Credit Reporting Act (FCRA), 15 U.S.C. §§ 1681–1681x (2012 & Supp. III 2015).

16. See generally Michelle Natividad Rodriguez & Beth Avery, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NELP (Feb. 1, 2017), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> [https://perma.cc/V2DQ-LUGJ] (describing the widespread growth of these policies); *On the President's Announcement on 'Ban the Box' Hiring*, NELP (Nov. 2, 2015), <http://www.nelp.org/news-releases/on-the-presidents-announcement-on-ban-the-box-hiring/> [https://perma.cc/2F6D-BRLQ] (statement of Christine Owens, Executive Director, National Employment Law Project).

17. See *Work Opportunity Tax Credit*, OKLA. EMP. SECURITY COMMISSION [hereinafter OESC], [https://www.ok.gov/oesc\\_web/Services/Workforce\\_Services/Assistance\\_Programs/Work\\_Opportunity\\_Tax\\_Credit.html](https://www.ok.gov/oesc_web/Services/Workforce_Services/Assistance_Programs/Work_Opportunity_Tax_Credit.html) [https://perma.cc/RWW7-G7TC] (describing the federal tax credit for employers who hire ex-felons and certain other qualifying groups, “which have traditionally faced significant barriers to employment”).

18. Second Chance Act of 2007: Community Safety Through Recidivism Prevention (Second Chance Act of 2007), Pub. L. No. 110-199, 122 Stat. 657 (codified as amended in scattered sections of 42 U.S.C.); see *Second Chance Act*, COUNSEL OF ST. GOV'T JUST. CTR., <https://csgjusticecenter.org/nrrc/projects/second-chance-act/> [https://perma.cc/7P5A-8EEQ].

19. *Program Background*, FED. BONDING PROGRAM, <http://bonds4jobs.com/about-us> [https://perma.cc/E9DT-Y8LD].

20. Johnathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-

Management survey, which indicates that eighty-seven percent of employers conduct criminal background checks on job applicants<sup>21</sup> as opposed to fifty-one percent of employers in 1996.<sup>22</sup> Not surprisingly, the increased reliance on criminal records in hiring decisions has a tremendous impact on an ever-growing class of persons—ex-offenders.<sup>23</sup> The impact is undeniable given the rapid increase in the U.S. prison population<sup>24</sup> and the number of ex-offenders released each year.<sup>25</sup> Since 1980, the number of federal and state prisoners has ballooned from about 330,000<sup>26</sup> to 2.2 million in 2014—an increase of nearly 500%.<sup>27</sup> Additionally, “[m]ore than 650,000 ex-offenders are released from prison every year.”<sup>28</sup> Today, it is estimated that “roughly a third of the adult population . . . have some type of criminal record, which can trigger a whole host of stigmas and restrictions, including barriers to employment.”<sup>29</sup>

Some employers attribute the increased use of criminal background checks to their risk of defending negligent-hiring lawsuits; however, other factors likely influence an employer’s decision not to hire an ex-offender, such as the employer’s reputation of hiring ex-offenders,<sup>30</sup> a potential

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C.L. L. REV. 197, 198 (2014).

21. SOC’Y FOR HUM. RES. MGMT., BACKGROUND CHECKING—THE USE OF CRIMINAL BACKGROUND CHECKS IN HIRING DECISIONS 3 (2012) [hereinafter SHRM], <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/criminalbackgroundcheck.aspx> [<https://perma.cc/HV6T-9NTZ>].

22. Roberto Concepción, Jr., *Need Not Apply: The Racial Disparate Impact of Pre-Employment Criminal Background Checks*, 19 GEO. J. ON POVERTY L. & POL’Y 231, 236–37 (2012).

23. *See id.* at 237.

24. *See generally* THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 1–8 (2015) [hereinafter THE SENTENCING PROJECT], [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf) [<https://perma.cc/H5WB-5KQL>] (providing graphs and statistics on U.S. prison population trends).

25. *Prisoners and Prison Re-Entry*, U.S. DEP’T OF JUSTICE, [http://www.justice.gov/archive/fbci/progmenu\\_reentry.html](http://www.justice.gov/archive/fbci/progmenu_reentry.html) [<https://perma.cc/F4ZP-Z4QU>] (“Over 10,000 ex-prisoners are released from America’s state and federal prisons every week . . .”).

26. *See* ALLEN J. BECK & DARRELL K. GILLARD, BUREAU OF JUSTICE STATISTICS, BULLETIN: PRISONERS IN 1994, at 1 (1995), <http://www.bjs.gov/content/pub/pdf/Pi94.pdf> [<http://perma.cc/9KCA-6FXH>].

27. THE SENTENCING PROJECT, *supra* note 24, at 2; *see also* Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 816 (2017).

28. *Prisoners and Prison Re-Entry*, *supra* note 25.

29. Obama, *supra* note 27, at 818.

30. Christine Neylon O’Brien & Jonathan J. Darrow, *Adverse Employment Consequences Triggered by Criminal Convictions: Recent Cases Interpret State Statutes*

increase in workplace violence,<sup>31</sup> and sometimes, the subjective belief that ex-offenders are simply bad people.<sup>32</sup> Regardless of the reason, in 2012, an average of sixty-four percent of employers who conducted criminal background checks on job applicants responded that the discovery of any criminal record—violent, non-violent, misdemeanor, or felony—was influential in not extending a job offer.<sup>33</sup>

### B. Policies Supporting the Hiring of Ex-Offenders

Policies supporting the hiring of ex-offenders “center[] on the theory of rehabilitation.”<sup>34</sup> The rehabilitative theory supports hiring ex-offenders because rehabilitating criminals helps decrease the likelihood they will recidivate or “offend again.”<sup>35</sup> One way to accomplish successful rehabilitation is to secure employment.<sup>36</sup> In fact, “[a]ccording to a report from the U.S. Attorney General, ‘[s]teady gainful employment is a leading factor in preventing recidivism.’”<sup>37</sup> This should come as no surprise. “It is well established that denying employment opportunities to ex-offenders increases the likelihood they will recidivate, or commit a new criminal offense.”<sup>38</sup> Often ex-offenders recidivate because they feel as if there are no “opportunities to obtain legitimate employment and earn an honest

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*Prohibiting Discrimination*, 42 WAKE FOREST L. REV. 991, 994 (2007).

31. Williams, *supra* note 1, at 521.

32. See OKLA. STAT. ANALYSIS CTR., OKLA. BUREAU OF INVESTIGATION, CRIME VICTIMIZATION SURVEY 2010 REPORT 7 (2011), <https://www.ok.gov/osbi/documents/Oklahoma%20Crime%20Victimization%20Final%20Report%209.15.2011.pdf> [https://perma.cc/8GL2-Y9MU] (reporting that 49.7% of Oklahomans surveyed described released offenders as “dangerous or untrustworthy” or as “lazy, a drain on society”); Stephen P. Shepard, Note, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN J.L. 145, 146 (2011) (“Being labeled an ex-offender in America is essentially the modern equivalent to a ‘scarlet letter’ . . .”).

33. See SHRM, *supra* note 21, at 7.

34. Timothy L. Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts, Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 194 (2008).

35. See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1316 (2000) (suggesting that rehabilitation reduces the likelihood that ex-offenders will offend again).

36. E.g., Creed, *supra* note 34, at 194.

37. Michael Connett, Comment, *Employer Discrimination Against Individuals with a Criminal Record: The Unfulfilled Role of State Fair Employment Agencies*, 83 TEMP. L. REV. 1007, 1014 (2011) (quoting OFFICE OF THE ATT’Y GEN., U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 2 (2006)).

38. Shepard, *supra* note 32, at 147.



living.”<sup>39</sup>

A good example of what it means to an ex-offender to be given a second chance is demonstrated in a video clip where Ronnie Elder, Plant Manager for Dave’s Killer Bread, shares that he spent over sixteen years in prison.<sup>40</sup> Following his first release from prison, an eighteen-month sentence, he went six years before going back to the only thing he knew, which he described as “a life of crime.”<sup>41</sup> He said, “the closer I got to coming home from a fifteen-year bit, my biggest concern was who’s going to give me an opportunity, who’s going to give me a job.”<sup>42</sup> Ronnie credits his stability to Dave’s Killer Bread, which is a company that believes second-chance employment “has the power to reduce the negative impact of mass incarceration and recidivism in America.”<sup>43</sup> This is reflected in its employment statistics, as some thirty percent of its employees are ex-offenders.<sup>44</sup> Dave’s Killer Bread’s decision to hire ex-offenders affirms the “near-universal public belief ‘that helping ex-offenders find stable work [is] the most important step in helping them reintegrate into their communities.’”<sup>45</sup>

Another concern that fuels the policies supporting the hiring of ex-offenders is that “[t]he categorical denial of employment to ex-offenders exerts a severe disparate impact on [black] and Hispanic populations.”<sup>46</sup> This is primarily because “[blacks] are convicted at higher rates than whites for weapon crimes, property crimes, drug crimes, and violent crimes.”<sup>47</sup> Moreover, once convicted and released, “[blacks] encounter greater resistance from employers” than do whites.<sup>48</sup> A 2009 study suggested that a conviction record reduced the callback rate of black job applicants by sixty percent, which is twice as much as for identically

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39. *Id.*

40. *Second Chance Project — Dave’s Killer Bread*, YOUTUBE (Mar. 23, 2016), <https://youtu.be/c9XQMk6cxUg>.

41. *Id.*

42. *Id.*

43. *Id.* Dave’s Killer Bread started a foundation to spread its second-chance employment mission with other employers. DAVE’S KILLER BREAD FOUND., <http://www.dkbfoundation.org/> [<https://perma.cc/E7T2-TUCL>].

44. *Our Legacy*, DAVE’S KILLER BREAD, <http://www.daveskillerbread.com/legacy-1/> [<https://perma.cc/HV2G-9DFE>].

45. Connett, *supra* note 37, at 1014 (alteration in original) (quoting Williams, *supra* note 1, at 532).

46. *Id.* at 1012.

47. *Id.*

48. *Id.* at 1013.

qualified white applicants.<sup>49</sup>

*C. Policies Supporting the Use of  
Criminal Records in Hiring Decisions*

Policies for denying jobs to applicants with a criminal record are grounded in the idea that “[e]mployers want to protect their workers and the public, while also protecting themselves from liability and negative publicity for any workplace violence.”<sup>50</sup> Moreover, courts have continuously found employers liable for their employees’ conduct; “[t]hus, employers are more likely to err on the side of caution and simply not hire those with criminal records.”<sup>51</sup> Some argue that “[i]t would be inconsistent and hypocritical to compel businesses . . . to ignore individual[s]’ criminal history . . . [when] private employers must subordinate their own organizational and financial interests . . . .”<sup>52</sup> For example, “employers have an interest in reducing the risk of workplace violence by not hiring an individual with a propensity to commit violent or other deviant acts.”<sup>53</sup>

Historically, under respondeat superior, courts have held employers liable “for an employee’s actions when the employee was acting as an agent and within the scope of his employment.”<sup>54</sup> For example, in the 1913 case *Chicago R.I. & P. Ry. Co. v. Radford*,<sup>55</sup> the Oklahoma Supreme Court found a railroad company liable for its employee’s actions when the employee “falsely imprisoned a passenger arising out of a controversy over the payment of a fare.”<sup>56</sup> In recent years, employers have also been

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49. *Id.* (citing Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, ANNALS AM. ACAD. POL. & SOC. SCI., May 2009, at 195, 199).

50. Williams, *supra* note 1, at 535 (footnote omitted).

51. *Id.* at 539.

52. James Jacobs, *Is Employment Discrimination Against Ex-Offenders Immoral?*, WASH. POST: THE VOLOKH CONSPIRACY (Feb. 2, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/02/is-employment-discrimination-against-ex-offenders-immoral/> [https://perma.cc/ZBD3-MNGX].

53. Shepard, *supra* note 32, at 148 (footnote omitted).

54. Starnes, *supra* note 1, at 337 (citing *Tippecanoe Beverages, Inc. v. S.A. El Aguila Brewing Co.*, 833 F.2d 633, 637 (7th Cir. 1987)).

55. *Chicago R.I. & P. Ry. Co. v. Radford*, 1913 OK 7, 129 P. 834.

56. *Baker v. Saint Francis Hosp.*, 2005 OK 36, ¶ 12, 126 P.3d 602, 605–06 (citing *Radford*, 1913 OK 7, ¶ 4, 129 P. at 837).

subject to negligent-hiring lawsuits.<sup>57</sup> In contrast to respondeat superior, “[n]egligent hiring is a cause of action under which an employer may be held liable for hiring a person who the employer knew or should have known would create a foreseeable risk of injury to others.”<sup>58</sup> Unlike respondeat superior, which holds employers vicariously liable for an employee’s torts committed within the scope of employment, the negligent-hiring doctrine holds employers “directly liable” for an employee’s torts that go beyond the scope of employment.<sup>59</sup> Likewise, a cause of action for negligent retention or supervision can be brought against an employer who continues to retain or fails to supervise an employee it knew or should have known posed a risk of harm to others.<sup>60</sup>

But employers are not only subject to lawsuits when they hire an ex-offender who commits a tortious act while employed; employers can also be held liable for discrimination when declining to hire an ex-offender results in a disparate impact on a protected class and there is no business necessity justifying such action.<sup>61</sup>

### III. FEDERAL EFFORTS AND INCENTIVES OFFERED TO HELP ESTABLISH A BALANCE BETWEEN EMPLOYING EX-OFFENDERS AND PROTECTING EMPLOYERS

Given the inflating U.S. prison population,<sup>62</sup> the large number of ex-offenders being released annually,<sup>63</sup> the statistics on recidivism,<sup>64</sup> and employers’ increasing use of pre-employment criminal background

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57. Starnes, *supra* note 1, at 337.

58. Adriel Garcia, Comment, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP. L. REV. 921, 924 (2013) (citing RESTATEMENT (SECOND) OF AGENCY § 213(b) (AM. LAW INST. 1958)).

59. See Creed, *supra* note 34, at 187.

60. Williams, *supra* note 1, at 535.

61. See Concepción, *supra* note 22, at 235–36.

62. See generally THE SENTENCING PROJECT, *supra* note 24.

63. See *Prisoners and Prison Re-Entry*, *supra* note 25.

64. See generally PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA’S PRISONS 1–3 (2011), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/staterecidivismrevolvingdooramericaprison20pdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/staterecidivismrevolvingdooramericaprison20pdf.pdf) [https://perma.cc/PV9C-AR7P] (summarizing the historical variations in recidivism rates). While Oklahoma has one of the lowest recidivism rates, nearly a quarter of all ex-offenders are still reincarcerated. See *id.* at 13, 17 (finding that Oklahoma’s recidivism rate was the lowest in the country at 24.1% for inmates released in 1999 and third lowest at 26.4% for inmates released in 2004).

checks,<sup>65</sup> there are continuous federal efforts to limit the use of criminal records as dispositive factors in hiring decisions.<sup>66</sup> Employers who employ more than fifteen employees and whose state has not enacted its own legislation rely on the EEOC for guidance on best practices with respect to job applicants who have criminal records.<sup>67</sup> This guidance, however, has left employers with additional questions.<sup>68</sup>

#### A. The EEOC's Guidance for Employers

In 2012, the EEOC issued the *EEOC Enforcement Guidance on Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (EEOC Guidance)<sup>69</sup> in an effort to provide best practices for employers faced with assessing criminal records in hiring decisions<sup>70</sup> and to limit the use of those criminal records in such decisions.<sup>71</sup> Because studies have revealed that blacks and Hispanics are convicted of crimes at a much higher rate than any other race, “[t]he EEOC is concerned about using criminal histories to screen out job applicants because . . . [b]road use of criminal histories could keep people in those racial groups unemployed indefinitely.”<sup>72</sup>

According to the EEOC Guidance, “an employer can’t use a seemingly neutral policy that affects protected group members disproportionately unless the policy is job related and consistent with [a] business necessity.”<sup>73</sup> In other words, an ex-offender “can prevail in a Title VII claim if he or she can show that a particular employment practice had a disparate impact on a protected class.”<sup>74</sup> Where a plaintiff establishes a

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65. See Smith, *supra* note 20, at 198.

66. See generally 1 MERRICK T. ROSSEIN, EMPLOYMENT DISCRIMINATION LAW AND LITIGATION § 4:10.50 (2016) (providing a comprehensive analysis of the EEOC Guidance on arrest and conviction records).

67. See Starnes, *supra* note 1, at 332–33 & nn.104–05; *id.* at 335.

68. See Tiffany R. Nichols, Note, *Where There's Smoke, There's Fire?: The Cloud of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance on Criminal Records Under Title VII*, 30 GA. ST. U. L. REV. 591, 624–26 (2014).

69. EEOC GUIDANCE, *supra* note 3.

70. See Sarah Esther Lageson et. al., *Legal Ambiguity in Managerial Assessments of Criminal Records*, 40 LAW & SOC. INQUIRY 175, 175 (2015).

71. McAfee & Taft, *Employers Call for Clarification on Criminal-History Guidance*, OKLA. EMP. L. LETTER, Apr. 2013, at 7.

72. *Id.*

73. *Id.*

74. Nancy B. Sasser, Comment, “Don’t Ask, Don’t Tell”: *Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment*

prima facie case for disparate impact, “Title VII shifts the burdens of production and persuasion to the employer to ‘demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.’”<sup>75</sup> Factors that the EEOC Guidance encourages employers to consider when determining whether an exclusion based upon a criminal record is job related and consistent with business necessity are: (1) “[t]he nature and gravity of the offense or conduct”; (2) “[t]he time that has passed since the offense or completion of the sentence”; and (3) “[t]he nature of the job sought.”<sup>76</sup>

The EEOC Guidance provides employers with some direction when assessing a job candidate’s criminal record. Essentially, it tasks employers to make an individualized assessment of those candidates without much direction.<sup>77</sup> The assessment charges employers to search beyond the three factors discussed above and “to encompass all of the circumstances of the conviction . . . and allow[] applicants an opportunity to explain why they should be employed, despite their conviction(s).”<sup>78</sup> However, there is no guidance directing employers on how to go about obtaining this information and what to do once it is obtained.<sup>79</sup> The lack of guidance leaves employers with “a lot of nuance and discretion to deal with and not a lot of hard-and-fast rules.”<sup>80</sup>

Others argue that the EEOC is subjecting employers to an analysis similar to the Supreme Court’s strict-scrutiny test<sup>81</sup>:

[Even] [i]f an employer successfully demonstrates that its policy or practice is job related for the position in question and consistent with business necessity, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that serves the employer’s legitimate goals

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*Discrimination*, 41 U. RICH. L. REV. 1063, 1066–67 (2007).

75. EEOC GUIDANCE, *supra* note 3, at 10–11 (quoting 42 U.S.C. § 2000e–2(k)(1)(A)(i) (2012)).

76. *Id.* at 11.

77. See Lucas Loafman & Andrew Little, *Race, Employment, and Crime: The Shifting Landscape of Disparate Impact Discrimination Based on Criminal Convictions*, 51 AM. BUS. L.J. 251, 281 (2014).

78. *Id.*

79. See Nichols, *supra* note 68, at 624–25 (footnotes omitted) (providing a list of questions that employers are sometimes faced with; for example, “Do repeat offenses—even if mere arrests—dictate greater deference to employers?”).

80. McAfee & Taft, *supra* note 71, at 7.

81. See Loafman & Little, *supra* note 77, at 284.

as effectively as the challenged practice but that the employer refused to adopt.<sup>82</sup>

Not only does the language in the EEOC Guidance “generally appl[y] to governmental actions involving protected classes and fundamental rights,”<sup>83</sup> the EEOC Guidance as a whole is not binding, and it fails to address instances where an ex-offender is not a member of a protected class—ultimately “leaving a large portion of the ex-offender population with no remedy.”<sup>84</sup>

### *B. Ban-the-Box Movement as an Influence on Nationwide Legislation*

The EEOC Guidance also incorporates a best practice that encourages employers to delay asking about prior convictions until later in the hiring process.<sup>85</sup> This best practice endorses the ban-the-box movement.<sup>86</sup> Ban the box is a nationwide movement by civil-rights advocates that urges the removal of “criminal history questions from standard employment applications.”<sup>87</sup> Sparked by public policy favoring successful reintegration of ex-offenders and prevention of recidivism through employment,<sup>88</sup> ban-the-box proponents desire to “restrict the manner in which employers are permitted to inquire about criminal history during the applicant screening process.”<sup>89</sup> It is important to note that the movement does not preclude employers from inquiring about criminal records; rather, it delays the inquiry until after a conditional offer is made and the employer has had an opportunity to assess the applicant’s job readiness.<sup>90</sup> The policies rest on the belief that employers “would be more likely to hire” ex-offenders if they first “had an opportunity to evaluate the skills that [ex-offenders]

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82. EEOC GUIDANCE, *supra* note 3 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012)).

83. Loafman & Little, *supra* note 77, at 284.

84. Petersen, *supra* note 10, at 176.

85. See MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP. L. PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2017), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/7AWG-LLBF>].

86. *See id.*

87. *See, e.g.,* Michael A. Stoll, *Ex-Offenders, Criminal Background Checks, and Racial Consequences in the Labor Market*, 1 U. CHI. LEGAL F. 381, 383 (2009).

88. *Id.*

89. Smith, *supra* note 20, at 211.

90. *Id.*

could bring to the workforce,”<sup>91</sup> rather than having a criminal record trigger any preconceived notions. The policy also encourages employers to consider the age of the crime and make a “holistic evaluation” of the applicant.<sup>92</sup>

The idea behind the ban-the-box movement took root four decades ago in Hawaii. In 1974, Hawaii placed the first ban on the use of criminal records in hiring decisions for both public and private employers.<sup>93</sup> This ban has been somewhat relaxed. The Hawaii Supreme Court recently acknowledged, in *Shimose v. Hawai'i Health Sys. Corp.*,<sup>94</sup> that a 1998 revision to Hawaii's ban-the-box statute now allows employers to inquire into an applicant's criminal history “provided that the conviction record bears a rational relationship to the duties and responsibilities of the position.”<sup>95</sup> The revised Hawaii statute is similar to what is now found in other state statutes, such as New York, which requires that convictions bear a “direct relationship” with the duties and responsibilities of the position sought before employers are permitted to use criminal records as a determinative factor in hiring decisions.<sup>96</sup>

Attempts to extend the movement followed in 2004;<sup>97</sup> however, it was not until recently—within the last couple of years—that the movement has “gone viral.”<sup>98</sup> As of April 2017, twenty-five states and over a hundred cities have adopted some form of the policy for state employers, private employers, or both.<sup>99</sup> The policies appear to be more appealing to states and cities because, unlike the EEOC Guidance, they offer a remedy to all ex-offenders, not just ex-offenders of a protected class, such as race.<sup>100</sup> In

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91. *Id.*

92. See Petersen, *supra* note 10, at 198.

93. See *Shimose v. Hawai'i Health Sys. Corp.*, 345 P.3d 145, 150–51 (2015).

94. *Shimose*, 345 P.3d 145.

95. *Id.* at 148 n.2 (quoting HAW. REV. STAT. § 378-2.5 (Supp. 2007)); see RODRIGUEZ & AVERY, *supra* note 85, at 8 (describing the 1998 revision).

96. See O'Brien & Darrow, *supra* note 30, at 996, 1009–10 (quoting N.Y. CORRECT. LAW § 752 (McKinney 2015)).

97. See Garcia, *supra* note 58, at 925.

98. Anita Campbell, *What Employers Need to Know About the “Ban the Box” Movement*, SMALL BUS. TRENDS (May 18, 2015), <https://smallbiztrends.com/2015/05/employers-ban-the-box-movement.html> [https://perma.cc/6A3E-FW5T] (quoting Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC'Y FOR HUM. RESOURCE MGMT. (July 2014), <https://www.shrm.org/ResourcesAndTools/hr-topics/risk-management/Pages/Ban-the-Box-Movement-Viral.aspx> [https://perma.cc/R7KC-JVSV]).

99. RODRIGUEZ & AVERY, *supra* note 85, at 1.

100. See Petersen, *supra* note 10, at 198.

addition, state and local representatives “can tailor legislation to meet the needs of their community.”<sup>101</sup> For example, Vermont adopted a fair-chance policy in 2015, via executive order, under which only public employers were prohibited from making criminal-record inquiries on job applications.<sup>102</sup> Then in 2016, Vermont enacted a statute adding private employers as well.<sup>103</sup> By contrast, in 2013, Minnesota updated its fair-chance policy that places various restrictions on both public and private employers, including prohibiting questions on the job application about prior conviction and asking anything about arrests or expunged records at any time during the hiring process.<sup>104</sup> Minnesota also incorporates a job-related screening requirement, where employers are to evaluate whether the prior “conviction ‘directly relate[s]’ to the position.”<sup>105</sup>

While fair-chance policies appeal to some state and local governments, they are not without limits.<sup>106</sup> Most “[f]air-chance policies often apply only to government employers. And existing fair-chance policies almost universally fail to include a buffer mechanism, whereby the individual assessing a candidate’s criminal record shares convictions with the hirer and supervisor only on a need-to-know basis.”<sup>107</sup> The buffer mechanism is designed to “ensure ex-offenders get a . . . fair chance while allowing employers to [fully] consider an applicant’s criminal record.”<sup>108</sup>

### C. *The Fair Credit Reporting Act’s Guidance for Employers*

The FCRA is a federal effort designed to help employers properly comply with the law surrounding the use of background checks.<sup>109</sup> Because employers often rely on third parties to conduct pre-employment screenings, such as criminal background checks, “report[s] prepared by a

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101. *Id.*

102. RODRIGUEZ & AVERY, *supra* note 85, at 13–14.

103. *Id.*

104. *Id.* at 10.

105. *Id.*

106. Petersen, *supra* note 10, at 176.

107. *Id.*

108. *Id.*

109. See Kirsten Handelman, *The 21st Century Employer’s Catch-22: Cotran v. Rollins Hudig Hall International, Inc. and the Consequences of the Fair Credit Reporting Act*, 35 U.S.F.L. REV. 439, 441 (2001) (“The FCRA is ‘the federal law that governs the acquisition and use of virtually any type of information gathered by third parties on job applicants and employees.’”).



consumer reporting agency . . . must comply with the FCRA.”<sup>110</sup> The FCRA requires employers to notify applicants of its intent to conduct a background check and to specify what reports the check will include, criminal, credit, or both.<sup>111</sup> Employers are also required to obtain an applicant’s written consent before the background check is conducted.<sup>112</sup> The FCRA further requires employers to alert consumer reporting agencies that they have notified the applicant, obtained their written consent, and intend on using “the report for employment purposes only.”<sup>113</sup> Should an employer receive a criminal background check that contains a criminal record and the employer decides not to hire the individual, before taking adverse action, employers are required to provide the applicant with the following: “(1) notice of intent to take adverse action, (2) copy of the report on which [the employer] based the employment decision, and (3) copy of the Federal Trade Commission’s (FTC) ‘Summary of Your Rights Under the Fair Credit Reporting Act.’”<sup>114</sup>

The ideas behind the FCRA’s requirements are that applicants should be made aware of any information contained in their background checks and have an opportunity to dispute inaccuracies.<sup>115</sup> However, applicants have a limited amount of time to do so.<sup>116</sup> Generally, they have five days to respond before employers are permitted to send a notice of adverse action.<sup>117</sup>

In addition to the requirements placed on employers, the FCRA also places restrictions on consumer reporting agencies.<sup>118</sup> The FCRA states that a consumer reporting agency “may not report records of *arrests* that did not result in entry of a judgment of conviction, where the arrests occurred more than seven years ago.”<sup>119</sup> However, according to the FCRA,

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110. Katherine A. Peebles, *Negligent Hiring and the Information Age: How State Legislatures Can Save Employers from Inevitable Liability*, 53 WM. & MARY L. REV. 1397, 1423 n.138 (2012).

111. See Starnes, *supra* note 1, at 322–23.

112. *Id.*

113. Robyn Ruderman, *Preventing Negligent Hiring Claims*, N.Y. EMP. L. LETTER, Aug. 2006, at 4, 5.

114. *Id.*; accord *A Summary of Your Rights Under the Fair Credit Reporting Act*, FED. TRADE COMMISSION, <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf> [<https://perma.cc/HL2B-RQQ4>].

115. See Ruderman, *supra* note 113, at 5.

116. See *id.*

117. *Id.*

118. See Concepción, *supra* note 22, at 234 & n.17.

119. ROSSEIN, *supra* note 66, § 4.10.50 (emphasis added) (citing 15 U.S.C. § 1681c(a)).

*convictions* may be reported for an indefinite amount of time.<sup>120</sup> While the FCRA provides some guidance for employers, “in practice [it] gives [ex-offenders] little protection from mistakes or unwarranted invasions of privacy.”<sup>121</sup>

*D. The Work Opportunity Tax Credit:  
An Incentive to Hire Ex-Offenders*

The WOTC was created in 1996<sup>122</sup> to encourage employers to hire members of groups that “traditionally faced significant barriers to employment.”<sup>123</sup> Ex-felons are one of the groups the WOTC was designed to help.<sup>124</sup> In practice, the WOTC works as a federal tax credit.<sup>125</sup> The maximum tax credit varies depending on the type of employee hired, but employers are generally entitled to a \$2,400 tax credit for hiring an ex-felon.<sup>126</sup> While it was initially designed to be a “one-year measure,” it has continuously been extended over the years,<sup>127</sup> and on December 18, 2015, President Barack Obama signed a bill extending it again through 2019.<sup>128</sup>

Although the initiative was “designed to encourage employers to increase hiring of members of certain disadvantaged groups,”<sup>129</sup> including ex-felons,<sup>130</sup> “studies have [revealed] that it has little effect on hiring choices or retention . . . . Most of the benefit of the credit appears to go to large firms in high turnover, low-wage industries, many of whom use intermediaries to identify eligible workers and complete required paperwork.”<sup>131</sup> And by only covering ex-felons and not ex-offenders with

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(2012)).

120. *Id.*

121. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 773 (2011).

122. ELIZABETH LOWER-BASCH, RETHINKING WORK OPPORTUNITY: FROM TAX CREDITS TO SUBSIDIZED JOB PLACEMENT 1 (2011), <http://www.clasp.org/resources-and-publications/files/big-ideas-for-job-creation-rethinking-work-opportunity.pdf> [https://perma.cc/UE7D-7AHT].

123. OESC, *supra* note 17.

124. *Id.*

125. *Work Opportunity Tax Credit*, U.S. DEP'T OF LAB. [hereinafter DOL], <http://www.doleta.gov/business/incentives/opptax/> [https://perma.cc/DSV5-7AV4].

126. OESC, *supra* note 17.

127. LOWER-BASCH, *supra* note 122, at 4.

128. DOL, *supra* note 125.

129. LOWER-BASCH, *supra* note 122, at 1.

130. OESC, *supra* note 17.

131. LOWER-BASCH, *supra* note 122, at 1.

misdemeanors, the WOTC is underinclusive. Nevertheless, given the policy in favor of successfully reintegrating ex-offenders, any hiring of ex-offenders is better than none at all, so the WOTC still functions as a valuable incentive for employers to do so.

*E. The Federal Bonding Program:  
An Additional Incentive to Hire Ex-Offenders  
and an Effort to Rehabilitate Ex-Offenders*

The Department of Labor (DOL) established the FBP in 1966 “as an employer job-hire incentive that guaranteed the job honesty of at-risk job seekers.”<sup>132</sup> The DOL recognizes that employment is a key factor to help reduce recidivism after an ex-offender is released and that those ex-offenders are “very often . . . rejected for employment due to their personal backgrounds.”<sup>133</sup> The DOL also recognizes that employers and insurance companies often view ex-offenders as at-risk employees and “designate [them] as being ‘not bondable’ for job honesty.”<sup>134</sup> Consequently, the DOL has partnered with the Union Insurance Group, a national insurance brokerage firm, to issue fidelity bonds to employers who hire at-risk applicants.<sup>135</sup> The program is free for employers and provides protection for the first six months of the ex-offender’s employment.<sup>136</sup> It is important to note that the coverage only applies to acts of employee dishonesty, such as “theft, forgery, larceny, and embezzlement.”<sup>137</sup> The bond does not protect the employer from other employee conduct, such as negligent acts or “poor workmanship,” nor does it shield the employer from liability if the employee is injured on the job.<sup>138</sup>

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132. *Program Background*, *supra* note 19.

133. *Id.*

134. *Id.*

135. *Id.*

136. FED. BONDING PROGRAM, <http://www.bonds4jobs.com/index.html> [https://perma.cc/RHS4-UD3K].

137. *Highlights of the Federal Bonding Program*, FED. BONDING PROGRAM, <http://www.bonds4jobs.com/highlights.html> [https://perma.cc/26G3-5F2T].

138. *See id.* (stating employers are liable for “poor workmanship, job injuries, work accidents, etc.”).

*F. The Second Chance Act:  
An Effort to Rehabilitate Ex-Offenders*

The SCA was signed into law in 2008.<sup>139</sup> Its primary purpose is to “reduce recidivism and improve outcomes for people returning from state and federal prisons, local jails, and juvenile facilities.”<sup>140</sup> It accomplishes this objective by providing “federal funding for educational, literacy, vocational, and job placement services, as well as substance abuse treatment, for offenders during and after incarceration.”<sup>141</sup> Note that while the SCA seeks to address problems ex-offenders face with gaining employment, it does not have an antidiscrimination provision.<sup>142</sup> Therefore, employers are forced to rely on guidance from the EEOC or state law.<sup>143</sup>

While the federal efforts and incentives are good attempts to address the dilemma between hiring ex-offenders and protecting private employers, they are not without limits. As noted above, the EEOC Guidance is nonbinding<sup>144</sup> and fails to reach ex-offenders who are not members of a protected class;<sup>145</sup> the FCRA is underinclusive, as it only applies to third-party consumer reporting agencies;<sup>146</sup> the WOTC does little to affect hiring decisions and is also underinclusive;<sup>147</sup> the FBP doesn’t reach negligent acts;<sup>148</sup> and the SCA lacks an antidiscrimination provision.<sup>149</sup> Consequently, states should enact their own legislation limiting the use of criminal records in hiring decisions, while also offering more protection for employers who hire them.

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139. Connett, *supra* note 37, at 1014.

140. *Second Chance Act*, *supra* note 18.

141. Connett, *supra* note 37, at 1014 (citing Second Chance Act of 2007: Community Safety Through Recidivism Prevention (Second Chance Act of 2007), Pub. L. No. 110-199, § 3(a), 122 Stat. 657, 658 (2008) (codified as amended in scattered sections of 42 U.S.C.)).

142. Concepción, *supra* note 22, at 250 n.161 (citing O’Brien & Darrow, *supra* note 30, at 1025–26).

143. *But see* McAfee & Taft, *supra* note 71, at 7 (stating the EEOC Guidance leaves a great deal of uncertainty for how employers should handle criminal history); Kashcheyeva, *supra* note 8, at 1053 (discussing how most states do not legislatively address employment discrimination regarding criminal records).

144. *Cf.* EEOC GUIDANCE, *supra* note 3, at 1 (noting that it is a “guidance document[]”).

145. Petersen, *supra* note 10, at 176.

146. Peebles, *supra* note 110, at 1423 n.138.

147. LOWER-BASCH, *supra* note 122, at 1.

148. *Highlights of the Federal Bonding Program*, *supra* note 137.

149. Concepción, *supra* note 22, at 250 n.161.

#### IV. OKLAHOMA'S LAW ON THE USE OF CRIMINAL RECORDS IN HIRING DECISIONS

Generally, private employers in Oklahoma are not required to conduct a criminal background check on job applicants.<sup>150</sup> Since Oklahoma recognizes a cause of action for negligent hiring,<sup>151</sup> many employers do so to avoid liability.<sup>152</sup> There are, however, some exceptions. For example, the state requires retail-counter sales agents, employed by “an Oklahoma licensed alarm or locksmith company” to undergo a criminal background check, and they must satisfy the EEOC Guidance.<sup>153</sup> In addition to requiring criminal background checks for some licensures, the state also places a similar requirement on a number of state employers.<sup>154</sup>

##### *A. Oklahoma Statutes Governing Private Employment Practices*

Although federal efforts have been made to address the use of criminal records in hiring decisions, the issue remains unresolved for private employers in Oklahoma. Currently, title 22, section 19 of the Oklahoma Statutes bars private employers from asking for information relating to criminal records if the record is sealed:

Employers, educational institutions, state and local government agencies, officials, and employees shall not, in any application or interview or otherwise, require an applicant to disclose any information contained in sealed records. An applicant need not, in answer to any question concerning arrest and criminal records

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150. *See infra* Section IV.A.

151. *Mistletoe Express Serv., Inc. v. Culp*, 1959 OK 250, ¶ 25, 353 P.2d 9, 15.

152. *See Ruderman*, *supra* note 113, at 4.

153. OKLA. STAT. tit. 59, § 1800.6a(A)–(B)(1) (Supp. I 2015).

154. *See* OKLA. STAT. tit. 63, § 1-1947(A)(2) (2011 & Supp. II 2012) (requiring any employee or applicant to undergo a criminal history background check for a position that involves “working inside long-term care facilities” on behalf of the State Department of Health or the Department of Human Services); OKLA. STAT. tit. 56, § 1025.2(A)(1)(a) (2011) (requiring “community services provider[s] or Medicaid personal care provider[s]” to conduct criminal history checks through the Department of Human Services before there is “an offer to employ or to contract with . . . [an] applicant”); OKLA. STAT. tit. 68, § 2357.206(7)(g)(1) (2011 & Supp. II 2016) (requiring “scholarship-granting organizations” to conduct “criminal background checks on all employees and board members to ensure that no individual is involved with the organization who might reasonably pose a risk to the appropriate use of contributed funds”).

provide information that has been sealed, including any reference to or information concerning such sealed information and may state that no such action has ever occurred. Such an application may not be denied solely because of the refusal of the applicant to disclose arrest and criminal records information that has been sealed.<sup>155</sup>

Similarly, title 25, section 1302 of the Oklahoma Statutes prohibits employers from discriminating against job applicants who fall under a protected class:

It is a discriminatory practice for an employer . . . [t]o fail or refuse to hire . . . because of race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer . . . .<sup>156</sup>

While at first glance the provisions seem as if Oklahoma has addressed issues concerning employment discrimination against ex-offenders, nothing in Oklahoma law prohibits an employer from discriminating against an applicant who has a criminal record that is not sealed; nor does it provide employers with any additional guidance as to what should be considered when assessing a job applicant with a criminal record. Consequently, employers are forced to rely on the EEOC Guidance, which as seen above, is not as clear as employers would like. Additionally, private employers who employ fewer than fifteen employees have no guidance at all and are free to discriminate against ex-offenders based solely on their criminal record.<sup>157</sup>

#### *B. Respondeat Superior vs. Negligent Hiring in Oklahoma*

As briefly discussed above, an employer can be held vicariously liable for its employees' tortious acts committed while within the scope of

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155. OKLA. STAT. tit. 22, § 19 (Supp. I 2016).

156. OKLA. STAT. tit. 25, § 1302(A)(1) (2011).

157. See Starnes, *supra* note 1, at 332-33 ("State and local law control all aspects of small businesses with fewer than fifteen employees."); Kashcheyeva, *supra* note 8, at 1053 (stating most states "rel[y] on the limited and selective protections afforded to ex-offenders by federal statutes").

employment.<sup>158</sup> It can also be held directly liable for its employees' tortious acts committed while outside of the scope of employment.<sup>159</sup> Understanding the difference between these doctrines is helpful in understanding the proposed reform to the negligent-hiring standard in Oklahoma introduced later in this Note.

### 1. Respondeat Superior

Under the doctrine of respondeat superior, an employer can be held vicariously liable to a third party for the “willful acts of an . . . employee acting within the scope of the employment [and] in furtherance of assigned duties.”<sup>160</sup> Thus, employers escape respondeat superior liability when an employee's tortious conduct is not within the scope of employment.<sup>161</sup> In *Perry v. City of Norman*,<sup>162</sup> the Oklahoma Supreme Court held that “one acts within the scope of employment if engaged in work assigned, or if doing what is proper, necessary and usual to accomplish the work assigned or doing that which is customary within the particular trade or business.”<sup>163</sup> For example, in *Baker v. Saint Francis Hospital*,<sup>164</sup> the court held that a child-care worker was acting outside the scope of employment when the worker intentionally struck the head of a crying baby against the corner of a shelf, but the worker was within the scope of employment when she negligently allowed the baby to fall from a crib.<sup>165</sup>

There are other instances where the Oklahoma Supreme Court has deemed conduct committed on the job but not in furtherance of the organization's business as conduct that falls outside the scope of employment. For example, in claims brought under respondeat superior that involve “sexual predatory conduct,” the court has consistently held that this sort of conduct falls outside the scope of employment because “no reasonable person would conclude that predatory sexual conduct was part

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158. E.g., Michael F. Wais, Note, *Negligent Hiring—Holding Employers Liable When Their Employees' Intentional Torts Occur Outside of the Scope of Employment*, 37 WAYNE L. REV. 237, 246–47 (1990).

159. See *id.* at 247.

160. *Perry v. City of Norman*, 2014 OK 119, ¶ 11, 341 P.3d 689, 691.

161. See *Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, ¶¶ 5–6, 188 P.3d 158, 161 (stating conduct does not trigger respondeat superior liability unless it was “part of, and in furtherance of, the . . . business”).

162. *Perry*, 2014 OK 119, 341 P.3d 689.

163. *Id.* ¶ 11, 341 P.3d at 691.

164. *Baker v. Saint Francis Hosp.*, 2005 OK 36, 126 P.3d 602.

165. *Id.* ¶¶ 7–8, 18–19, 126 P.3d at 604, 607–08.

of, and in the furtherance of, the . . . organization's business."<sup>166</sup>

## 2. Negligent Hiring

Where respondeat superior protects employers, in that they are not found liable to third parties for their employees' tortious acts, the employer may still be found liable for negligent hiring.<sup>167</sup> Unlike the vicarious liability of respondeat superior, "[n]egligent hiring is a doctrine of primary liability," in that the employer is liable for its own negligence rather than the acts of its employees.<sup>168</sup> A notable difference between the doctrines of respondeat superior and negligent hiring is that the former does not require evidence of a person's "past acts" because the doctrine only requires a plaintiff prove the employee was "within the scope of their employment."<sup>169</sup> By contrast, the latter requires evidence of an employee's prior acts<sup>170</sup> to establish the employer was negligent "in selecting and retaining only competent and fit employees."<sup>171</sup> Thus, the use of criminal records in hiring decisions is only invoked in negligent-hiring lawsuits, not suits brought under respondeat superior.

## 3. The Development of the Negligent-Hiring Doctrine in Oklahoma

Since the development of the negligent-hiring doctrine, the Oklahoma Supreme Court has not discussed the doctrine in great detail.<sup>172</sup> Most of the opinions reiterate the fact that the court recognizes the doctrine, but offer little guidance as to what conduct would expose employers to liability and what safeguards would prevent liability.<sup>173</sup> *Mistletoe Express*

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166. See *Schovanec*, 2008 OK 7, ¶ 6, 188 P.3d at 161.

167. See *Wais*, *supra* note 158, at 239-41.

168. *Id.* at 246-47.

169. *Id.* at 248 n.54 ("Employee's past acts are admissible [sic] under negligent hiring to demonstrate the connection between the past actions and the tortious conduct. Past acts are irrelevant to a respondeat superior claim since the plaintiff is only required to prove that the tortious conduct was 'within the scope of employment.'").

170. *Id.*

171. Mark Minuti, Note, *Employer Liability Under the Doctrine of Negligent Hiring: Suggested Methods for Avoiding the Hiring of Dangerous Employees*, 13 DEL. J. CORP. L. 501, 501 (1988).

172. See Mason G. Patterson, *Your Liability for Negligent Hiring, Retention in Oklahoma*, OKLA. EMP. L. LETTER, Aug. 1999, at 3.

173. See *id.*



*Service, Inc. v. Culp*<sup>174</sup> is the landmark case in which the Oklahoma Supreme Court adopted the negligent-hiring doctrine.<sup>175</sup> It was the first time that the Oklahoma Supreme Court recognized that negligent hiring and retention were different than respondeat superior,<sup>176</sup> and that there are instances where “[a]n employer who owes some special legal duty to the public may be held liable for an assault committed by an employee to whom he commits the performance of such duty, without regard to whether such assault was within the line of the employee’s duties.”<sup>177</sup> While the court found that the employee was acting within the scope of his employment—thus, the employer was liable under respondeat superior<sup>178</sup>—it also acknowledged that an employer can be held liable for negligent hiring when there is evidence that an employer *knew* or *should have known* that an employee had a propensity to create a risk of harm and the “customer’s injury was a result of that risk.”<sup>179</sup>

Following *Mistletoe*, the court reiterated the distinction between negligent hiring and respondeat superior, but this time in a claim for punitive damages.<sup>180</sup> In *Dayton Hudson Corp. v. American Mutual Liability Insurance Co.*,<sup>181</sup> the court had to decide whether *actual* or *constructive* knowledge of an employee’s dangerous propensities was required to bar recovery for punitive damages.<sup>182</sup> The court elected *actual* knowledge, rather than *constructive*, and held that in order for an insurer to be liable for punitive damages for the insured’s actions, the insured must not have had prior knowledge.<sup>183</sup> In other words, if the employer knew of and disregarded an employee’s dangerous propensities, then the insured alone was responsible for punitive damages.<sup>184</sup> If however the employer did not know but merely should have known, then the insurer was

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174. *Mistletoe Exp. Serv., Inc. v. Culp*, 1959 OK 250, 353 P.2d 9.

175. *Jordan v. Cates*, 1997 OK 9, ¶ 12, 935 P.2d 289, 292.

176. *Id.*

177. *Mistletoe*, 1959 OK 250, ¶ 25, 353 P.2d at 15 (quoting 35 AM. JUR. *Master and Servant* § 549, at 980 (1941)).

178. *Id.* ¶ 28, 353 P.2d at 16.

179. *Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, ¶ 34, 188 P.3d 158, 168–69.

180. *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 1980 OK 193, ¶¶ 13, 15, 17, 621 P.2d 1155, 1160–61.

181. *Dayton*, 1980 OK 193, 621 P.2d 1155.

182. *Id.* ¶¶ 15–17, 621 P.3d at 1161.

183. *Id.* ¶ 17, 621 P.3d at 1161.

184. *See id.*

responsible for punitive damages.<sup>185</sup> In *Jordan v. Cates*,<sup>186</sup> the court made clear that Oklahoma recognizes a separate cause of action for negligent hiring distinct from respondeat superior, settling any uncertainty with the negligent-hiring doctrine.<sup>187</sup> It stated that “[t]he distinction drawn in *Dayton* between *vicarious* and *nonvicarious* liability suggests that the theory of negligent hiring and retention is available in a nonvicarious liability case or in a case where vicarious liability has not been established.”<sup>188</sup> But the court in *Jordan* never reached the issue of negligent hiring because respondeat superior had been stipulated to.<sup>189</sup>

*Jordan* is not the only case that draws upon *Dayton*’s distinction for guidance on the negligent-hiring doctrine. Nearly forty years after *Mistletoe* was decided, the court revisited the negligent hiring, retention, and supervision doctrine. In *N.H. v. Presbyterian Church (U.S.A.)*,<sup>190</sup> the court applied *Dayton*’s prior-knowledge requirement to establish liability for negligent hiring, retention, and supervision.<sup>191</sup> In holding that an employer lacked sufficient knowledge to be found liable under negligent hiring, retention, and supervision, the court emphasized that “[t]he critical element for recovery is the employer’s *prior knowledge* of the servant’s propensities to create the specific danger resulting in damage,”<sup>192</sup> not whether there can be a showing that the employer was negligent in failing to ascertain an employee’s dangerous propensities.<sup>193</sup> The court further held that the national organization lacked any reason to know because conduct that would have revealed the employee’s dangerous propensities was not communicated to the organization.<sup>194</sup> Accordingly, the court left open whether prior knowledge is actual or constructive. The following case demonstrates how the court attempted to clarify, without overruling,

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185. *See id.*

186. *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289.

187. *Id.* ¶ 12, 935 P.2d 292 (“It is well settled that Oklahoma recognizes a cause of action for negligent hiring and retention [of an employee].” (citing *Mistletoe Exp. Serv., Inc. v. Culp*, 1959 OK 250, 353 P.2d 9)).

188. *Id.* ¶ 15, 935 P.2d at 293.

189. *Id.* ¶¶ 15–16, 935 P.2d at 293; *see also* Kristen L. Brightmire, *Oklahoma Supreme Court Addresses an Employer’s Liability for the Intentional Acts of Its Employee*, OKLA. EMP. L. LETTER, Mar. 1997, at 5.

190. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, 998 P.2d 592.

191. *Id.* ¶ 21, 998 P.2d at 600.

192. *Id.* (emphasis added) (citing *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 1980 OK 193, ¶ 17, 621 P.2d 1155, 1161).

193. *Dayton*, 1980 OK 193, ¶¶ 16–17, 621 P.2d at 1161.

194. *N.H.*, 1999 OK 88, ¶ 21, 998 P.2d at 600–01.

the decision of *N.H.*

In *Schovanec v. Archdiocese of Oklahoma City*,<sup>195</sup> the court addressed facts almost identical to *N. H.*, but decided the case differently.<sup>196</sup> Relying on *N.H.*, the defendants in *Schovanec*, the archbishop and the diocese, argued they were not liable for negligent supervision because they lacked actual knowledge of an employee's dangerous propensities since they were not reported to the defendants.<sup>197</sup> The plaintiff argued that this defense "created a 'willful blindness' defense for employers, and impermissibly shifted the duty of supervising . . . employees from the employer . . . to [third parties]."<sup>198</sup> In effect, the employers were trying to hide behind the employees' duty to report.

The plaintiff also argued "that the concept of employer supervision includes a *duty to ascertain and know certain facts*, (or a duty to investigate), and that the [employer's] failure to investigate its employee showed a breach of that duty."<sup>199</sup> The court seemed to agree: "acts occurring within the knowledge of an employee may show notice of those acts to the employer" and "minds [could] differ on what a reasonably prudent person would do in the circumstances of the defendant."<sup>200</sup> In contrast with *N.H.*, which held that the employer did not have reason to know of an employee's propensities because information was not communicated to the employer,<sup>201</sup> the court in *Schovanec* held there was an issue of fact as to whether the employer had reason to know, even though the conduct was not communicated to the employer.<sup>202</sup> So the question remains: when we remove *Schovanec*'s standard, which only applies to negligent supervision and retention claims,<sup>203</sup> are we to apply *N.H.*'s *prior knowledge* standard<sup>204</sup> in cases of negligent hiring? Or does *Mistletoe's knew or should have known* standard<sup>205</sup> apply? Clarification for the Oklahoma negligent-hiring standard is needed.<sup>206</sup>

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195. *Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, 188 P.3d 158.

196. *Id.* ¶¶ 1, 40-41, 188 P.3d at 160, 172-73.

197. *Id.* ¶ 30, 188 P.3d at 167.

198. *Id.* ¶ 4, 188 P.3d at 161.

199. *Id.* ¶ 27, 188 P.3d at 166.

200. *Id.* ¶¶ 37, 39, 188 P.3d at 171-72.

201. *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶¶ 21-22, 998 P.2d 592, 600-01; *see also Schovanec*, 2008 OK 70, ¶ 30, 188 P.3d at 167.

202. *Schovanec*, 2008 OK 70, ¶ 41, 188 P.3d at 173.

203. *See id.* ¶¶ 8, 40-41, 188 P.3d at 162, 173.

204. *N.H.*, 1999 OK 88, ¶ 21, 998 P.2d at 600-01.

205. *Mistletoe Exp. Serv., Inc. v. Culp*, 1959 OK 250, ¶ 25, 353 P.2d 9, 15.

206. An in-depth discussion regarding employers' internal procedures and liability-

## V. AN ALTERNATIVE SOLUTION FOR OKLAHOMA

The need to find a balance between hiring ex-offenders and protecting employers is paramount. Oklahoma has the second-highest incarceration rate in the United States.<sup>207</sup> It also has the nation's highest female incarceration rate.<sup>208</sup> Since 2004, Oklahoma has consistently released over 7,000 ex-offenders annually.<sup>209</sup> Each year, those released ex-offenders are expected to successfully reintegrate into society, while often facing barriers in obtaining employment due to their criminal backgrounds. Non-profit organizations, such as ReMerge<sup>210</sup> and TEEM,<sup>211</sup> recognize those barriers and have made great strides in assisting ex-offenders in this

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insurance coverage is beyond the scope of this Note. However, it is important to note that the standard must be clear; otherwise, it could affect how employers organize their internal procedures. The standard could also affect employers' general-liability-insurance coverage. See generally *Dayton Hudson Corp. v. Am. Mut. Liab. Ins. Co.*, 1980 OK 193, 621 P.2d 1155.

207. Clifton Adcock, *Growth in Prison Population Persists*, OKLA. WATCH (Jan. 7, 2016), <http://oklahomawatch.org/2016/01/07/number-of-prison-inmates-surges-again/> [<https://perma.cc/LC8F-636Z>]; THE SENTENCING PROJECT, *supra* note 24, at 4. While this Note focuses primarily on Oklahoma incarceration rates, it is shocking that “[w]ith just 5% of the world’s population, the United States incarcerates 25% of the world’s prisoners. We keep more people behind bars than the top thirty-five European countries combined, and our rate of incarceration dwarfs not only other Western allies but also countries like Russia and Iran.” Obama, *supra* note 27, at 816 (footnote omitted).

208. Sarah Wynn, *Mean Women and Misplaced Priorities: Incarcerated Women in Oklahoma*, 27 WIS. J.L. GENDER & SOC’Y 281, 291 (2012); THE SENTENCING PROJECT, *supra* note 24, at 4.

209. OKLA. DEP’T OF CORR., 2013 ANNUAL REPORT 19 (2013) [hereinafter ODOC REPORT], <https://www.ok.gov/doc/documents/annual%20report%202013%20for%20web.pdf> [<https://perma.cc/GTU6-JE6K>].

210. ReMerge is a prison-diversion program designed to help women secure stable employment. *Who We Are*, REMERGE, <http://www.remergeok.org/who-we-are> [<https://perma.cc/33YM-ZWNB>]; see also Matt Patterson, *ReMerge Program Offers Hope, Confidence for Troubled Moms in Oklahoma*, OKLAHOMAN (Mar. 31, 2016, 12:00 AM), <http://newsok.com/article/3778522> [<https://perma.cc/YP6U-6A76>] (documenting ReMerge program graduates’ positive experiences).

211. The Education and Employment Ministry (TEEM) is a non-profit organization located in Oklahoma that strives to break the chain of incarceration by helping ex-offenders “with education, social services, and job training and placement.” See TEEM, <http://www.teem.org> [<https://perma.cc/2QV5-SY76>].

arena.<sup>212</sup> While those efforts have had some success,<sup>213</sup> they cannot solve the dilemma alone; rather, it requires more from the legislature and the courts.

Furthermore, it is well established that employment is key to maintaining quality of life and psychological well-being.<sup>214</sup> Employment is also key to reducing recidivism.<sup>215</sup> Yet, many employers are still reluctant to hire ex-offenders out of fear of negligent-hiring liability.<sup>216</sup> Thus, Oklahoma must find a balance between hiring ex-offenders and protecting employers. The best way to accomplish this balance is by reforming the negligent-hiring standard, adopting a fair-chance policy, and establishing a statutory presumption against negligent hiring.

*A. The Need to Reform Oklahoma's  
Negligent-Hiring Standard*

As we have seen, Oklahoma's negligent-hiring standard is a bit unclear.<sup>217</sup> Under *Schovanec*, an employer could be held liable for negligent supervision and retention if the employer knew or should have known of an employee's dangerous propensities.<sup>218</sup> But in cases involving negligent hiring, we are left to decide whether an employer must have only prior knowledge according to *N.H.* or whether an employer must have actual or constructive knowledge according to *Mistletoe*.<sup>219</sup> The

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212. See Tim Talley, *Graduates Praise Prison-Diversion Program in Oklahoma*, NEWSOK (July 10, 2016, 12:00 AM), <http://newsok.com/article/3860674> [<https://perma.cc/HVE3-3KT7>]; *Second Chance Success Story*, TEEM: BLOG (May 25, 2016, 11:55 AM), <http://www.teem.org/blog/> [<https://perma.cc/XQF6-2BM8>].

213. See Talley, *supra* note 212; *Second Chance Success Story*, *supra* note 212.

214. E.g., Lars Axelsson et al., *Inequalities of Quality of Life in Unemployed Young Adults: A Population-Based Questionnaire Study*, INT. J. EQUITY HEALTH, Mar. 21, 2007, at 1, 1. See generally Duncan Gallie & Helen Russell, *Unemployment and Life Satisfaction: A Cross-Cultural Comparison*, 39 EUR. J. SOC. 248 (1998) (studying impact of unemployment on psychological well-being).

215. See, e.g., Shepard, *supra* note 32, at 147; TEEM, *supra* note 211 (TEEM's "three-pronged approach to breaking cycles of incarceration" includes "job training").

216. See Williams, *supra* note 1, at 539.

217. See *supra* Section IV.B.3.

218. See *Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, ¶¶ 37-39, 188 P.3d 158, 172-73.

219. Compare *Mistletoe Exp. Serv., Inc. v. Culp*, 1959 OK 250, ¶ 25, 353 P.2d 9, 15 (finding employer liable under respondeat superior but acknowledging an employer is liable for negligent hiring when evidence indicates an employer *knew or should have known* that an employee had a propensity to create a risk of harm), with *N.H. v.*

uncertainty leaves employers without guidance as to what conduct would expose employers to liability; thus, clarification is needed.

This Note proposes a reform to the negligent-hiring doctrine that mirrors the standard from *Mistletoe* and *Schovanec*: *knew or should have known*.<sup>220</sup> If we were to adopt *N.H.*'s view in negligent-hiring claims—that an employer doesn't have reason to know of such propensity unless it is communicated to the employer—then it would create a willful blindness defense in all negligent-hiring claims where the employer elected not to investigate an applicant and failed to conduct a pre-employment background check.<sup>221</sup> Essentially, the employer would escape liability by showing two things: (1) there is no duty to run a background check; and (2) they did not have reason to know because the information was not communicated to them. In theory, this approach could benefit ex-offenders and employers—employers would escape liability when they do not conduct a background check and ex-offenders' criminal pasts would not be used in hiring decisions—but in practice, it would provide injured third parties with practically no relief, undermining the judiciary's goal of “protect[ing] both the consumer and the employee while balancing their needs with those of the business community.”<sup>222</sup>

#### *B. The Need to Enact a Fair-Chance Policy for Private Employers*

More and more states, counties, and cities are adopting fair-chance policies<sup>223</sup> because “[t]hey are . . . flexible, and local representatives can tailor [the policy] to meet the needs of their community.”<sup>224</sup> Some states have policies that only apply to public employers and limit the use of information from arrest records, while other states have policies that apply to both public and private employers, limit the information on arrests and

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Presbyterian Church (U.S.A.), 1999 OK 88, ¶ 21, 998 P.2d 592, 600–01 (finding employer not liable for negligent hiring, retention, and supervision because the employer did not have *prior knowledge or reason to know* when employees did not communicate conduct that would put the employer on notice).

220. See *Mistletoe*, ¶ 25, 353 P.2d at 15; *Schovanec*, ¶¶ 40–41, 188 P.3d at 172–73.

221. See *Schovanec*, 2008 OK 70, ¶ 4, 188 P.3d at 161 (noting the plaintiff's argument that the defendant's lack-of-actual-knowledge defense would create a willful blindness defense where the employers can hide behind the employees' duty to report).

222. Rodolfo A. Camacho, *How to Avoid Negligent Hiring Litigation*, 14 WHITTIER L. REV. 787, 787 (1993).

223. See RODRIGUEZ & AVERY, *supra* note 85, at 1.

224. See Petersen, *supra* note 10, at 198.

expunged records, and incorporate a job-related screening requirement for prior convictions.<sup>225</sup> Until recently, Oklahoma was without any fair-chance policy. This changed when Oklahoma Governor Mary Fallin issued an executive order on February 24, 2016, banning questions about felony convictions from state employment applications.<sup>226</sup> She acknowledged that “[e]mployment after a felony conviction is always a challenge, but the ability to gain employment is a critical and necessary component in reducing recidivism and for those individuals to lead productive and successful lives.”<sup>227</sup> While Fallin’s executive order is a step in the right direction, the ban should not be limited to state agencies. Rather, a fair-chance policy should be adopted by enacting a statute to include private employers as well, since they account for over one-million jobs in the Oklahoma market, and all convictions.<sup>228</sup> In addition, the proposed fair-chance policy must provide employers with more guidance on how to handle criminal records in hiring decisions.

This Note’s proposed fair-chance policy would mirror some of the factors highlighted in the EEOC Guidance—job relatedness, arrest versus conviction records, and the time elapsed since the offense<sup>229</sup>—but it would also include a Certificate of Employability (COE). Essentially, the fair-chance policy would require private employers to: (1) conduct a criminal background check; (2) ban the box on applications that asks about prior convictions until after a conditional offer of employment is made; (3) evaluate whether the prior crime is directly related in nature to the job sought; (4) avoid making decisions based on arrest records that do not result in a conviction; and (5) consider a COE as evidence that the applicant is fit for duty. This will give ex-offenders a fair chance to interview and be considered for jobs before any preconceived notions develop due to early discovery of a criminal past. It will also provide employers with more guidance as to what information from the

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225. See RODRIGUEZ & AVERY, *supra* note 85, at 6–15.

226. See Fallin Signs ‘Ban the Box’ Order, MIDDLEGROUND (Feb. 24, 2016), <http://themiddlegroundnews.com/article/fallin-signs-ban-the-box-order> [<https://perma.cc/E6DY-VESV>].

227. Rick Green, *Oklahoma Gov. Mary Fallin Signs Executive Order on Felony Convictions, Employment Applications*, OKLAHOMAN (Feb. 24, 2016), <http://newsok.com/article/5480920> [<https://perma.cc/4223-7MGY>].

228. OFF. OF ADVOCACY, SMALL BUS. ADMIN., SMALL BUSINESS PROFILE: OKLAHOMA 1 (2014), [https://www.sba.gov/sites/default/files/files/Oklahoma13\(1\).pdf](https://www.sba.gov/sites/default/files/files/Oklahoma13(1).pdf) [<https://perma.cc/QX8L-C7D4>] (“Oklahoma’s small businesses employed over half or 675,890 of the state’s private workforce in 2011.”).

229. See EEOC GUIDANCE, *supra* note 3, at 10–15.

background check should or should not be considered. Finally, it would make it easier for employers in their decision making, since it would be a uniform procedure for all ex-offender applicants, as opposed to the current burden employers face when trying to discern what would or would not have a disparate impact on a protected class.

### 1. Impose a Duty

This Note's proposed fair-chance policy would impose a duty on all employers to conduct criminal background checks. Imposing this duty is consistent with the majority of courts, who agree "that employers have a 'duty to exercise reasonable care in view of all the circumstances in hiring individuals who, because of the employment, may pose a threat of injury to members of the public.'"<sup>230</sup> In fact, the Oklahoma Supreme Court has acknowledged that a "duty to discover facts, and to anticipate what might occur under the circumstances, is involved, at some point, in all negligence cases."<sup>231</sup> Under this Note's proposal, if employers have a duty to conduct a criminal background check on all applicants and it is done in accordance with the proposed fair-chance policy, employers would be safeguarded under the proposed statutory presumption against negligent hiring discussed in Section V.C. below.

### 2. Ban the Box

Applications for employment routinely contain a question about prior convictions.<sup>232</sup> Selecting "yes" often carries with it the likelihood that the application is never considered.<sup>233</sup> Some companies simply discard the "yes" applications by hand, while other companies use sophisticated software to filter out applications before an applicant has had an opportunity to explain the situation or otherwise be considered for the job.<sup>234</sup> It is this process that creates the barrier to employment for ex-

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230. See Camacho, *supra* note 222, at 796 (quoting Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 911 (Minn. 1983)).

231. Schovanec, 2008 OK 70, ¶ 36, 188 P.3d at 170 (citing Moran v. City of Del City, 2003 OK 57, ¶ 11, 77 P.3d 588, 592).

232. See Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 10 (2014).

233. See *id.*

234. See *id.*



offenders.

This Note's proposed fair-chance policy would require private employers to ban the box on applications that ask about prior convictions until after a conditional offer is made. This would allow an ex-offender an opportunity to apply and interview for a position before a criminal background check is conducted and any preconceived notions surface. Once a conditional offer is made, employers would advise the applicant that the offer is contingent upon the completion of a criminal background check. If a criminal conviction is detected during the background check, employers would consider whether the prior crime is directly related to the position sought, how much time has elapsed since the offense, and whether the applicant possesses a COE. If after careful evaluation an applicant is found unfit for the position, the employer would take adverse action using the method in the FCRA or some other system that notifies the applicant why he or she was not selected.<sup>235</sup>

### 3. Connect a Job with the Crime: Is the Prior Crime Job Related?

This Note's proposed fair-chance policy would require prior convictions be *directly* related to the duties and the responsibilities of the position sought before the conviction qualifies to make the applicant unfit for the position. The process would require a case-by-case analysis, but the ultimate question would hinge on what a reasonable person would do in the same or similar circumstance. In determining whether a prior conviction is directly related to the position sought, employers would use the factors from the EEOC Guidance: (1) "[t]he nature and gravity of the offense"; (2) "[t]he nature of the job . . . sought"; and (3) "[t]he time that has passed since the offense."<sup>236</sup> The employer would then ask whether a reasonable person in the same or similar circumstance would consider the prior act directly related to the duties and responsibilities of the position sought. If it is found related, then it is foreseeable, given the nature of the duties and responsibilities of the position, that the applicant would commit the same or a similar act as reported on the background check.<sup>237</sup>

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235. For an example of such a system, see 18 PA. STAT. AND CONS. STAT. ANN. § 9125 (West 2017) (requiring employers to notify applicants when the employer decides not to hire the applicants "based in whole or in part on criminal history record information").

236. EEOC GUIDANCE, *supra* note 3, at 11.

237. See generally RESTATEMENT (FIRST) OF TORTS § 302 cmts. i, 1-n (AM. L. INST. 1934) (describing the circumstances when a person should foresee the potential negligence

To illustrate, consider the following scenario. An applicant applies for a certified nursing aide (CNA) position with a nursing home. After a conditional offer is made, the nursing home conducts a criminal background check. It discovers that the applicant was convicted of aggravated sexual assault two years ago. In evaluating the applicant's criminal record, the employer determines the *nature* of the offense is sexual; the *gravity* of the offense is violent; and the *time* that has elapsed since the offense is recent. The employer knows that the nature of the position sought requires employees to have direct and frequent interaction with residents, other employees, and visitors. Employees also have unsupervised contact with residents, as they often assist them with their daily living, which includes bathing and clothing the resident. The ultimate question for the employer to consider is whether a reasonable person in the same or similar circumstance would think the prior conviction is job related—that is, is it foreseeable that the applicant would commit the same act while employed? Given the nature and gravity of the offense, with respect to the nature of the job, a reasonable person would likely conclude that the offense is job related because it is foreseeable that a sexual assault could occur if the applicant is hired. Additionally, since the offense is two years old, the risk of harm is presumably greater than someone who committed the same act ten years ago.

If, however, the same applicant applied for a telephone debt-collector position at a call center, the result may be different. Here, the nature of the job involves little-to-no contact with the public and involves supervised interaction with other employees.<sup>238</sup> In contrast with the preceding scenario, the position here does not afford employees the same autonomy and privacy as the CNA position does. Thus, given the nature of the job, a reasonable person may find that the prior crime is not job related.

Several states have adopted a job-relatedness requirement.<sup>239</sup> For example, New York has enacted an antidiscrimination statute prohibiting employers from discriminating against an applicant who has a criminal record.<sup>240</sup> The statute provides that liability can be overcome if the

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or intentional wrongdoing of another person).

238. These positions often require an employee to work independently at a desk, calling customers with delinquent accounts. See *Bill Collector: Reviews and Advice*, US NEWS, <http://money.usnews.com/careers/best-jobs/bill-collector/reviews> [https://perma.cc/XFA6-ZD8X].

239. ROSSEIN, *supra* note 66, § 4.10.50 n.1 (listing some of the states that have adopted the “job relatedness” requirement into law).

240. See N.Y. CORRECT. LAW § 752 (McKinney 2015).

employer shows the prior conviction has a “*direct relationship*” with the position sought.<sup>241</sup> Wisconsin enacted a similar antidiscrimination statute that requires a prior conviction “*substantially relate* to the circumstances of the particular job” before an employer can deny employment based on a criminal record.<sup>242</sup> Pennsylvania allows employers to consider a prior conviction “only to the extent that it ‘*relate[s]*’ to the applicant’s suitability for the particular position in question.”<sup>243</sup>

While the job-relatedness requirement is an essential component of this Note’s proposed fair-chance policy, it should not be dispositive. Employers should also consider whether the charge was in fact a conviction or whether it was merely an arrest.

#### 4. Arrest vs. Conviction Records

To date, six of the twenty-five states that have adopted a fair-chance policy limit an employer’s use of arrest records in hiring decisions where the arrest did not result in a conviction.<sup>244</sup> This Note’s proposed fair-chance policy should do the same. The fact that someone was arrested does not mean criminal conduct actually occurred, nor is it proof of criminal conduct.<sup>245</sup> Yet, arrests that do not result in a conviction are often disclosed in criminal background checks and are not distinguished from a conviction.<sup>246</sup> This can lead to unfortunate results for the applicant. As the law of evidence recognizes, arrest records can be highly prejudicial.<sup>247</sup>

One scholar has noted that even after applicants attempt to explain the situation surrounding their arrests, employers are still apprehensive about hiring the applicant due to the fact the arrest was revealed in the

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241. O’Brien & Darrow, *supra* note 30, at 1010 (emphasis added) (quoting CORRECT. LAW § 752).

242. *Id.* at 1002 (emphasis added) (citing WIS. STAT. § 111.335(1)(b)–(c) (2003)).

243. *Id.* at 1006 (alteration in original) (emphasis added) (quoting 18 PA. STAT. AND CONS. STAT. ANN. § 9125 (West 2000)).

244. See RODRIGUEZ & AVERY, *supra* note 85, at 14–15.

245. EEOC GUIDANCE, *supra* note 3, at 1.

246. See Stoll, *supra* note 87, at 411 (“Arrest records (especially when they do not lead to conviction) are much noisier signals of propensity for criminality because they also reflect policing and enforcement strategies that could be influenced by racial considerations.”).

247. See, e.g., Blakely v. Oklahoma, 1992 OK CR 70, ¶¶ 2, 5, 13–14, 841 P.2d 1156, 1157, 1159 (applying OKLA. STAT. tit. 12, § 2403 (2011), Oklahoma’s version of FED. R. EVID. 403, and remanding for a new trial because the trial court admitted evidence of an unrelated prior arrest, resulting in a “significant danger of unfair prejudice”).

background report.<sup>248</sup> There is a stigma associated with arrests, even ones that do not lead to a conviction, and the stigma alone may preclude an applicant from gaining employment.<sup>249</sup> Yet arrest records are an inherently unreliable measure for determining whether the applicant did what he or she was alleged to have done.<sup>250</sup> Convictions, on the other hand, generally are a reliable measure for concluding “a person engaged in particular conduct.”<sup>251</sup>

Employers, however, should be able to ask whether applicants have any pending charges resulting from the arrest, since there are instances where a person is arrested, released on bail, and still awaiting court proceedings for the arrest.<sup>252</sup> If an applicant explains to an employer that an arrest did not result in a conviction, that there are no pending charges, and provides supporting documentation, then the employer should not refuse to hire the applicant based solely upon the criminal record. If, however, the applicant had been convicted, the employer should also consider a COE.

### 5. Certificate of Employability

As of 2016, at least ten states have enacted legislation that presents ex-offenders with a certificate of rehabilitation or employability and is designed to remove employment barriers stemming from past

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248. See Lageson et al., *supra* note 70, at 195.

249. See *id.*

250. States rarely report the number of arrests that ultimately result in convictions; however, records from the District of Columbia, which does track that information, indicates that many arrests are never prosecuted and many that are result in dismissal or not-guilty verdicts. See UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT FISCAL YEAR 2015, at 65 tbl.17 (District of Columbia Superior Court Matters and Cases Handled by the United States Attorney's Office), <https://www.justice.gov/usao/file/831856/download> [<https://perma.cc/Y8M5-XDXZ>] (reporting that of the 21,258 felony and misdemeanor arrests made in fiscal year 2015 the United States Attorney's office declined 7,435 cases; of the 13,823 cases presented, 6,333 were ultimately dismissed; and of the 1,366 cases taken to a bench or jury trial, 550 resulted in not-guilty verdicts).

251. EEOC GUIDANCE, *supra* note 3, at 1.

252. See Monica Scales, Casenote, *Employer Catch-22: The Paradox Between Employer Liability for Employee Criminal Acts and the Prohibition Against Ex-Convict Discrimination*, 11 GEO. MASON L. REV. 419, 427 n.58 (2002) (quoting a Wisconsin statute that states it is not discrimination where an employer refuses to hire an applicant with “a pending criminal charge [that] substantially relate[s] to the circumstances of the particular job or licensed activity” (quoting WIS. STAT. ANN. § 111.335 (West 2001))).

convictions.<sup>253</sup> In some states, the “certificate is a bar to any action alleging lack of due care in hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting with a person to whom the certificate was issued if the certificate was known about at the time of the alleged negligence.”<sup>254</sup> Each state has adopted its own issuance and time requirements. For example, New Jersey law authorizes its courts to issue a certificate, but only after “three years from the completion of the sentence.”<sup>255</sup> In Michigan, however, the Department of Corrections is authorized to issue a certificate “no more than 30 days before release,” and “[t]he [c]ertificate is valid for 4 years after issuance,”<sup>256</sup> absent any grounds for revocation,<sup>257</sup> so long as the prisoner meets the requirements of the statute, such as the successful completion of a career and technical education course.<sup>258</sup>

Oklahoma should adopt a COE that mirrors Michigan’s and treat a COE as evidence that the applicant is rehabilitated and fit for employment. It should also give employers a defense in negligent-hiring lawsuits.<sup>259</sup> This Note’s proposed fair-chance policy would implement a certificate program and authorize a COE for offenders who have:

- (1) successfully completed ODOC’s Offender Work Program;<sup>260</sup>
- (2) successfully completed ODOC’s Offender Treatment Program;<sup>261</sup>
- (3) demonstrated evidence of rehabilitation; and

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253. Garretson, *supra* note 12, at 15.

254. *Id.* at 20.

255. *Id.* at 19.

256. *Id.* at 18–19.

257. Thomas Ahearn, *Michigan Law Protects Employers Hiring Ex-Offenders with Certificate of Employability*, EMP. SCREENING RESOURCES: NEWS BLOG (Jan. 21, 2015), <https://www.esrcheck.com/wordpress/2015/01/21/michigan-law-protects-employers-hiring-ex-offenders-with-certificate-of-employability/> [<https://perma.cc/5HM2-FGG9>].

258. *See* Garretson, *supra* note 12, at 19.

259. *See id.* at 18–19. The following states allow the certificate to be used as evidence to protect employers in negligent hiring lawsuits: Illinois, Michigan, North Carolina, Ohio, Tennessee, and Vermont. *See id.* at 18–23. While not providing a defense to employers, New Jersey’s certificate prohibits certain professional licensing authorities from denying professional licensure on the grounds of the prior conviction. *See* N.J. STAT. ANN. §§ 2A:168A-3, -7, -12 (West 2015).

260. *See* ODOC REPORT, *supra* note 209, at 25 (summarizing two ODOC institutions “which employ incarcerated offenders”).

261. *See id.* at 29 (detailing the various treatment programs the ODOC offers).

(4) received approval from the ODOC.

The ODOC offers incarcerated offenders the opportunity to work at either Agri-Services or Oklahoma Correctional Industries.<sup>262</sup> It also offers incarcerated offenders an opportunity to participate in the Offender Treatment Program that provides several “intervention and reentry services,” including substance abuse treatment, life skills services, faith and character community services, and adult basic education.<sup>263</sup> It would be a minor change to require the ODOC to issue a COE no more than thirty days before release for offenders who have worked in the Offender Work Program, completed the Offender Treatment Program, and who have received approval. The ODOC, like many departments of corrections, already “evaluate[s] ex-offender risk for communities and ha[s] access to information far superior to that provided to employers in background checks.”<sup>264</sup> Therefore, the ODOC can better attest to the character and fitness of the applicant.

Ex-offenders should be able to remain eligible for the COE as long as they have not been convicted of any crimes since released and have no pending charges. In contrast with New Jersey’s three-year time requirement,<sup>265</sup> Oklahoma’s COE should not have a probationary period before a COE can be issued. To place a time limit of three or more years before ex-offenders can qualify for a certificate is to birth a paradox. Statistics show that ex-offenders generally recidivate within three years of being released.<sup>266</sup> And “a sizeable body of empirical research shows that . . . offenders who secure stable employment are less likely to re-offend.”<sup>267</sup> If there is a probationary time period to prove that ex-offenders have not recidivated before they are worthy of employment, what are ex-offenders to do for employment in the meantime? Further, how are they supposed to pay restitution? or obtain a state ID? Finally, because the stigma of a conviction lasts a lifetime, the proposed COE would stay in effect indefinitely unless the ex-offender triggers grounds for revocation.

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262. *See id.* at 25.

263. *See id.*

264. Williams, *supra* note 1, at 521.

265. Garretson, *supra* note 12, at 19.

266. “Within three years of release, about two-thirds (67.8 percent) of released prisoners were rearrested.” *See Recidivism*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> [<https://perma.cc/5FUD-CUBX>].

267. Beth M. Huebner & Mark T. Berg, *Examining the Sources of Variation in Risk for Recidivism*, 28 JUSTICE Q. 146, 149 (2011).

Surely this proposal will spark some resistance. First, there may be concerns about how to handle violent or sexual offenders. While the problem is perplexing, as recently as 2013, the ODOC reported that “[t]he controlling or major offense of half of Oklahoma’s incarcerated offenders is a non-violent crime.”<sup>268</sup> It also found that the “majority of [probation and] parole clients committed non-violent crimes.”<sup>269</sup> Second, there are valid concerns regarding the costs for implementing such a system. While implementing the new system will require a short-term cost to taxpayers, the reduced recidivism will save taxpayers far more over the long term.<sup>270</sup> In a recent article celebrating the graduation of four women from an Oklahoma prison-diversion program, the program’s director noted that “[d]iverting the four program graduates will save taxpayers about \$250,000 in incarceration costs.”<sup>271</sup> With savings like these, the more ex-offenders securing employment and living productive lives, the less taxpayers will have to pay for costs associated with incarceration. Not only does a COE make sense economically, it would also help break the cycle of incarceration.<sup>272</sup> As one official notes, “If we can stop the cycle of incarceration and substance abuse the chances of [offenders’] children having successful lives improves dramatically.”<sup>273</sup>

### *C. Establishing a Statutory Presumption Against Negligent Hiring*

Equally important as the need to help ex-offenders successfully reintegrate into society is the need to protect employers, who are asked to assume any increased risk that hiring an ex-offender may bring.<sup>274</sup> As we’ve seen, the first step in finding a balance between hiring ex-offenders and protecting private employers is to address the need to reform the negligent-hiring standard. The second step is to enact legislation that would adopt a fair-chance policy for private employers.<sup>275</sup> The third step

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268. ODOC REPORT, *supra* note 209, at 17; *cf.* Obama, *supra* note 27, at 816 (“Many people who commit crimes deserve punishment, and many belong behind bars. But too many, especially nonviolent drug offenders, serve unnecessarily long sentences.”).

269. ODOC REPORT, *supra* note 209, at 17.

270. Although there may be some costs imposed upfront, a certificate system might be more cost-effective than the current system that, in 2012, spent over \$46 billion on corrections. *Id.* at 41.

271. Talley, *supra* note 212 (quoting Terri Woodland, director of ReMerge).

272. *See id.*

273. *Id.*

274. *See* Love, *supra* note 121, at 788.

275. *See* Sections V.A–B and accompanying notes.

is to establish a statutory presumption against negligent hiring, within the proposed fair-chance policy, for employers who comply with the proposed fair-chance policy and makes a reasonable determination that the applicant is fit for the position.

This Note's proposed fair-chance policy would establish a presumption, much like the business judgment rule does,<sup>276</sup> that an employer's decision to hire an applicant is reasonable. However, where the business judgment rule simply nods to a statute, the proposed fair-chance policy would establish the presumption explicitly within the proposed statute. The presumption could be rebutted by proof that the employer failed to conduct a background check in accordance with the fair-chance policy or by proof that the employee's prior offense is directly related to his or her job duties.

In 1999, Florida was the first state to implement a statute affording employers a presumption against negligent hiring if the employer "conducted a background investigation of the prospective employee and

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276. The proposed statutory presumption would work similar to "the business judgment rule as applied to directors and officers of a corporation" in American corporate law. *Warren v. Century Bankcorporation, Inc.*, 1987 OK 14, ¶ 5, 741 P.2d 846, 855. The business judgment rule is a common law "acknowledgement of the managerial prerogatives" of Oklahoma directors under title 18, section 1006(B)(7) of the Oklahoma Statutes, and "[i]t is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Paula Dalley, *Materials on Corporations 15* (2017) (unpublished manuscript) (on file with author) (quoting *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000)). Title 18, section 1006(B)(7) provides that a certificate of incorporation shall include:

A provision eliminating or limiting the personal liability of a director to the corporation or its shareholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director:

- a. for any breach of the director's duty of loyalty to the corporation or its shareholders,
- b. for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law,
- c. under Section 1053 of this title, or
- d. for any transaction from which the director derived an improper personal benefit.

No such provision shall eliminate or limit the liability of a director for any act or omission occurring before the date when such provision becomes effective.

OKLA. STAT. tit. 18, § 1006(B)(7) (2011).



hired him because its investigation didn't reveal any information demonstrating his unsuitability for a particular job."<sup>277</sup> The statute lays out what constitutes a background check.<sup>278</sup> It states that a background check can include one or more of the following:

- (1) a Florida Department of Law Enforcement background check;
- (2) a reasonable effort to contact references and the employee's former employers to inquire about his suitability for a certain job;
- (3) a completed job application that includes criminal and civil litigation history;
- (4) a driver's license record if it's relevant to the applied-for position; or
- (5) an interview of the prospective employee.<sup>279</sup>

Florida's statutory presumption is rebuttable upon a showing the employer was negligent, meaning "it ignored certain information, didn't follow up on possibly damaging information, or didn't ask the right questions on its job application or in the employment interview."<sup>280</sup> While the Florida statute is a good guidepost, this Note proposes Oklahoma take it a step further and detail what employers are expected to do with the background check.

The proposed Oklahoma statute should resemble Florida's, in that it would require a thorough background check. However, unlike Florida, the proposed Oklahoma's statute should prohibit questions concerning criminal history on job applications.<sup>281</sup> Such questions would occur once a conditional offer is made. Once a conditional offer is made and an employer conducts a criminal background check, employers should then apply the standards detailed in the proposed statute as outlined in Section V.B.3 above. If the employer conducts a background check, follows the proposed fair-chance policy, and makes a reasonable determination when hiring the employee, then the employer would be protected under the presumption.

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277. *Family of Murder Victim Shot by Coworker Sues Restaurant*, FLA. EMP. L. LETTER, Aug. 2008, at 1 (citing FLA. STAT. § 768.096 (2007)).

278. *See id.*

279. *Id.* (emphasis omitted).

280. *Id.*

281. *See id.*

## VI. CONCLUSION

Successful reintegration of ex-offenders is a pressing public concern in Oklahoma, and there is no doubt that employment plays a substantial role in that process. However, if employers are required to assume risks arguably associated with hiring ex-offenders, then an effective balance is needed. The equitable balance needed includes, first, reforming Oklahoma's negligent-hiring doctrine. Second, enacting a fair-chance policy as well as providing employers more guidance on how to handle criminal records in hiring decisions. And third, establishing a statutory presumption against negligent hiring. Implementing such policy will not promise ex-offenders a job, but it will provide them with a fair chance to be considered for one before any preconceived notions surface due to their criminal records. It will also help employers by offering more protection against negligent-hiring lawsuits. This proposal attempts to reduce the problems ex-offenders face when seeking employment, while also offering more guidance and protection for the employers who hire them.