THE USE OF ARREST AND CONVICTION RECORDS IN THE WORKPLACE: INDIVIDUAL RIGHTS AND EMPLOYER DUTIES

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I. INTRODUCTION

The use of criminal records as a work place selection tool is at the intersection of two completing public policies: non-discrimination based on criminal history and negligent hiring. On one hand, society believes employment reduces recidivism. As a result, many states have passed laws prohibiting discrimination based on arrest but permit discrimination based on a related conviction. Society also believes businesses should be liable for negligent hiring because business insurers are often able to bear the costs of the injury. Businesses must sometimes "pick their poison" – honor their obligation not to discriminate or risk a negligent hiring lawsuit. This paper will explore the intersection between an individual's right to non-discrimination based on arrest or conviction and the employer's negligent hiring responsibilities.

II. OVERVIEW OF NEGLIGENT HIRING AND TITLE VII GUIDANCE

A. Negligent Hiring, Training/Supervision, Entrustment or Retention

"A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." Restatement (Third) of Agency § 7.05 (2006).[4]

The claims of "Negligent Hiring," "Negligent Training/Supervision," "Negligent Entrustment," and "Negligent Retention" are closely related and are based on a general negligence theory. To establish a negligence claim, a plaintiff must prove: (1) A Duty of Care; (2) Breach of the Duty; (3) Causation; and (4) Harm.[5] In a negligent hiring claim, the breach of the duty occurs when the employer neglects to check the errant employee's references, fails to contact the wrongdoing employee's former employers, or has knowledge or should have known of the employee's unfitness for employment. A

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[4] *See also*, West's Key Number Digest, 231H Labor and Employment Key 3040 and *Negligent Hiring - General. Negligent Hiring and Retention of An Employee*, 29 Am. Jur. Trials 267 (1982) for resource information.
[5] *Negligent Hiring, Retention, and Supervision*, Practical Law Practice Note 2-506-0672.

negligent training/supervision claim is based on a claim that the employer knew or should have known the employee's incompetence or unfitness to perform the responsibilities of the job. (A negligent entrustment claim is a variant of a negligent training/supervision claim which involves a dangerous instrumentality, *e.g.*, firearm, machinery, motor vehicles.) Finally, a negligent retention claim is a "catch-all" claim and alleges almost any post-hiring error. (For ease of reference, we will collectively call these claims "Negligent Hiring.")

In a Negligent Hiring claim, the plaintiff is often a customer; however, it could be any member of the general public. Where the plaintiff is a fellow employee, the employer often argues that workers' compensation is the injured employee's exclusive remedy. *See Santos v. The Boeing Co.*, 2004 WL 1384724, at *7 (N.D.Ill. May 11, 2004) (an employee's negligent retention claim against an employer was dismissed because the claim was barred by the Illinois Workers' Compensation Act); *Ferris v. Delta Air Lines, Inc.*, (277 F.3d 128, 138 (2d Cir. 2001)) (an employee's negligent retention and supervision claims were dismissed because they were barred by the New York Workers' Compensation Law); *Beaulieu v. Northrop Grumman Corp.*, 161 F. Supp. 2d 1135, 1148 (D. Haw. 2000)(claim for negligent hiring barred by exclusivity provision of workers' compensation statute).

Note: The tort theories of negligent hiring differ from the respondeat superior or vicarious liability theory because the latter doctrines only apply if the employee was acting within the scope of employment.[6] When a plaintiff brings a claim of negligent hiring, the theory is that the employer is still liable for an employee's tortious actions, even when committed outside of the scope of employment.[7] Support for the employer's actual or constructive knowledge can come in various forms, but the most common form is where the employee's criminal conviction record had been available at the time of hire or promotion.

B. EEOC's Enforcement Guidance

The Equal Employment Opportunity Commission ("EEOC") enforces Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII does not prohibit discrimination based on "arrest or conviction." To plug this statutory gap, the EEOC issued "Enforcement Guideline on the Consideration of Arrest and Conviction Records"[8] ("Guideline"), relying on the protected categories of "race" and "national origin" to achieve their enforcement goal. The Guideline set forth that information regarding an "arrest" that does not result in a conviction does not constitute evidence that a crime had been committed, and therefore, an "arrest" record is not a permissible factor in determining the selection or the retention of individuals.

[6] Restatement (Third) of Agency § 2.04 (2006).
[7] Restatement (Second) of Agency § 213 (1958), in pertinent part, provides: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: ... *in the employment of improper persons*[.]" (Emphasis added.)
[8] EEOC Enforcement Guidance No. 915.002 (2012), available at http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf ("Guidance").

A conviction record, however, is evidence that a crime has been committed; but even then, the EEOC urges caution. Applying the disparate treatment theory of discrimination, the EEOC warns that when an employer treats similarly situated individuals (*i.e.*, individuals convicted of a crime) differently and there is a difference of race or national origin between such individuals, the employer's action constitutes *prima facie* evidence of an unlawful employment action.

Further, the Guideline warns that if an employer adopts a neutral screening policy, *e.g.*, no drug conviction for truck drivers, that had an effect of disproportionately screening out individuals belonging to a certain "race" or "national origin," claims against the employer's would fall under the disparate impact theory of discrimination. The employer can defend itself from an ultimate finding of liability if it can demonstrate that the "neutral" policy was job related and consistent with business necessity. This means, the challenged policy must be related to the position at issue and necessary for a safe and efficient performance of the job.[9] According to the Guideline, the plaintiff can still prevail if he can show there was a less-discriminatory alternative available.[10]

To illustrate this point, the Guidance cites *Green v. Missouri Pacific Railroad* and its three-factor test.[11] The Green factors, as the test has become known, links specific criminal conduct to the position sought or held, examining:

1. The nature and gravity of the offense or conduct (the legal elements to the crime and the harm caused by the crime);

2. The time that has passed since the offense, conduct and/or completion of the sentence (including the age of the criminal when the crime occurred and evidence of rehabilitation); and

3. The nature of the job held or sought (the job's essential functions, the circumstances under which the job is performed (*e.g.*, the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job duties are performed (*e.g.*, outdoors, in a warehouse, in a private home)).[12]

Our research identified no post-2012 decisions where the courts cite this Guidance.[13] We attribute this absence of reported decisions to the fact that many state and local laws offer more robust protection, making it is unnecessary for individuals to rely on Title VII and this Guideline.

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9 42 U.S.C § 2000e-2(k)(1)(a).
10 *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14; *see also*, Guidance.
11 *Green v. Missouri Pac. R. Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977); *see also*, Guidance.
12 *Id.*
13 *See* Guidance.

III. UNDER STATE LAW

Since state and local laws have more robust protection of individual rights, let us examine the laws of a few states, comparing the balance of individual rights and employer responsibilities.

A. California

1. Negligent Hiring

In California, an employer is "liable to a third person for the employer's negligence in hiring or retaining an employee who is incompetent or unfit." [14] "Negligence liability will be imposed on an employer if it knew or should have known that hiring the employee created a particular risk or hazard and that particular harm materializes."[15]

2. Arrest and Conviction Record

Under California Labor Code § 432.7, employers are prohibited from asking for, conducting searches on, and using information about prior arrests that do not result in a conviction, or about participation in pre-trial or post-trial diversions.[16] The statute grants applicants a private cause of action against employers for violation of the law.[17] Since the law affects what information employers can request, employers that use screening firms must ensure that both parties comply with the statute in the request and delivery of background information.[18]

The statute does not apply when other laws require the employer to obtain prior conviction information, prohibit the applicant from holding the position regardless of expungement of the conviction, or prohibit the employer from employing an individual with a conviction record.[19] The statute also does not prohibit consideration of prior convictions for persons seeking or holding jobs: as peace officers; at the California Department of Justice; at any other criminal justice agency; positions that would require use or possession of a firearm; or health facilities involving regular access to patients and/or drugs and medications.[20]

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[14] *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864, 868 (Ct. App. 2009).
[15] *Id.*
[16] Cal. Lab. Code § 432.7.
[17] *Faria v. San Jacinto Unified Sch. Dist.*, 50 Cal. App. 4th 1939, 1948(1996).
[18] Rosen, Les, *New California Law Significantly Impacts Use of Past Criminal Records by Employers during Employment Background Screening*, at http://www.esrcheck.com/wordpress/2014/01/21/new-california-law-significantly-impacts-use-of-past-criminal-records-by-employers-during-employment-background-screening/.
[19] Cal. Lab. Code § 432.7(m).
[20] Cal. Lab. Code § 432.7 (a),(m).

3. Cases

Cal. Lab. Code § 432.7 (prohibiting inquiry about, conducting searches on or utilizing arrests that did not result in a conviction) is the focus of many California decisions. In *Pitman v. City of Oakland*, the court clarified that an employer's decision to terminate based on the plaintiff's arrest prior to the actual conviction verdict did not automatically grant a cause of action under Cal. Lab. Code § 432.7.[21] The court held that a complainant must affirmatively allege that the arrest did not result in a conviction to state a claim under Cal. Lab. Code § 432.7.[22]

Cal. Lab. Code § 432.7 requires California employers to be precise in the placement and font size of disclaimers.[23] In *Starbucks v. Superior Court*,[24] the application asked: "Have you been convicted of a crime in the last seven (7) years?" but with a disclaimer for California applicants printed on the back of the form among disclaimers for three other states.[25] The court held that although the language did not violate § 432.7, the placement and font size raised a triable issue of material fact as to whether a reasonable applicant would have seen the disclaimer.[26]

B. Colorado

1. Negligent Hiring

In Colorado, an employer's duty of care extends to those who come into contact with an employee with reasonably foreseeable and dangerous propensities.[27] The injured party must have come into contact with the employee through his/her employment, or in his/her "carrying out the duties of the job."[28] Colorado decisional law excludes the duty of care to those injured by incidents during the employee's off-duty commute.[29]

Colorado Revised Statutes ("CRS") § 8-2-201, part of Colorado's Employer's Liability Act, abolishes the fellow-servant doctrine and grants employees a cause of action against the employer for the negligent acts of fellow employees, even where the employee causing the injury was doing so outside the scope of employment.[30] The statute also limits the use of an errant employee's criminal history in civil suits unless

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[21] *Pitman v. City of Oakland*, 197 Cal. App. 3d 1037, 1044 (Ct. App. 1988).
[22] *Id.* at 1044.
[23] *See Starbucks Corp. v. Superior Court*, 168 Cal. App. 4th 1441 (2008).
[24] *Id.*
[25] "CALIFORNIA APPLICANTS ONLY: Applicant may omit any convictions for the possession of marijuana (except for convictions for the possessions of marijuana on school grounds or possession of concentrated cannabis) that are more than two (2) years old, and any information concerning a referral to, and participation in, any pretrial or post-trial diversion program."
[26] *Id.*
[27] *Raleigh v. Performance Plumbing & Heating*, 130 P.3d 1011, 1017 (Colo. 2006).
[28] *Id.*
[29] *Id.*
[30] CRSA § 8-2-201.

the conduct has a *direct relationship* to the facts and resulted in an actual conviction without pardon, court seal, or deferred judgment.[31]

2. Arrest and Conviction Record

CRS § 24-5-101 is limited to public employers who may not ask applicants questions regarding their conviction record or perform background checks prior to being determined a finalist or being offered a conditional offer of employment.[32] Further, § 24-5-101 requires that, prior to the public employer rescinding the conditional offer of employment; the employer must consider factors similar to the *Green* factors:

(a) The nature of the conviction;

(b) Direct relationship between the conviction and the position's duties and responsibilities;

(c) Evidence of good conduct and rehabilitation; and

(d) The time that has elapsed since the conviction.[33]

The statute prohibits adverse employment actions such as refusal to hire and termination but no other employment actions such as failure to promote.[34] Exceptions for certain positions include state office, peace officers, positions with direct contact with "vulnerable persons," educators, correctional facility employees, or positions with the retirement association.[35]

3. Cases

Public employers enjoy wide latitude in application of the *Green* factors. In *Givan v. City of Colorado Springs,*[36] the City of Colorado Springs was charged with violating CRS § 24-5-101 for its discharge of a foreman based on his conviction of felony incest.[37] The conviction had no relation to the employee's fitness to perform the job functions.[38] The city's personnel manual authorized discharges based on an employee's conviction record if the city, "in its sole discretion," finds that the conviction "renders the employee unfit to perform their (sic) job, brings disrepute upon, and/or compromises the integrity of the City of Colorado Springs."[39] The Supreme Court of Colorado held that the incest conviction was <u>not</u> related to the plaintiff's ability to perform his job, however,

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[31] CRS § 8-2-201.
[32] CRS § 24-5-101(2)(b).
[33] CRS § 24-5-101(4).
[34] *Id.*
[35] CRS § 24-5-101(2).
[36] *Givan v. City of Colorado Springs*, 876 P.2d 27, 33 (Colo. App. 1993), *rev'd*, 897 P.2d 753 (Colo. 1995) (in holding that the nature of the conviction would cause such a great disturbance with the workforce that the discharge was justified, even though there was no relationship between the actual position's duties and there was evidence of rehabilitation and good conduct.).
[37] *Id* at 33.
[38] *Id.*
[39] *Id* at 30.

determined that the egregiousness of the conduct would negatively affect morale and the integrity of the city, justifying the employee's discharge.[40]

C. Georgia

1. Negligent Hiring

A successful negligent hiring claim requires the plaintiff to prove that (1) the employee was incompetent and (2) the employer knew or should have known this fact.[41] An employer may be liable for the damages caused by the incompetent employee if in exercising reasonable care, the employer might have foreseen that injuries would result from the "tendencies" of the employee.[42] To protect itself from liability for these negligent hire claims, background checks can be critical to prove that reasonable care was used in its hiring practices and that the employer did not know and had no reason to know of any propensity for bad acts.[43]

2. Arrest and Conviction Record

Under Georgia Law, employers are limited in their use of prior conviction records. Georgia's First Offender Statute creates a "discharge" mechanism that allows the expungement of a criminal conviction from an individual's record.[44] Discharges are only available for first-time criminal offenses.[45]

The Official Code of Georgia Annotated ("OCGA") § 42-8-63 bars employers from considering criminal charges that have been "discharged." The statute goes on to exempt a number of employers from this prohibition including peace officers,[46] schools, child welfare agencies, or day care centers (if the conduct is related to child molestation, sexual battery, enticing a child for indecent purposes, sexual exploitation of a child, pimping, pandering, or incest),[47] and mental health facilities (if related to sexual battery, incest, pimping, or pandering).[48]

Next, OCGA § 35-3-34 allows employers to access an applicant's criminal history, including arrests, detentions, indictments, accusations, information, or other formal charges and any dispositions unless the charges were exonerated or discharged

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[40] *City of Colorado Springs v. Givan*, 897 P.2d 753, 759-760 (Colo. 1995).
[41] *Hutcherson v. Progressive Corp.*, 984 F.2d 1152, 1155 (11th Cir. 1993).
[42] *Munroe v. Universal Health Servs., Inc.*, 277 Ga. 861, 863, 596 S.E.2d 604, 606 (2004).
[43] Luke Caselman, *Permissive Discrimination: How Committing A Crime Makes You A Criminal in Georgia*, 65 Mercer L. Rev. 759 (2014).
[44] OCGA § 42-8-60, *et seq.*
[45] OCGA § 42-8-60, *et seq,* provides for complete exoneration for a criminal conviction, excluding certain serious felonies, including: serious violent felonies, sexual offenses, human trafficking, neglecting or exploiting vulnerable individuals, sexual exploitation of minors, furnishing obscene materials to minors, and child pornography. If a defendant is discharged *without adjudication of guilt* for a sex crimes, he will not be required to register as a sex offender under OCGA § 42-1-12 and the ruling of *Jackson v. State,* 299 Ga. App. 356, 358, 683 S.E.2d 60, 62 (2009).
[46] OCGA § 42-8-63.1; *see* § 42-8-60(j)(9)(B).
[47] OCGA § 42-8-63.1(a)(1).
[48] OCGA § 42-8-63 - § 42-8-63.1.

without adjudication of guilt.[49] To obtain the information from the Georgia Crime Information Center, the employer must identify itself if applying electronically or if not, with the applicant's fingerprints or signed consent.[50] If an adverse employment decision is made based on the information obtained, the employer must notify the employee or applicant: 1) that record was obtained from the center; 2) the specific contents of the record; and 3) the effect that the record had on its decision.[51] The center will not provide employers with records of first offenders if the offense is "discharged," but may do so before the actual request for discharge is filed.[52]

3. Cases

Through design or defect, OCGA § 42-8-63 does not provide a civil remedy, and therefore, does not give rise to a private cause of action.[53]

D. Hawaii

1. Negligent Hiring

Hawaii employers owe a duty of care to those who are foreseeably endangered by the conduct of their employees, but only regarding those risks or hazards whose likelihood made the conduct unreasonably dangerous. Thus, a cruise line and its union were not liable for rape by a fellow seaman, where the rape occurred when the two decided to share a room after the ship had to dock for emergency repairs because the risk was not foreseeable.[54] However, a company engaged to screen storage facility employees was held responsible to a storage user and his 12-year old daughter after she was raped by a storage facility employee, even though the employee's conviction for sexual assault occurred ten years earlier (Hawaii's non-discrimination statute prohibits the consideration of convictions after ten years) because it should have disclosed the perpetrator's registration as a sex offender (which has no time limitation).

2. Arrest and Conviction

Hawaii Revised Statutes ("HRS") § 378-2 prohibits employment discrimination based upon "arrest and court conviction." [55] The definition of "arrest and court conviction" includes "being questioned, apprehended, taken into custody or detention, held for investigation, charged with an offense, served a summons, arrested with or without a warrant, tried, or convicted." [56] However, employers may consider a conviction, provided it occurs within the last ten years, which bears a rational relationship to the duties and responsibilities of the position held or sought.[57] This

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[49] OCGA § 35-3-34.
[50] OCGA § 35-3-34(a)(1)(A).
[51] OCGA § 35-3-34(b); *see* Ga. Employment Law § 5:26 (4th ed.).
[52] *Id.*
[53] *Mattox v. Yellow Freight Systems, Inc.*, 243 Ga.App. 894 (Ga. Ct. App. 2000).
[54] *Janssen v. American Hawaii Cruises, Inc.*, 69 Haw. 31, 34, 731 P.2d 163, 165 (1987).
[55] HRS § 378-2.
[56] HRS § 378-2.5.
[57] *Id.*

means that an employer must make an individualized assessment of the circumstances of the conviction, consider evidence of rehabilitation, assess the responsibilities of the position, and weigh the probability and gravity of the foreseeable harm. Discrimination based solely on an arrest (without a conviction) is never permitted.[58]

3. Cases

HRS § 378-2 provides a private right of action against discriminatory conduct. In *Wright v. Home Depot U.S.A., Inc.*,[59] the plaintiff, after one year of employment, applied for a promotion.[60] Home Depot conducted a background investigation as part of its promotion process.[61] The background check revealed that plaintiff had a prior felony conviction for a controlled substance, which for unexplained reasons, was not discovered as part of the initial hiring process.[62] The conviction made him ineligible for employment and he was terminated. Plaintiff sued for wrongful discharge and discrimination.[63]

The Hawaii Supreme Court determined that HRS § 378-2.5 applies to current and prospective employees.[64] While an employer may refuse to hire or terminate an individual if the conviction (less than ten years old) bears a rational relationship to the job duties and responsibilities, the court noted that the definition for "rational relationship" is not defined in the statute.[65] The court determined that "the relationship between the conviction and the employment must be rational"[66] and remanded the case to determine if the plaintiff sufficiently alleged his prior conviction was not rationally related to his employment as a sales clerk in the lumber department.[67]

In *Shimose v. Hawaii Health Systems Corp.*,[68] the Supreme Court narrowed the definition of the rational relationship. Shimose applied for a radiological technician job at a state hospital.[69] The hospital rejected Shimose's application because of his conviction for possession with intent to distribute crystal methamphetamine.[70] The Supreme Court ruled that the trial court erred when it granted the hospital's motion for summary judgment because there was an issue of material fact as to whether a conviction for possession with intent to distribute crystal methamphetamine was rationally related to the radiological technician job.

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[58] HRS § 378-2; *see also, Kinoshita v. Canadian Pac. Airlines*, Ltd., 803 F.2d 471, 475 (9th Cir. 1986) where plaintiff's argument that he was unlawfully discharged on the "mere fact" of his drug-related arrest was correctly asserted but insufficiently supported by the evidence.
[59] *Wright v. Home Depot U.S.A., Inc.*, 111 Hawaii 401, 142 P.3d 65 (2006).
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id. at* 410, 142 P.3d at 273.
[65] *Id. at* 411, 142 P.3d at 275.
[66] *Id.*
[67] *Id. at* 412, 142 P.3d at 276.
[68] *Shimose v. Hawaii Health Systems Corp.*, 134 Hawaii 479, 345 P.3d 145 (2015).
[69] *Id.* at 481, 345 P.3d at 147.
[70] *Id.*

To determine whether a prior conviction is rationally related to the duties and responsibilities of a particular position, the employer must determine if the conviction is related to the job duties and responsibilities the employee seeks or holds.[71] The court reviewed the job description and determined that the conviction did not affect plaintiff's ability to perform the job of radiological technician because there was no indication that the job required administering or assisting patients with any drugs.[72] Access to syringes, needles, drug reaction boxes, and crash carts did not constitute a rational relationship because the drugs on the carts were not controlled substances.[73] The court also noted that a felony drug conviction should not serve as a blanket disqualification for a job simply because the individual may have access to children or the elderly.[74]

E. Illinois

1. Negligent Hiring Laws

Under Illinois law, a negligent hiring or retention claim requires that the plaintiff plead and demonstrate these elements:

(1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons;

(2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and

(3) that this particular unfitness proximately caused the plaintiff's injury.[75]

Remedies are available for negligent hiring claims for physical injuries as well as non-physical injuries such as damage to reputation.[76]

2. Arrest and Conviction Record

The Illinois Human Rights Act prohibits employers, employment agencies, and labor organizations from inquiring into or using an arrest, or inquiring into or using the criminal history record information expunged, sealed or impounded, as a basis for adverse employment decisions.[77] Employers may obtain or use information, other than the fact of arrest, which indicates that the applicant or employee engaged in the conduct

[71] *Id.* at 486, 345 P.3d at 152.
[72] *Id.* at 487, 345 P.3d at 153.
[73] *Id.*
[74] *Id.*
[75] *Van Horne v. Muller*, 185 Ill. 2d 299, 311, 705 (1998); *see Mueller v. Community Consolidated School District 54,* 287 Ill.App.3d 337, 341–42, 222 Ill.Dec. 788, 678 N.E.2d 660 (1997).
[76] *Van Horne*, 185 Ill. 2d at 311-312.
[77] 775 Illinois Compiled Statutes ("ILCS") § 5/2-103(A).

for which he or she was arrested.[78] All criminal conviction information is open to the public in Illinois.[79] State agencies, local government, school districts, and private organizations may request and use sealed felony information if background checks are required for evaluating the qualifications and character of a current or prospective employee.[80]

Under the Criminal Identification Act, employers cannot ask applicants if their criminal records are sealed or expunged, or consider those sealed or expunged records when making employment decisions.[81] Employment applications must contain language advising applicants that they need not disclose sealed or expunged conviction or arrest records.[82]

3. Cases

Though an arrest, by itself, may not be relied upon for termination, an employer may terminate employees based on their conduct involving an arrest, for reasons including: violating company policies in ways including dishonesty, failure to disclose a violation of business conduct, or violation of the company's controlled substance policy.[83] In *Murillo v. City of Chicago*, the Appellate Court of Illinois held that the city improperly relied on an arrest record to justify the termination of plaintiff's employment.[84] Plaintiff worked as a janitor for the police department and the arrest record was for a drug possession that occurred seven years prior to starting her job at there and did not result in a conviction.[85] The court held that employers are not in violation of 775 ILCA § 5/2–103 for simply using arrest records in an adverse employment decision, as arrest records can contain proof of actual criminal or improper conduct; however, they must not act merely on the basis of the arrest.[86]

F. New York

1. Negligent Hiring

Under New York Executive Law ("NYEXC") § 296(15), there is a rebuttable presumption to exclude evidence of a prior conviction of an individual in a negligent hiring, retention, or supervision claim against an employer if the employer had previously evaluated the employee's fitness for the position and made a good faith determination that the prior conviction had no direct relationship with the position to be

[78] 775 ILCS § 5/2-103(B).
[79] 20 ILCS § 2635/5.
[80] 20 ILCS § 5/2-103(B).
[81] 20 ILCS § 2630/12(a).
[82] *Id.*
[83] *Hickson v. AT & T Servs., Inc.*, 641 F. App'x 590, 594 (7th Cir. 2016); *see Franklin v. City of Evanston*, 384 F.3d 838 (2004).
[84] *Murillo v. City of Chicago*, 2016 IL App (1st) 143002, ¶ 27.
[85] *Id. at* ¶¶ 6-7.
[86] *Id. at* ¶¶ 26-27.

held and presented no unreasonable risk to property or safety to others, using the factors enumerated under New York Correction Law ("NYCOR") § 753.[87]

2. Arrest and Conviction Record

NYEXC § 296(15) and NYCOR § 752 prohibits employers, as well aiders and abettors, from adverse employment actions against individuals due to their prior convictions unless

(1) a direct relationship exists between the prior conviction and the position; or

(2) such "employment would involve an unreasonable risk to property or to the safety or welfare" of others.[88]

In making the fitness determination, NYCOR § 753 states the following factors must be considered:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by that person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.[89]

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[87] NYEXC § 296(15).
[88] NYEXC § 752.
[89] NYEXC § 753.

The employer must also consider certificates of relief or good conduct as indication of rehabilitation regarding that offense.[90]

Employers are prohibited from inquiring or taking adverse employment action against an individual for any arrest or criminal accusation that resulted in the individual's favor, youthful offender adjudication, or conviction for a violation under seal.[91] Individuals need not divulge any information regarding any arrest or criminal accusation that is not pending and has been terminated or a proceeding was reached in the individual's favor.[92] These protections do not apply in the employment of police officers and peace officers.

3. Cases

NYCOR § 752 (which allows employers to consider prior convictions where "employment would involve an unreasonable risk to property or to the safety or welfare") exposes employers to negligent hiring of an employee with a dangerous record, when they rely upon the statute to exclude the conviction record of the errant individual from evidence. In *Glover v. Augustine*, a registered sex offender with a lengthy criminal conviction history was employed as an elevator operator. When he attacked an office worker, the employer was found liable.[93] The reviewing court rejected the employer's argument that NYCOR § 752 prevented consideration of the employee's conviction record.[94]

Conversely, a New York Intermediate Court held that a robbery and three other nonviolent convictions could not show a propensity for violence, as a matter of law.[95] The Appellate Court set aside the jury's verdict for the plaintiff in the negligent hiring case, finding that the employee's criminal history record did not give the employer reason to believe the individual's unsuitability for the position.[96]

NYCOR § 753(2)'s presumption of rehabilitation does not preclude employers who does not have evidence to rebut the presumption, from giving greater weight to other factors.[97] In *Arrocha v. Board of Education of City of New York*, the plaintiff applied for a teaching license of which the Board's subsequent denial became the subject of the litigation.[98] The plaintiff had been convicted for selling cocaine nine years prior to his application for the license.[99] The plaintiff provided evidence of his rehabilitation, *i.e.*, a certificate of relief from disabilities (granting him the presumption of rehabilitation under the statute), five letters of recommendation, and evidence of

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[90] *Id.*
[91] NYEXC § 296(16).
[92] *Id.*
[93] *Id.*
[94] *Glover v. Augustine*, 38 A.D.3d 364, 365(2007).
[95] *Id.*
[96] *Givens v. New York City Hous. Auth.*, 249 A.D.2d 133 (1998).
[97] *Arrocha v. Bd. of Educ. of City of New York*, 93 N.Y.2d 361, 365-366(1999)
[98] *Id. at 363*; *See* COR § 752, which also covers discrimination in consideration for license applications.
[99] *Id.*

academic achievements during and after incarceration.[100] However, the court upheld the Board's decision, opining that the Board did not have to rebut the presumption of rehabilitation and could give more weight to the other factors.[101] The court also took the stance that it is beyond the power of judicial review to "re-weigh" the factors considered by the Board, further casting doubt on the effect of the presumption of rehabilitation under the statute.[102]

IV. CONCLUSION

Society and the courts must adopt a balanced approach. Businesses are liable for the acts of an errant employee, when they fail to act when the risk of harm by such employee was foreseeable. Business must be allowed some leeway in considering conviction records if there is a nexus between the specific criminal conduct and the position being sought or held. If there is no nexus, then the conviction record should not be considered because society believes individuals, even those convicted of a crime deserve a "fresh start."

— End —

[100] *Arrocha*, 93 N.Y.2d at 363.
[101] *Id.*
[102] *Id.*

THE USE OF ARREST AND CONVICTION RECORDS IN THE WORKPLACE: INDIVIDUAL RIGHTS AND EMPLOYER DUTIES

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Employer Liability in Negligent Hiring Claims

NEGLIGENT HIRING

- **Employee = Agent**

  A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's **negligence** in selecting, training, retaining, supervising or otherwise controlling the agent.

  Restatement (Third) of Agency § 7.05 (2006)

- **Negligent Hiring ≠ Respondeat Superior**
  - Employers may be liable for Employee actions outside the scope of their employment

NEGLIGENT HIRING (cont'd)

- **Generally, Employers are liable when:**
  1. Employee was **unfit for employment / incompetent to perform the job function**, in that he/she had a propensity to cause a particular harm to others;
  2. At time of hire, Employer **knew or should have known** of such propensity; and
  3. Employee's unfitness/incompetence caused injuries to Plaintiff.

- **Negligent Hiring Prevention Tools:**
  - <u>**Pre-employment background checks**</u>
  - Drug testing
  - Physical exams

Employer Liability in Title VII Disparate Impact Claims

Title VII of the Civil Rights Act of 1964

➢ Unlawful for an Employer to:

1. **Fail or refuse to hire,** discharge, or otherwise to **discriminate** against any individual, or
2. **Limit, segregate, or classify** individuals for employment in any way which would deprive or tend to deprive them of employment opportunities or otherwise adversely affect his status as an employee,
3. Based on the individual's **race**, **color**, **religion**, **sex**, or **national origin**

Prior Conviction ≠ Protected Category entitled to automatic protection

HOWEVER,

Disparate Impact

- **Facially neutral** employment policy or practice that had an **effect of disproportionately screening out** individuals based on race, color, religion, sex, or national origin
- African Americans and Hispanics are convicted in numbers disproportionate to their representation in the general population

	White	African American (x White)	Hispanic (x White)
All Ages	0.47%	2.72% (**x 5.9**)	1.09% (x 2.4)
18-19	0.10%	1.07% (**x 10.5**)	0.35% (x 3.4)
20-24	0.58%	3.87% (**x 6.5**)	1.52% (x 2.6)
25-29	0.96%	5.43% (**x 5.7**)	2.25% (x 2.3)
30-34	1.11%	6.41% (**x 5.8**)	2.46% (x 2.2)
35-39	1.03%	6.12% (**x 6.0**)	2.27% (x 2.2)

Male Federal Imprison Rate per 100,000 US residents, *Prisoners in 2014*
USDOJ, Office of Justice Programs, Bureau of Justice Statistics

Disparate Impact (cont'd)

- Employment policy with disparate impact allowed when it is job related for the position in question and consistent with business necessity

Plaintiff makes *prima facie* case of Disparate Impact: Proves that Employer uses a **particular employment practice** that **causes a disparate impact on a protected class**

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Employer makes Business Necessity Defense: Demonstrates that practice is **job related** and **consistent with business necessity** by considering: (1) Nature and gravity of offense; (2) Time that has passed since the offense and/or completion of sentence; (3) Nature of the specific job sought

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Plaintiff Refutes: Proves that Employer **refused** to adopt a **less discriminatory alternative practice**

State Laws

Hawaii

Hawaii Revised Statutes ("HRS")

§ 378-2(a)(1)(A): Prohibits any employer to **refuse to hire or employ or to bar or discharge** from employment, **or otherwise to discriminate** against any individual based on their **arrest and court records.**

§ 378-2.5: Allows employers to inquire about and consider an individual's **criminal conviction record** within the **most recent ten years** excluding periods of incarceration, only **after making a conditional offer of employment**, if the record bears a **rational relationship to the duties and responsibilities of the position.**

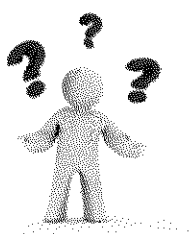
New York

New York Executive Law § 296(15);
New York Correction Law § § 752-753:

Prohibits any person to deny employment to any individual based on **having been convicted** of one or more criminal offenses, or by reason of a finding of a **lack of "good moral character"** based on having been convicted, **unless**: (1) there is a **direct relationship between the previous criminal offenses and the employment sought** or held by the individual; or (2) the granting or continuation of the employment would **involve an unreasonable risk to property or to the safety or welfare** of specific individuals or the general public.

Provides a rebuttable presumption in favor of excluding the prior incarceration or conviction from evidence in employer negligence claims if employer evaluated the factors set forth in NYCOR § § 752-753 and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that employee.

Questions?



Thank You