

Policy Options: Limiting Employer Liability When Hiring Individuals Formerly Incarcerated

Employers in Philadelphia require skilled and dedicated workers in order to be successful. Returning citizens (those formerly incarcerated) represent an underutilized talent pool, many of whom possess the qualifications employers seek. Every year, around 35,000 individuals are released from local jails and state and federal prisons and return to Philadelphia, contributing to the population of nearly 50,000 parolees and probationers living within the city in any given year¹.

Employers balance two challenges when considering hiring returning citizens: the possibility of lawsuits for discriminatory hiring practices and the concerns over negligent hiring claims. This brief addresses the concerns we hear from employers about hiring a formerly incarcerated applicant and the potential for a negligent hiring lawsuit. Recognizing employer concerns, some states have adopted negligent hiring protections that limit employer liability associated with hiring returning citizens. Pennsylvania has not adopted any such legislation.

Philadelphia Works has identified 12 states that have passed the laws to limit employer liability when hiring formerly incarcerated individuals. The three common approaches are:

1. Limit the use of an employee's criminal history as evidence during a trial unless the nature of the criminal history bears a direct relationship to the facts underlying the cause of action (e.g. [Colorado](#); [Minnesota](#));
2. Establish a state-issued certificate which functions as a bond to protect the employer by a presumption of due care as long as the employer knew a candidate had such a certification at the time of hiring (e.g. [Georgia](#); [Illinois](#); [North Carolina](#); [Ohio](#); [Tennessee](#));
3. If the employer has complied with the law to conduct a criminal background investigation, the employer is presumed not to be held liable for negligent hiring under certain circumstances (e.g. [Florida](#); [Massachusetts](#); [New York](#)).

¹ The Philadelphia Reentry Coalition: Countywide Blueprint, October 2013

Pennsylvania

Currently, Pennsylvania does not have any such employer protections related to negligent hiring of those with criminal records. The Commonwealth recognizes claims for negligent hiring, retention and supervision when an employer has failed to exercise reasonable care in the selection or training of its employees. To maintain such an action, a plaintiff must establish all elements of negligence, including causation. An employer may be negligent for the failure to exercise reasonable care in determining an employee's propensity for violence in an employment situation where the violence would harm a third person. In these situations, a plaintiff must establish that the employer breached a duty to protect others against a risk of harm. **The following states have passed legislation that limits employer liability related to hiring those with criminal records** (Each summary also includes whether that state has passed "*ban-the-box*" fair hiring laws by September 2015 that limit employer inquiries about criminal records of candidates at early stages in the hiring process.):

Colorado

"Ban the box" for State employment and licensing

The state of Colorado passed H.B. 1023 in 2010, which limits employer liability exposure by preventing the introduction of an employee's criminal record during a civil trial if the records were sealed or the employee received a pardon, the arrest did not result in a conviction, the employee received a deferred judgment at sentence and the deferred judgment was not revoked or unless the facts of the case related directly to the prior conviction.

Florida

No statewide "ban the box"

Florida Statute §768.096 creates a presumption that an employer did not act negligently towards a damaged third party in its hiring practices if the employer conducts background investigations of its prospective employees and the investigations reveal nothing that would reasonably demonstrate unsuitability for the particular work to be performed. The background investigation must include: 1) a criminal background investigation (from the Department of Law Enforcement); 2) making a reasonable effort to contact references and former employers regarding the suitability of the prospective employee for employment; 3) completion of a job application which includes questions about criminal convictions and involvement in civil actions for intentional torts where the prospective employee was a defendant; 4) Obtaining, with written authorization from the prospective employee, a check of his/her drivers' license record if such a check is relevant to the work to be done; **or** 5) Interviewing the prospective employee. Further, if an employer elects not to conduct a background investigation, there is no presumption that the employer failed to use reasonable care in hiring an employee.

Georgia

"Ban the box" for State employment

S.B. 365, passed in April 2014, creates a "Program and Treatment Completion Certificate" (PTCC) and provides that when an employer hires, retains, licenses, leases to, admits or otherwise engages in activity with a returning citizen who has received a PTCC or was granted a pardon, that employer is

protected by a presumption of due care. The law further states that “such presumption may be rebutted by relevant evidence which extends beyond the scope of the PTCC or pardon and which was known or should have been known by the person against whom negligence is asserted.”

Illinois

“Ban the box” for public and private employment

Since January 2013, 730 ILCS 5/5-5.5-25 states that a person previously convicted of a crime can apply for a Certification of Good Conduct from the circuit court in the county of conviction after two years from the completion of the felony offense or one year for a misdemeanor if he or she has conducted himself or herself in a manner warranting the issuance. The certificate is granted by the Illinois Prisoner Review Board. The “eligible offender” must show by clear and convincing evidence that he/she has been a law-abiding citizen and is fully rehabilitated. An employer is not civilly or criminally liable for an act or omission by an employee who has been issued a certificate of good conduct, except for a willful or wanton act by the employer in hiring the employee who has been issued a certificate of good conduct.

Louisiana

No statewide “ban the box”

H.B. 505 passed in 2014 protects an employer, general contractor, premises owner, or other third party from a cause of action for negligent hiring of, or failing to adequately supervise an employee or independent contractor due to damages or injury caused by that employee or independent contractor solely because that employee or independent contractor has been previously convicted of a criminal offense. The law does not include crimes of violence and sex offenses, or when the act that gave rise to damages or injury was within the scope of employment and substantially related to the nature of the crime for which the employee was convicted and the employer, general contractor, premises owner, or other third party knew or should have known of the conviction.

Massachusetts

“Ban the box” for public and private employment

In 2010, the State of Massachusetts passed S.B. 2583, which bans the use of questions about criminal history on an initial written employment applications and allows employers access to a new criminal offender record information (CORI) database to obtain an applicant’s criminal history. If an employer obtains information from the CORI database, follows the required procedures, and made an employment decision within 90 days of obtaining the CORI information, the employer will not be liable for negligent hiring. The law does not provide a similar safe harbor if the employer receives the information from a private, third-party vendor. The law also provides for the erasure of certain convictions from an individual’s CORI record.

Minnesota

“Ban the box” for public and private employment

Minnesota Statute §181.981 provides a measure of protection for employers from negligent hiring claims by limiting the admissibility of an employee’s criminal history as evidence in a civil lawsuit. An employee's criminal history may not be introduced in a civil action if 1) the duties of the position did not

expose others to a greater risk than what is created by the employee as he/she interacts with the public outside of the work duties or that might be created by being employed in general; 2) a court order sealed any record of the criminal case before the occurrence of the act giving rise to the civil action or the employee received a pardon; 3) the record is of an arrest or charge that did not result in a criminal conviction; or 4) the action is based solely upon the employer's compliance with the Minnesota ban the box statute.

New York

No statewide "ban the box", but it is illegal to discriminate against people with criminal records

The New York State Human Rights Law (New York Executive Law 296(15)) provides some protection to employers from negligent hiring claims, so long as the employer complied with the New York Corrections Law Article 23-A that prohibits an employer from unfairly discriminating against a person previously convicted of one or more criminal offenses. The New York Executive Law 296(15) creates a rebuttable presumption in favor of excluding prior incarceration or conviction evidence of any person in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, if after learning about an employee's past conviction history, the employer made a reasonable good faith determination that factors weigh in favor of hire or retention of that applicant or employee.

North Carolina

No statewide "ban the box"

H.B. 641 passed in 2011 establishes a Certification of Restoration of Rights, which allows a returning citizen who meets certain criteria, to be relieved of all collateral sanctions which arose as a result of an individual's conviction except for imprisonment, probation, parole, post-release supervision, forfeiture, restitution, fines, assessments or costs of prosecution, includes a provision protecting employers and others against negligent actions. The certificate acts as a bar to any action alleging lack of due care in employment, licensing, admitting to a school or program, or transacting business with the individual to whom the Certificate of Restoration of Rights was issued if the person knew of the certificate at the time of the alleged negligence.

Ohio

"Ban the box" for State employment

S.B. 337, passed in 2012, grants immunity to employers for any negligent hiring claims based on wrongdoing by an individual with a "certificate of qualification for employment" where the employer knew of the certificate at the time of hiring. The law limits liability of employers in civil actions related to the retention of individuals possessing certificates of qualification for employment by providing that an employer can only be held liable if the "person having hiring and firing responsibility" for the employer had actual knowledge that the employee demonstrated dangerousness or had a felony conviction after his or her hire, and the person nevertheless willfully retained the individual as an employee. Further, in any judicial or administrative proceeding alleging negligence or fault, employers can use the certificate of qualification for employment as evidence of due care in transacting business or engaging in activity with the individual to whom the certificate was issued, provided that the employer actually knew about the certificate at the time of the alleged negligence or fault.

Tennessee

No statewide “ban the box”

Tennessee’s 2014 Negligent Hiring and Retention law (Tenn. Code Ann. § 40-29-107) encourages employers to hire returning citizens by protecting employers from negligence claims for hiring or retaining one who has received a “certificate of employability” as long as the employer knew about the certification when the alleged negligence occurred. However, an employer who hires a person who had been issued a certificate of employability may be held liable in a civil action if 1) the employee, after being hired, subsequently demonstrates a danger or is convicted of a felony; 2) The employee is retained after the demonstration of danger or the conviction; 3) The plaintiff proves by a preponderance of the evidence (e.g., more likely than not) that the person having hiring or firing responsibility for the employer had actual knowledge that the employee was dangerous or had been convicted of the felony; and 4) The employer, after having actual knowledge of the employee's demonstration of danger or conviction of a felony, was willful in retaining the person as an employee.

Texas

No statewide “ban the box”

In June 2013, the governor of Texas signed H.B. 1188 to limit liability for negligent hiring and supervision of employees with criminal convictions. The Texas law prohibits a cause of action against an employer, general contractor, premises owner or third party solely for negligently hiring or failing to adequately supervise an employee based on evidence that the employee was convicted of an offense, except where the employer knew or should have known that an employee had been convicted of a crime while performing duties substantially similar to those required in the current position, or had been convicted of one of several crimes enumerated in the statute, including murder, sexually violent offense, aggravated kidnapping, etc.