Limiting Employer Liability: Addressing the Perceived Risks of Hiring Workers with Criminal Histories

Background

In a recent nationwide survey, between 89 and 95 percent of business leaders, human resources professionals, and individual employers reported that they were personally willing to hire workers with criminal records or were neutral on the issue.[1] A mere 5 to 11 percent of the group surveyed indicated an unwillingness to hire workers with records, and the data suggest that the number of people who are unwilling is dropping every year. Although that is good news for workers with criminal histories, the personal views of those decision-makers are just one of many factors that play into the hiring process. The survey group reported several concerns that posed obstacles to hiring workers with records despite their own inclinations. At the top of the list: the risk of legal liability that may arise due to hiring a worker with a criminal record.

Fears about workers with criminal records creating exposure to liability are natural given the risk-averse nature of most businesses, but research suggests that those fears are not necessarily supported by the law or the record of successful negligent hiring lawsuits.[2] Unfortunately, as long as the perception of risk exists, risk-averse employers—even those who are otherwise open to hiring workers with criminal records—will seek to minimize their exposure to liability by thinking twice before making a hire.

Various state statutes and common law legal doctrines (judicial precedent) allow employers to be held responsible for harm caused by their employees, but few of them implicate employee criminal history in any significant way. The most used doctrine, the common law doctrine of *respondeat superior,* generally holds employers liable for harm caused by employees acting *within the scope* of their employment regardless of the employee's history—criminal or otherwise. (Consider a roofer accidentally dropping a hammer off a roof onto a person below, for example.) Concerns about hiring workers with criminal records generally arise under a different doctrine: negligent hiring liability.

In the simplest terms, negligent hiring liability allows employers to be held responsible for harmful acts committed by employees *outside the scope* of employment. (Consider a roofer assaulting a customer with a hammer after a personal dispute, for example.) But negligent hiring liability usually only applies under the limited circumstances where the employer knew, or should have known, that the employee was likely to cause such harm and the employer created the conditions that allowed the harm to occur. (Imagine an employer hiring a roofer who had been aggressive to customers in the past to perform unsupervised work at a customer's home, for example.) Employee criminal history can become relevant in these cases when it is used to establish that an employer knew, or should have known, that an employee is likely to cause certain types of harm.[3]

This brief examines the legislative action that states have taken to limit the risks—real or perceived—of negligent hiring liability faced by employers that hire workers with criminal histories. It also identifies models for reform that other states can use to mitigate that risk.

Statutory Limits on Liability Based on Employee Criminal History

In recent years, 16 states have passed legislation to combat the negative effect that the perceived risk of negligent hiring liability has on hiring workers with criminal records. These laws either limit exposure to such liability or remove it from the equation altogether. Although these laws vary widely in the scope of protection they provide and their operation and applicability, they can be categorized based on two critical characteristics:

1. Whether the availability of protection depends on the employee receiving some sort of judicial or administrative relief from the effects of a conviction (usually in the form of a certificate of relief or expungement)

2. Whether the protections limit the admissibility of evidence about criminal history in a lawsuit or place general limitations on liability (i.e., the ability to bring a successful lawsuit at all)

Employee Relief Requirements[4]

In 13 of the 16 states, the extent to which the law provides limitations and/or bars on employer liability depends on the employee having obtained a form of relief from the effects of conviction. This relief is generally in the form of a discretionary judicial certificate (often called a "certificate of employability" or "certificate of rehabilitation"), which limits the extent to which employee criminal history can be used against an employer in court.[5] These certificates are usually available upon petition to the court and subject to various eligibility requirements that often include waiting periods, consideration of rehabilitation, and bars for certain types of offenses.[6]

Broader relief mechanisms, such as pardon and record clearance, also give rise to protections in a number of states. Colorado, Indiana, and Minnesota all offer special protections to employers that hire people who have been granted such relief.[7]

Seven states grant employers protections even when an employee has not been granted relief. (These include states like Colorado, Indiana, and Minnesota where employers receive some measure of protection by default and an additional heightened level of protection if an employee has been granted relief.) In these states, the protections are generally dependent on the court that hears the negligent hiring claim making certain findings. For example, in Colorado and Indiana, employer protections that are not based on relief only take effect if the court determines that "the nature of the criminal history [of the employee] does not bear a direct relationship to the facts underlying the cause of action [against the employer]." This means that an employer cannot be liable unless the acts committed by the employee are similar to those reflected in the employee's criminal history. For example, in a case involving theft from a customer, a criminal record of only drug possession convictions would be unlikely to make the employer liable.

Two of those seven states (Louisiana and Texas) go even further by stating that the conviction of an employee cannot generally be the sole basis for a cause of action against an employer, regardless of whether the employee was granted some form of relief.

Limits on Admissibility of Evidence vs. General Limits on Liability

For the 16 states with laws that limit liability based on employee criminal history, the varying nature of those limitations can be considered in two categories:

1. Evidentiary protections that limit or expand the admissibility or effect of certain evidence related to employee criminal history in a negligence lawsuit

2. General limitations on liability, including limits on the types of lawsuits that may be brought and, in some states, total immunity from liability[8]

Within the first category are laws that either (1) allow the fact that an employee has been granted relief—e.g., a certificate of relief or expungement—to be introduced as evidence in the employer's favor or (2) prohibit the introduction of any evidence about employee criminal history. Thirteen states limit employer liability with evidentiary protections such as these.

Five states allow employee relief to be introduced by the defendant employer as evidence that the employer acted with reasonable care—or "due care"—regarding others' safety when hiring an employee. Because a successful negligence lawsuit generally requires the plaintiff to establish that a person *did not* act with reasonable care, this evidentiary protection can form the basis of a complete defense to liability for employers. These five states include Georgia and Vermont, where state law explicitly says that certificates of relief are admissible to establish that the employer acted with reasonable care.

The other eight states prevent a plaintiff from introducing evidence of a person's criminal history once certain facts have been established—e.g., the fact that a certificate of relief was granted to the employee before they were hired, as is the case in Connecticut and Washington. In other states, the admissibility of criminal history depends on the defendant employer establishing facts unrelated to relief. For example, Colorado law prohibits the introduction of criminal history if the employer defendant establishes that the employee's criminal offenses are not directly related to the cause of the harm.[9] New York takes a different approach, creating a presumption against admissibility if the defendant shows that they "made a reasonable, good faith determination" that the nature of the offense and the employee's past and present circumstances should not have prevented them from hiring the employee.[10]

In the second broad category of protections are laws that either preclude or significantly limit employer liability altogether. As is the case with most evidentiary protections, these broader protections are often predicated on some showing of fact like the employee having obtained relief or the absence of a significant relationship between the employee's criminal history and the duties of the job.

North Carolina and Tennessee are among the states with the strongest protections. Both prevent an employer from being liable in negligent hiring/retention lawsuits if the employee was granted relief and the employer knew about the relief when the alleged harm occurred. Louisiana and Texas take a broader approach by stating that liability in negligent hiring/retention suits cannot be based solely on an employee's criminal history. These states make this protection available regardless of whether an employee obtained relief. Laws such as these effectively raise the standard of proof in all covered civil actions.[11]

Characteristics of State Laws that Limit Liability[12]

The following table provides an overview of the key features of state policies that limit employer negligent hiring liability based on employee criminal history. The data below are current through the end of 2021 legislative sessions. States where the requirements or nature of protection vary are generally those where the scope of protection depends on whether relief has been granted.

State	Relief Required?	Nature of Protection
Colorado	VARIES	Varies, depending on whether relief has been granted
Connecticut	YES	Criminal history is generally inadmissible in court
District of Columbia	NO	Criminal history is inadmissible if employer made a good-faith determination that certain characteristics of the applicant and their offense warranted hiring
Georgia	YES	Presumption of due care
Indiana	VARIES	Varies, depending on whether relief has been granted
Illinois	YES	Relief precludes employer liability
Louisiana	VARIES	Liability cannot be based solely on employee conviction
Michigan	YES	Relief is admissible as evidence of due care; creates a defense to liability in certain circumstances
Minnesota	VARIES	Inadmissibility of a conviction as evidence varies depending on the type of relief granted
New York	NO	Presumption against inadmissibility of criminal history if employer made a good-faith determination that certain characteristics of the applicant and their offense warranted hiring
North Carolina	YES	Relief creates a bar to liability
Ohio	YES	Relief may create immunity or be introduced as evidence of due care, depending on the type of relief
Tennessee	YES	Relief provides immunity from negligent hiring claim and may be introduced as evidence of due care in other actions

Texas	NO	Liability cannot be based solely upon employee conviction
Vermont	YES	Relief is admissible as evidence of due care
Washington	YES	Relief prevents conviction from being brought into evidence

Fidelity Bonds and Crime Insurance

Fidelity bonds, sometimes referred to as "crime insurance," pose a related but distinct concern for employers. At their simplest, fidelity bonds are insurance products bought by employers that reimburse clients and customers for losses resulting from acts committed by an employee—usually in the form of theft, fraud, or other similar dishonesty. Certain types of businesses are required by law to be bonded, such as those that administer employee benefit plans.[13] For employers that rely on those bonds, hiring workers with criminal records can present a problem because most privately sold fidelity bonds explicitly omit employees with criminal records from coverage.[14]

To date, New York is the only state to take action to limit the extent to which fidelity bonds can exclude workers with criminal records.[15] The federal government has filled the gaps in coverage by creating the Federal Bonding Program, which provides employers with free coverage for workers with criminal histories. The program has been generally successful at putting people with criminal histories back to work, but the coverage it provides is often slight compared to that offered by commercial bonds. Each federal bond is generally capped at $5,000 and usually covers only the first 6 months of a person's employment—limits that do not inherently apply to commercial bonds.[16]

Policy Priorities

States that are seeking to maximize job opportunities by limiting the impact that fears of legal liability have on hiring workers with criminal histories should consider the following policy options:

1. Explicitly prevent employee criminal history from being the sole basis for negligent hiring liability.[17]

2. Ensure that the admissibility of employee criminal history is appropriately limited and that its evidentiary relevance is no broader than necessary.[18]

3. To the extent that employee relief is required for an employer to be protected from liability, ensure that relief is broadly available and free of unnecessary obstacles like high costs and onerous procedural requirements.

4. Educate employers and their advisors about the true extent of civil legal exposure that may arise under state law due to the actions of workers with criminal records.

5. Evaluate the extent to which commercial bonding exceptions limit hiring options and explore options to limit such exceptions through state regulation.

Endnotes

[1] Society of Human Resource Management, SHRM Foundation, and Charles Koch Institute, *2021 Getting Talent Back to Work Report* (Alexandria, VA: SHRM Foundation, 2021), https://www.gettingtalentbacktowork.org/wp-content/uploads/2021/05/2021-GTBTW_Report.pdf.
[2] See generally David McElhattan, "The Exception as the Rule: Negligent Hiring Liability, Structured Uncertainty, and the Rise of Criminal Background Checks in the United States," *Law & Social Inquiry* 47, no. 1 (2021), 132–61.
[3] Employer knowledge can be "constructive" as well, meaning that it can be presumed if the information could have been obtained via a reasonable investigation, e.g., an applicant criminal background check. For more on how criminal history and criminal background checks fit into the traditional doctrine of negligent hiring, see Benjamin Levin, "Criminal Employment Law," *Cardozo Law Review* 39, no. 6 (2018), 2280–2285.
[4] Note that regardless of how non-relief-based employer protections are brought into effect, a number of blanket exceptions to those protections often apply. These include exceptions for particularly serious offenses (as is the case in West Virginia) and exceptions in cases where a past criminal act was committed while performing duties substantially similar to the job at issue (as is the case in Texas).
[5] The effect of these certificates is often much broader than just providing negligent hiring protection. In many states, they also remove some or all of the barriers to employment or occupational licensure imposed by state law.
[6] Analogous administrative certificates, like Georgia's Program and Treatment Completion Certificate, are becoming more common, but the administrative certificates in Georgia and Ohio are currently the only ones that mitigate employer liability.
[7] Although relief provides a special degree of protection in Colorado and Indiana, employers may still be protected from liability if the court hearing a negligent hiring lawsuit makes certain findings. See below.
[8] Note that some states afford employers both types of protections, with the specific type available in any case varying depending on either the nature of the suit or whether an employee has obtained relief. For example, Tennessee provides immunity from suit where an employer relied on an employee's Certificate of Employability, but *only* in negligent hiring actions. In all other actions against an employer, the Certificate merely serves as evidence of an employer's due care.
[9] See Colo. Rev. Stat. § 8-2-201.
[10] See N.Y. Exec. Law § 296(15). New York law generally prohibits employers from refusing to hire on the basis of criminal history without first considering eight enumerated factors, including the nature and severity of the offense, the age of the conviction, evidence of rehabilitation, and "the interest of the employer of protecting property, and the safety and welfare of individuals or the general public." See N.Y. Correct. Law. § 753. It is those factors that must militate in favor of hiring for the protection to arise.
[11] Exceptions apply in each of these states, however. In Texas, for example, the limitation does not apply if the employer "knew or should have known" about a conviction for "an offense that was committed while performing

duties substantially similar to those reasonably expected to be performed in the employment, or under conditions substantially similar to those reasonably expected to be encountered in the employment."

[12] See Colo. Rev. Stat. § 8-2-201; Conn. Gen. Stat. § 52-180b; D.C. Code § 24-1351; Ga. Code Ann. § 51-1-54; Ind. Code §§ 22-2-17-4, 35-38-9-10; 730 ILCS 5/5-5.5-15(f); Iowa Code § 671A.1; HB-497 (2021); La. Rev. Stat. Ann. §§ 23:291, 23:291.1; MCLS § 600.2956a; Minn. Stat. § 181.981; N.Y. Exec. Law § 296(15); N.C. Gen. Stat. § 15A-173.5; Ohio Rev. Code Ann. §§ 2953.25(G), 2961.22-.23; Tenn. Code Ann. § 40-29-107(n); Tenn. Code Ann. § 40-29-108 (2021); Tex. Civ. Prac. & Rem. Code § 142.002; Vt. Stat. Ann. tit. 13, § 8014; Rev. Code Wash. § 9.97.020(3).

[13] Employee Benefits Security Administration, U.S. Department of Labor, Protect Your Employee Benefit Plan with an ERISA Fidelity Bond (Washington, DC: U.S. Department of Labor), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/protect-your-employee-benefit-plan-with-an-erisa-fidelity-bond.pdf.

[14] Roberta "Toni" Meyers Douglas, "Federal Bonding Program," Legal Action Center, accessed October 13, 2022, https://www.lac.org/resource/federal-bonding-program.

[15] 11 CRR-NY 76.0 to 76.3. The policy—which is similar to the state's statutory policy governing negligent hiring liability—was implemented in 2017 via revisions to state insurance regulations that were recommended by former governor Andrew Cuomo's Council on Community Reentry and Reintegration. See also, Elizabeth Blosfield, Insurance Journal, "New York Issues First-in-Nation Regulation on Commercial Crime Insurance" (January 3, 2017), https://www.insurancejournal.com/news/east/2017/01/03/436865.htm.

[16] "About the FBP," The Federal Bonding Program, accessed October 13, 2022, https://bonds4jobs.com/about-us.

[17] See e.g., Tex. Civ. Prac. & Rem. Code § 142.002 ("A cause of action may not be brought against an employer, general contractor, premises owner, or other third party solely for negligently hiring or failing to adequately supervise an employee, based on evidence that the employee has been convicted of an offense.")

[18] Conn. Gen. Stat. § 52-180b; N.Y. Exec. Law § 296(15).