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[BOX]ED OUT OF EMPLOYMENT

The Case for Hiring Ex-Convicts

Written by Ann Buchholtz

The size of the United States prison population is well established, as is the fact that it is the largest in the world. What is less certain is what these 2.8 million people (1 in 35 adults) can do after they have paid their debt to society. Employers have commonly included a box on employment applications for applicants to check if they have any previous arrests or convictions.

Many companies have had a *blanket* exclusion policy—any applicant who checks the prior arrest/conviction box is automatically rejected, and the firm makes no further effort to determine the reason the box is checked. With blanket exclusions, no one with any criminal history can get a foot in the door for a job. This raises two issues: 1) The societal cost of recidivism and 2) The racial discrimination from disparate impact.

According to the National Employment Law Project (NELP), one in four adults in the United States has a criminal record. Without meaningful opportunities for gainful employment, people with histories of arrest and/or conviction are increasingly likely to relapse into the behaviors that got them into trouble in the first place. The aggregate effect of individual employers having blanket exclusions of ex-convicts is that ex-convicts are unable to rebuild their lives after they complete their sentences. This leads to recidivism, for which society pays in increased crime, as well as the cost of further incarcerations. With so many adults having a criminal record, the potential impact of recidivism is huge.

Exacerbating the societal impact is the fact that *blanket* exclusions of people with criminal records disproportionately affect individuals in protected groups. Because incarceration rates are higher for African American and Hispanic men, blanket exclusions of people with criminal records have a *disparate impact* that violates Title VII of the Civil Rights Act of 1964.

Two types of discrimination violate Title VII. *Disparate treatment* is direct discrimination in which people in a protected group are treated differently because of their age, race, gender, etc. *Disparate impact* occurs when the application of a seemingly neutral criterion results in a disparate impact. A classic example is the application of minimum height and weight requirements that once existed for police departments. This screened out most women, as well as people of Asian heritage. The courts struck them down because the requirements were not necessary for being a successful firefighter.

In order to maintain a requirement that has adverse impact on a protected group, an employer must be able to show that the standard is a *bona fide occupational qualification* (BFOQ). In the case of blanket exclusions of ex-convicts, employers need to do an individual assessment instead. They must take into account the nature of the crime, the time that has elapsed since the crime, and the nature of the job for which the person is applying.

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No one expects or wants a daycare center to hire a person charged with child abuse. That exclusion is easy to justify. Similarly, organizations hiring public safety workers and other people in positions of high trust will have more arguments for enacting exclusions. In these cases, the only change created by the policy is that employers now must justify their exclusions. It is the responsibility of the employer to establish that exclusion of a specific candidate due to a certain type of prior arrest or conviction is justified by business necessity. This policy on blanket exclusions of ex-convicts has been in effect for nearly 30 years; however, many businesses have been unaware of the requirement. The Equal Employment Opportunity Commission (EEOC) issued revised guidance in 2012 to provide employers with direction and to clarify procedures. Since then, the EEOC has been prosecuting cases.

In January 2012, the EEOC entered into a conciliation agreement with PepsiCo, citing that African American applicants were disproportionately denied employment because they failed the company's criminal background check. A year later, the EEOC filed lawsuits against Dollar General and a South Carolina BMW manufacturing plant. In both cases, the EEOC accused the companies of discriminating against African Americans.

A change in logistics services caused problems for BMW. Their previous logistics service had only screened convictions that occurred in the past seven years. However, BMW did not have a screening time limit and so they ordered the new logistics service to screen employees again and drop the seven-year limit. The new screening identified employees that had convictions that occurred more than seven years earlier. BMW fired these employees, even if they had worked for the company for years.

The Dollar General case involved two applicants. The company gave the employee a conditional job offer, but then subsequently revoked it when screening uncovered a six-year old conviction, even though the applicant had disclosed the conviction in the interview and had worked successfully for another retailer in a similar position for four years.

The backlash against banning of blanket exclusions for ex-offenders has been fierce. Opponents describe the measure as job-killing and express concerns that the costs entailed will cripple businesses. *The Wall Street Journal* opined that exclusion of ex-offenders discriminates against criminals, irrespective of their race or gender. The state of Texas sued the EEOC, arguing that the ban on blanket exclusions infringes on state sovereignty and creates a safety hazard.

At the same time, pressure has been mounting to support a ban on the blanket exclusion box. According to an NELP study, 10 states and over 50 local jurisdictions have adopted "ban the box" initiatives, removing employment application questions that ask about arrest and conviction history. Some of these policies apply only to public employees, while others apply to contractors and/or private employers. The issue continues to provoke impassioned debate.

Situations in which private interest and collective good collide are not new. Garrett Hardin termed this problem "The Tragedy of the Commons," in reference to a hypothetical situation in which herders in a community use a common grazing area. It is in each herder's self-interest to allow all their cows to graze even if it damages the commons, temporarily or permanently.

In the case of banning the box, it may be in each employer's self-interest to have a blanket exclusion of people with criminal histories. Blanket exclusions are quick and easy to do

because they do not require the employer to take the time to look more closely at the applicant. However, the impact of blanket exclusions is significant for society. That significance is magnified by the size of the US population with a criminal history. People who are closed off from meaningful opportunities to earn a living will turn to crime out of desperation. Providing opportunities for people who "paid their dues" is in everybody's best interests.

Some firms even find that careful hiring can result in an employee who excels beyond the regular hire. Ex-convicts know that the job market is tilted against them and so they are often grateful for the opportunity and willing to work especially hard to earn and keep it. Many ex-convicts agree to work jobs that are commonly very hard to fill. Businesses like convenience stores that typically measure employee job tenure in months report that ex-convicts will often remain for years. In addition, businesses can often benefit from tax breaks that support the hiring of ex-convicts.

Blanket exclusions for criminal backgrounds are tantamount to imposing a life sentence on everyone who was ever arrested or convicted. It is important for society that people who served their time get out of prison and rebuild their lives. Employment is an essential part of that process. Expecting businesses to give ex-convicts a chance supports the greater good and is a valid responsibility for society to place on business. Similarly, society has an obligation to support businesses in that endeavor.

Businesses take a risk when they hire ex-convicts. Concern about liability and economic loss are valid. Employers need carrots as well as the stick wielded by the EEOC. Tax breaks can help employers pay for the extra resources needed to delve more deeply into criminal backgrounds and to provide any necessary job training and support that goes beyond what would traditionally be needed. Helping ex-convicts rebuild their lives and become contributing members of society is a shared responsibility.

Author Biography

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