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THINK TWICE, IT'S ALL RIGHT: THE USE OF CONVICTION HISTORIES IN HIRING DECISIONS UNDER CALIFORNIA LAW

*Arthur Four**

I. INTRODUCTION

For those convicted of crimes who have served their sentences or paid their penalties, gaining employment thereafter plays a critically important role in their successful reentry into society. A job guarantees a steady income and functions as a positive connection between the ex-offender and others in his or her community, effectively conferring trust and acceptance on that individual. Being denied employment solely because of one's past creates a mental barrier to reentry that makes it even more difficult to move on from a conviction. Given the negative economic and social ramifications arising from joblessness upon release, unemployment among ex-offenders is widely considered to be one of the leading causes of recidivism.¹

More than ever before, employer reliance on criminal background checks in hiring decisions has a starkly negative effect on the employability of ex-offenders.² According to the National Employment Law Project, 90 percent of employers use criminal background checks, and an estimated 65 million adults in the United States have criminal records.³ Most alarmingly, of those applicants

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1. 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, 301 (2014).

2. NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY": THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 1 (2011), http://www.nelp.org/page/-/65_million_need_not_apply.pdf [hereinafter NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY"].

3. *Id.* at 1, 3.

with previous convictions in their records, minorities are overwhelmingly the most impacted by employer practices and decisions that rely on conviction histories.⁴

In response to advancements in the ease and affordability of background check technology and heightened fears of employer liability for negligent hiring and security concerns, federal and state efforts have begun to regulate public, and increasingly even private, employers' use of conviction histories.⁵ California has recently, albeit slowly, started down this important path of helping to increase the employment of ex-offenders. Though the legislature's recent efforts evince a shift as to how it prioritizes the goal of ex-offender reentry, those efforts are likely to be ineffective.

Part II of this Note examines the historical development and use of different methods of combating employment discrimination via the use of criminal background checks. These approaches include disparate impact litigation in federal courts, administrative guidance for employers from the Equal Employment Opportunity Commission, and an increasing array of state and local legislative efforts known as "ban-the-box" initiatives.⁶

Part III analyzes California Labor Code section 432.9,⁷ the State's recent "ban-the-box" legislation passed and implemented in 2014 regarding public employers' use of conviction histories in hiring decisions. The law's benefits are discussed and its shortcomings are identified.

While progressive "ban-the-box" laws are a step in the right direction towards eradicating the unfair use of conviction histories in hiring decisions, California's laws must go further. These laws must reach private employer practices. Additionally, laws governing public employers must be more robust in order for those employers

4. *Id.* at 5. Since the beginning of the War on Drugs, incarceration rates of African Americans and Latinos heavily outnumber those of whites. MICHELLE ALEXANDER, *THE NEW JIM CROW* 98 (rev. ed. 2011). This disparity results in minorities with more criminal conviction records than whites and those convictions showing up on routine background checks during the applications process.

5. See NAT'L EMP'T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES TO REDUCE UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS, <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> (last updated Jan. 2015) [hereinafter NAT'L EMP'T LAW PROJECT, BAN THE BOX].

6. See Jonathan J. Smith, *Banning the Box but Keeping Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197 (2014).

7. CAL. LAB. CODE § 432.9 (West 2014).

to serve as models, thereby influencing the practices of private-sector employers in the State.

Part III then proceeds by suggesting that limited “ban-the-box” laws, such as Labor Code section 432.9, will be ineffective in serving their intended purposes alone. There must also be improved safeguards through the use of an expanded state certificate of rehabilitation system in order to encourage employers to comply with the prohibition on the unfair and discriminatory use of conviction histories in the hiring of ex-offenders.

Part IV concludes by discussing how an expanded and improved certificate of rehabilitation system, which is based in part on New York’s scheme, would help to increase the fair hiring and overall employability of ex-offenders in California. The successes and limitations of New York’s system are compared with California’s current system in order to propose a more effective method for combatting the overreliance on past convictions in hiring decisions.

II. THE USE OF CONVICTION HISTORIES IN EMPLOYER HIRING PRACTICES AND DECISIONS

A. Federal Law Concerning Conviction Histories in Hiring Decisions

1. Title VII Disparate Impact Cases Regarding Discriminatory Hiring Practices

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate on the basis of race against his or her employees or prospective applicants for employment.⁸ Title VII not only prohibits intentional and outright acts of discrimination, but also practices that have a disparate impact on race.⁹ Because African Americans and Latinos are overrepresented in the criminal justice system, screening out applicants based simply on their past convictions “disproportionately excludes”¹⁰ these groups and runs afoul of Title VII.¹¹

8. 42 U.S.C. §§ 2000e-2(a)(1), (2) (2012).

9. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (explaining that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation”).

10. NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY,” *supra* note 2, at 5.

11. *Smith*, *supra* note 6, at 199–200.

The Supreme Court originally set out disparate impact liability for employers based on discriminatory hiring in *Griggs v. Duke Power Co.*¹² There, the Court found an employer's policy requiring a high school diploma and passing of an intelligence test for employees violated Title VII.¹³ Because the policy tended to exclude African American applicants at a higher rate than white applicants without a showing of sufficient justification, the policy was impermissible, even absent discriminatory intent.¹⁴ The Court stated that when determining the justification for such exclusive policies, "[t]he touchstone is business necessity."¹⁵ Thus, practices that exclude applicants disproportionately and have no bearing on job performance will fail under a Title VII analysis.

Disparate impact and business necessity tests under Title VII were applied specifically to employer practices involving applicants' criminal histories in the seminal case *Green v. Missouri Pacific Railroad Co.*¹⁶ In *Green*,¹⁷ the district court dismissed a suit against a defendant railroad corporation with a contested policy disqualifying all applicants with conviction and arrest records for more than minor traffic offenses.¹⁸ The court found the plaintiff's statistical evidence insufficient to support a prima facie case of disparate impact by the defendant corporation against African Americans with arrest and conviction records, and, even if there was such an impact, the railroad set forth a legitimate business necessity to justify it.¹⁹

On appeal, the Eighth Circuit reversed.²⁰ The Circuit Court found the district court's statistical analysis misguided in that it failed to consider the exclusionary policy's impact on African Americans and whites separately.²¹ The Circuit concluded that when compared with the effects on white applicants, the corporation's

12. *Griggs*, 401 U.S. at 424.

13. *Id.* at 436.

14. *Id.* at 431–32.

15. *Id.* at 431.

16. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975).

17. *See Green v. Mo. Pac. R.R. Co.*, 381 F. Supp. 992 (E.D. Mo. 1974), *aff'd* in part, *rev'd* in part, 523 F.2d 1290 (8th Cir. 1975).

18. *Green*, 381 F. Supp. at 993, 997.

19. *Id.* at 994–96 (“[T]he percentage of blacks adversely affected by the subject hiring policies is not disproportionately large when compared with the percentage of blacks in the subject population.”). Further, the court found prevention of theft and recidivism among employees to be sufficient business necessities justifying the policy. *Id.* at 997.

20. *Green*, 523 F.2d at 1299 (reversing the district court's dismissal but affirming its limiting of the class action).

21. *Id.* at 1295.

policy disqualified African Americans “at a substantially higher rate than whites,” thus establishing a prima facie case of disparate impact discrimination.²² The Court went on to state that there could be no justifiable business necessity that would “automatically” disqualify anyone with a previous conviction from employment.²³

The Ninth Circuit addressed employment application policies with disparate racial impact in *Gregory v. Litton Systems, Inc.*,²⁴ affirming a district court decision predating both *Griggs* and *Green*.²⁵ It held that an employer’s application questionnaire discriminated against African American applicants by requiring the release of arrest records.²⁶ While neutral on its face, the questionnaire disproportionately barred African Americans from employment, and arrest records were deemed an insufficient business necessity for the particular job of sheet-metal worker.²⁷

While these decisions found disparate impact based on discrimination in hiring practices, federal courts have recently been much more reluctant to afford relief to plaintiffs in similar suits.²⁸ Accordingly, advocates of fair hiring practices that avoid arbitrary and discriminatory results have had to pursue extra-judicial courses of action.

2. Guidance by the Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) has been charged with enforcing Title VII of the Civil Rights Act of 1964 since the Act became effective in 1965.²⁹ The EEOC’s April

22. *Id.*

23. *Id.* at 1298.

24. *Gregory v. Litton Sys., Inc.*, 472 F.2d 631 (9th Cir. 1972).

25. *Gregory v. Litton Sys., Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970).

26. *Gregory*, 472 F.2d at 632.

27. *Id.*

28. See Smith, *supra* note 11, at 204–11. The author thoroughly reviews cases in which federal courts have rejected plaintiffs’ statistical evidence as insufficient to establish prima facie cases while deeming the respective employers’ business necessity defenses reasonable. One significant recent example is *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d Cir. 2007). There, the Third Circuit upheld the defendant transportation company’s policy of refusing to rehire employees with criminal convictions because those convictions had a negative effect on job safety. *Id.* at 248. The plaintiff’s conviction was 40 years old at the time of his dismissal. See Smith, *supra* note 6, at 210.

29. 42 U.S.C. § 2000e (2012); EEOC, EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf; Michael Pinard, *Eliminating Racial and Ethnic Disparity in the Criminal*

2012 guidance was released with the purpose of informing employers about the appropriate use of criminal records in the selection and retention of employees in light of employers' increased use of criminal records to screen for employment.³⁰ Since possessing a criminal history does not constitute a protected basis under Title VII, the EEOC's authority on the subject involves whether an employment discrimination claim is "based on race, color, religion, sex, or national origin."³¹ The EEOC stresses that incarceration rates are significantly higher for African Americans and Latinos than they are for whites; while one in three African American men and one in six Hispanic men is expected to serve time in prison in the United States, the rate is only one in seventeen for white men.³² Building on previous memoranda and prior policy statements, the guidance serves to lay out the permissible and impermissible uses of criminal records in employment decisions under Title VII.³³ "EEOC guidelines do not have the force of law, but judges frequently turn to them when evaluating whether unlawful discrimination has occurred."³⁴ Since its release, the guidance has been widely circulated among employers, employees, advocacy groups, and lawyers.³⁵ The updated guidance serves as a resource to litigants and may be given significant deference by courts based on the specificity and detail therein, and may thus increase success rates in Title VII litigation.³⁶

The guidance devotes much attention to disparate impact discrimination involving employers' use of criminal records.³⁷ The EEOC states that "there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a Title VII-protected group and the employer does not demonstrate that the

Justice System: Criminal Records, Race and Redemption, 16 N.Y.U. J. LEGIS. & POL'Y 963, 982–83 (2013). The enforcement guidance was released a year after the National Employment Law Project's urging that the EEOC revise and update its nearly twenty year-old existing guidance on the use of criminal background checks. NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY," *supra* note 2, at 20.

30. EEOC, *supra* note 29, at 6.

31. *Id.* at 9.

32. *Id.* at 6.

33. *Id.*

34. Alexander, *supra* note 4, at 153.

35. Pinard, *supra* note 29, at 983.

36. Smith, *supra* note 6, at 226.

37. EEOC, *supra* note 29.

policy or practice is job related for the positions in question and consistent with business necessity.”³⁸

To help employers avoid liability, the guidance urges them to focus on the three *Green* factors: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought.³⁹

In addition, the guidance urges employers to conduct individualized assessments when considering employees’ criminal records.⁴⁰ Such individual assessments consist of notifying applicants of the possibility of being excluded because of past conduct. Assessment procedures would provide opportunities for applicants with criminal histories to demonstrate why the exclusionary policy should not apply to them based on the presentation of additional information.⁴¹ Such relevant, individualized assessment includes rehabilitation efforts, employment or character references, as well as evidence that the individual performed the same type of work post-conviction without incident.⁴²

B. State Legislative “Ban-the-Box” Efforts

1. Progressive State Approaches

Fair hiring advocates have further sought to increase employment opportunities for ex-offenders through the “ban-the-box” legislative movement, which continues to gain steam each year.⁴³ “Ban-the-box” legislation, in varying degrees, removes an employer’s ability to rely on an applicant’s criminal background in determining whether he or she is qualified for the position sought.⁴⁴

“Ban-the-box” laws either remove inquiries about criminal histories entirely from employment applications (by removing the “box” on applications that ask about convictions) or delay such

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See Smith, *supra* note 6, at 212–13; Loafman & Little, *supra* note 1, at 307–11; Pinard, *supra* note 29, at 984–85; Katrina Liu, Comment, *Reentering the City of Brotherly Love: Expanding Equal Employment Protection for Ex-Offenders*, 22 TEMP. POL. & CIV. RTS. L. REV. 175, 188–90 (2012); NAT’L EMP’T LAW PROJECT, BAN THE BOX, *supra* note 5.

44. Smith, *supra* note 6, at 211–13.

inquiries until later on in the hiring process.⁴⁵ Fourteen states have adopted some form of “ban-the-box” policy, while six states have precluded criminal background inquiries for both public and private employers’ job applications.⁴⁶ Municipalities have also adopted such policies; some of the largest include San Francisco, Boston, Cleveland, Seattle, Philadelphia, and New York.⁴⁷ These various state and local statutes also differ as to which types of employers are covered: public or private.⁴⁸ States with recently passed “ban-the-box” statutes that reach private employers include Hawaii,⁴⁹ Minnesota,⁵⁰ and Rhode Island.⁵¹

There are two types of prevalent schemes found among the more progressive state approaches. The first is to preclude an employer, either public or private, from seeking information regarding an applicant’s criminal history until after the employer has determined that the applicant has met the minimum qualifications for the job sought.⁵² The other common approach goes further and bars criminal history inquiries until after an employer has actually made a conditional offer of employment to the applicant.⁵³

2. California’s Recent Legislation Concerning Criminal Histories in Hiring Decisions

a. California Labor Code Section 432.7

California Labor Code section 432.7, which became effective January 1, 2014, prohibits both public and private employers from seeking information concerning applicants’ arrests or detentions that did not result in convictions.⁵⁴ It also excludes employer access to pretrial or post-trial diversion programs and convictions that have been judicially sealed or dismissed.⁵⁵ “Seeking information” includes questions on applications and the use of employer-conducted background checks. A conviction, as defined, includes pleas,

45. Smith, *supra* note 6, at 211; NAT’L EMP’T LAW PROJECT, BAN THE BOX, *supra* note 5, at 2.

46. NAT’L EMP’T LAW PROJECT, BAN THE BOX, *supra* note 5, at 4.

47. *Id.*

48. Smith, *supra* note 6, at 213.

49. HAW. REV. STAT. § 378-2.5 (2014).

50. MINN. STAT. §§ 364.01–.10 (2014).

51. R.I. GEN. LAWS §§ 28-5-6, 28-5-7 (2014).

52. *See* NAT’L EMP’T LAW PROJECT, BAN THE BOX, *supra* note 5.

53. *See id.*

54. CAL. LAB. CODE § 432.7 (West 2014).

55. *Id.*

verdicts, and findings of guilt regardless of whether a sentence was imposed.⁵⁶ Section 432.7 also prohibits the use of such information “as a factor in determining any condition of employment.”⁵⁷

Exempted from the prohibition are positions for which:

(1) The employer is required by law to obtain information regarding a conviction of an applicant; (2) [t]he applicant would be required to possess or use a firearm in the course of his or her employment; (3) [a]n individual who has been convicted of a crime is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation; (4) [t]he employer is prohibited by law from hiring an applicant who has been convicted of a crime.⁵⁸

The section 432.7 prohibition reflects the reality that arrests and information derived from common criminal background checks, unlike official records of convictions, are not necessarily complete, up to date, or probative of guilt.⁵⁹

b. California Labor Code Section 432.9

Following section 432.7’s chaptering, California Labor Code section 432.9⁶⁰ was signed by Governor Brown on October 10, 2013 and went into effect July 1, 2014.⁶¹ Applicable to public employers in California, section 432.9(a) provides:

A state or local agency shall not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant, including any inquiry about conviction history on any employment application, until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.⁶²

56. *Id.* § 432.7(a).

57. *Id.*

58. *Id.* § 432.7(m)(1), (2), (3), (4).

59. *See* Gregory v. Litton Sys. Inc., 472 F.2d 631 (9th Cir. 1972); OFFICE OF LEGAL COUNSEL, EQUAL EMP’T OPPORTUNITY COMM., *supra* note 29.

60. CAL. LAB. CODE § 432.9.

61. NAT’L EMP’T LAW PROJECT, MEMORANDUM: IMPLEMENTATION OF CALIFORNIA “BAN THE BOX” LEGISLATION (AB 218) 1 (2014), <http://www.nelp.org/page/-/SCLP/2014/NELP-California-AB-218-Ban-the-Box-Implementation-Survey-Memo.pdf?nocdn=1>.

62. CAL. LAB. CODE § 432.9(a).

Section 432.9 thus prohibits questions or inquiries about applicants' convictions until later in the hiring process after the state or local agency has decided that the applicant is otherwise qualified for the position.⁶³ Of course, the section does not apply to positions for which it is *required* by law to conduct conviction history checks or for positions within a criminal justice agency.⁶⁴ While a violation of section 432.7 is a misdemeanor,⁶⁵ failure by an agency to follow section 432.9 is not.⁶⁶

Facially, employer compliance with section 432.9's imposition of individualized assessment as opposed to blanket bans on applicants with convictions conforms to the EEOC Guidance and the *Green* factors.⁶⁷ The Bill's sponsor, Assemblymember Dickinson, cited disparate impact on people of color as well as barriers to reentry resulting from the war on drugs and the rise of mass incarceration as reasons to end "discriminatory employment practices against persons with old criminal records []." ⁶⁸

2. Common Law Negligent Hiring Liability

"Ban-the-Box" laws, including California's recent labor code implementations, do not spare employers from negligent hiring liability. Currently, negligent hiring causes of action exist in "all fifty states and the District of Columbia."⁶⁹

California employers may find themselves subject to claims of negligent hiring if their employees harm clients, other employees, or third parties when the employer knew or should have known that the hired person possessed harmful characteristics that created a risk of harm.⁷⁰ California courts follow the rule in the Restatement (Second)

63. *Id.*

64. *Id.* § 432.9(b).

65. *Id.* § 433.

66. *Id.* § 432.9(f).

67. *See Green v. Mo. Pac. R.R. Co.*, 381 F. Supp. 992 (E.D. Mo. 1974), *aff'd* in part, *rev'd* in part, 523 F.2d 1290 (8th Cir. 1975); OFFICE OF LEGAL COUNSEL, EQUAL EMP'T OPPORTUNITY COMM., *supra* note 29.

68. *Employment Applications: Criminal History: Hearing on A.B. 218 Before the Senate Judiciary Comm.*, 2013–14 Regular Session (Cal. 2013) (Bill Analysis Jul. 1, 2013) [hereinafter *Hearing on A.B. 218*]. The Bill's sponsor also stated that "[p]ublic sector employers in California have a special obligation to pave the way for the private sector to reduce barriers to employment of people with criminal convictions." *Id.*

69. Steven 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, 157 (2011).

70. Loafman & Little, *supra* note 1, at 298.

of Agency that “[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 . . . (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others[.]”⁷¹ The particular type of resulting harm must be specific and known to the employer.⁷²

Employers, fearful of incurring liability for the on-duty acts of employee ex-offenders, set conservative cutoffs for selecting applicants with criminal and conviction histories.⁷³ With EEOC regulatory guidance warning of disparate impact and state case law imposing negligent hiring liability, California employers are faced with difficult decisions when considering applicants with criminal, and more specifically conviction, histories.⁷⁴ While private employers may not use arrest records in hiring decisions under Labor Code section 432.7, they may still consider conviction histories after a determination of an applicant’s other qualifications, as Labor Code section 432.9’s prohibition is only applicable to public agencies. The scheme is currently difficult to navigate for both employers and ex-offenders seeking jobs.

III. ISSUES AFFECTING CURRENT CALIFORNIA LAW AND A SUGGESTION FOR IMPROVEMENT BASED ON NEW YORK’S APPROACH

A. Critique of Existing California Law

Given Labor Code section 432.9’s significant lack of reach, enforcement mechanisms, and incentives for employers to follow its requirements in good faith, it is unlikely that the new law alone will be effective in combatting unfair discrimination and racial disparities in California hiring practices. While California’s “ban-the-box” legislation is intended to provide a redemption-based approach to reducing recidivism among ex-offenders, it does not go far enough to achieve its purpose. The following explores section 432.9’s three major limitations.

71. *Phillips v. TLC Plumbing, Inc.*, 91 Cal. Rptr. 3d 864, 868 (Cal. Ct. App. 2009); *Doe v. Capital Cities*, 58 Cal. Rptr. 2d 122 (Cal. Ct. App. 1996); *Evan F. v. Hughson United Methodist Church*, 10 Cal. Rptr. 2d 748, 758 (Cal. Ct. App. 1992); RESTATEMENT (SECOND) OF AGENCY § 213 (1958).

72. *Capital Cities*, 58 Cal. Rptr. 2d 122, 132–33.

73. See *Loafman & Little*, *supra* note 1, at 297–302.

74. See *id.*

1. Section 432.9 Is Too Narrow in Scope

Unlike the most far-reaching “ban-the-box” laws that proscribe against hiring practices by private employers,⁷⁵ section 432.9 is relatively narrow in terms of the types of employers that it covers: state and local public agencies.⁷⁶ Even within the public agencies that the law does reach, there are numerous exemptions for criminal justice agencies and positions that require preliminary background checks because of inherent safety and confidentiality concerns.⁷⁷

The substantive effect of section 432.9 is limited in that it only pushes back the point in time that a public employer may ask about or inquire into an applicant’s conviction history; it does nothing to preclude employers from rejecting applicants because of past criminal convictions.⁷⁸ The employer is thus free to reject an applicant because of a conviction if it relates to the position sought and there is a legitimate business justification. This may result not in expanded employment opportunities for ex-offenders, but instead, in longer, frustrating application periods that still leave jobseekers unemployed.⁷⁹ Allowing this discouraging result does not further the employment of ex-offenders nor does it reduce recidivism and racial disparities in employers’ hiring practices.⁸⁰ To be effective, the law must be more expansive in the types of employer behavior it regulates.⁸¹

The legislative history indicates that the law will make California “a model employer, leading the way for the private sector.”⁸² The limited scope of the law, however, is unlikely to encourage private employers to go any further. What is more likely to happen is that private employers will adopt only the minimal burden that section 432.9 has imposed on public agencies and justify

75. MINN. STAT. § 364.021 (2014) (applying to public *and* private employers); *see* Mary Poquette, *Update: Minnesota Governor Signs “Ban the Box” Bill into Law*, VERIFICATIONS INC. COMPLIANCE CORNER (May 14, 2013), <http://www.verificationsinc.com/eng/whatwevelearned/complianceprofile.cfm?szID=180> (discussing passing of Minnesota’s “ban-the-box” legislation).

76. CAL. LAB. CODE § 432.9 (West 2014); *Hearing on A.B. 218, supra* note 68.

77. CAL. LAB. CODE § 432.9(b).

78. *See id.* § 432.9(a).

79. *See* Smith, *supra* note 6, at 211–12.

80. *See* ALEXANDER, *supra* note 4, at 149 (discussing California employers’ express reluctance to hire ex-felons).

81. *See* Smith, *supra* note 6, at 217 (arguing that the more robust examples of Ban-the-Box legislation are most effective in deterring unfair discrimination and the corresponding racial impact).

82. *Hearing on A.B. 218, supra* note 68.

exemptions based on the type of position and business in question.⁸³ AB 218's author, after all, chose to give local agencies wide discretion with regard to determining exempt positions instead of listing every applicable position in the statute.⁸⁴

Given the current scheme, an applicant's conviction history can and inevitably will still play a role in the hiring process because section 432.9 has only pushed back when a public employer can inquire into that history.⁸⁵ A rejected applicant will likely know that he or she was denied on account of a criminal conviction *because* it comes up later in the hiring process, thereby making other applicants with criminal histories less likely to feel confident to apply.⁸⁶

2. Section 432.9 Is Difficult to Meaningfully Enforce

The statute is also inadequate in furthering its goals because it provides no effective enforcement mechanism to ensure compliance by employers. A violation of section 432.9 by an employer does not constitute a misdemeanor.⁸⁷ More critically, the law does nothing to actually prevent a public employer from deciding at an earlier stage to not hire applicants with previous convictions in their records. An employer can determine that it will not hire an applicant with convictions without considering an individualized assessment, and simply make a cursory check of the applicant's qualifications before rejecting that person. Employer action such as this would technically violate Title VII while seemingly complying with section 432.9. This conflict with Title VII makes compliance for employers tenuous, placing even good-faith employer-actors in difficult positions.⁸⁸

Such glaring gaps in the law make it easy for employers to avoid compliance without consequence, or to comply in bad-faith. In this way, "ban-the-box" laws may actually make it *easier* for employers

83. *See id.*

84. *Id.*

85. *Id.* ("[T]his bill does not prevent the agency from conducting a conviction history background check once the agency has established that the applicant meets the minimum requirements.").

86. *But see* Smith, *supra* note 6, at 217 (noting that "isolat[ing] the role that applicants' criminal records play in the job search process" helps rejected applicants better determine whether an employer may be subject to Title VII liability because of the manner in which the criminal conviction was used in the hiring decision. Under section 432.9, however, this function does not stop unfair employer practices).

87. CAL. LAB. CODE § 432.9(f) (West 2014); *Hearing on A.B. 218*, *supra* note 68.

88. *See* Loafman & Little, *supra* note 1, at 307–11.

to unfairly reject applicants based solely on conviction histories.⁸⁹ NAACP Assistant Counsel, Jonathan J. Smith writes:

[T]he mere presence of a ban the box policy does not guarantee that employers will consider criminal background information in a manner that complies with Title VII. Even in ban the box jurisdictions, employers retain substantial discretion in determining the weight they attach to an applicant's criminal record. While ban the box policies are designed to encourage employers to keep an open mind when evaluating job candidates with criminal histories, employers may still be inclined to reject those applicants. It is also conceivable that ban the box policies may even, in some instances, be exploited by employers determined not to hire those with criminal records.⁹⁰

Because employers are easily able to circumvent "ban-the-box" laws like section 432.9, the very purpose of this legislative initiative can be thwarted. Despite the law's intentions, applicants with convictions in their past are not given a fair chance at gainful employment and helping their own prospects for reentry into society.⁹¹ For many, being denied employment based on a conviction, leads to a realization that the stigma and collateral consequences of that conviction lasts many years after the past crime without any chance of social redemption.⁹² Lacking meaningful chances for employment based on employer skepticism and unfair discrimination, unemployment and recidivism rates increase among ex-offenders.⁹³

3. Negligent Hiring Liability Is Still a Concern for Employers

Section 432.9 also fails to effectively incentivize employers to implement fair hiring practices because of the risks of liability for negligent hiring. "[T]he possibility of negligent hiring claims creates tensions on companies that seek to limit risk by screening out

89. Alexander, *supra* note 4, at 151–52 (suggesting that preventing employers from viewing applicants' criminal records may actually encourage employers to make discriminatory racial associations and reject applicants even earlier in the process).

90. Smith, *supra* note 6, at 216.

91. ALEXANDER, *supra* note 4, at 148–52.

92. See Pinard, *supra* note 29, at 987–90.

93. See Loafman & Little, *supra* note 1, at 301.

convicted felons.”⁹⁴ Section 432.9 goes no further than the EEOC guidelines to negate these concerns. Facing a choice between negligent hiring claims and inconspicuous non-compliance with section 432.9 and Title VII, employers will likely choose the latter.⁹⁵

Because the use of conviction records and background checks in hiring decisions has increased in response to fear and liability for the acts of ex-offender employees,⁹⁶ “ban-the-box” laws like section 432.9 are insufficient because they do not alleviate or address this reality.

[I]t is possible that employers overestimate the risk of negligent hiring claims and therefore exclude applicants who pose little to no risk of harm, but in the highly litigious context of the contemporary social landscape, it is hardly surprising that employers would choose to err on the side of caution.⁹⁷

Even though section 432.9 may serve as a conduit for California employers to look beyond *just* an applicant’s conviction history, it does nothing to ensure that they meaningfully consider other factors.

B. Proposal: An Improved State System of Certificates of Rehabilitation for Ex-Offenders

Federal court litigation, Equal Employment Opportunity Commission guidelines and state and local “ban-the-box” legislative efforts are insufficient methods for properly addressing employer reluctance towards the hiring of ex-offenders and the resulting disproportionately racial ramifications. A better solution to the issue must focus on applicants’ demonstrated rehabilitation in order to provide public and private employers with necessary confidence in hiring those with conviction histories. A “redemptive” approach takes into account the nature of the crime for which an applicant was

94. *Id.* at 299. The authors note that in addition to negligent hiring, workplace safety under OSHA and financial loss from theft and fraud are major concerns cited by employers regarding the hiring of ex-offenders. *Id.* at 295–300.

95. *See* EEOC v. Freeman, 961 F. Supp. 2d 783, 803 (“[T]he EEOC has placed many employers in the ‘Hobson’s choice’ of ignoring criminal histories and credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, on the one hand, or incurring the wrath of the EEOC for having utilized information deemed fundamental by most employers.”).

96. *See* NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY,” *supra* note 2, at 1; Shepard, *supra* note 69, at 170–72.

97. Loafman & Little, *supra* note 1, at 298.

convicted, time since that conviction or release from prison, and the individual's subsequent commitment to abiding by the law.⁹⁸

1. Various State Approaches to Collateral Consequences

Collateral consequences of convictions for ex-offenders are pervasive in the employment context.⁹⁹ “Even where jurisdictions have adopted a policy of encouraging reintegration of ex-offenders, employers and others who control access to opportunities and benefits still hesitate to give this population a second chance.”¹⁰⁰ The result is a pervasive system that allows for the exclusion of ex-offenders from employment without regard to any consideration of their rehabilitation and post-conviction “efforts to turn their lives around.”¹⁰¹

In response to these structural barriers to reentry, groups such as the American Bar Association Committee on Effective Criminal Sanctions have suggested that more stringent procedures for relief from the consequences of criminal records must be put in place.¹⁰² While some states, through administrative action and judicial procedures have sought to increase the availability of such relief measures, California has done little in this regard.¹⁰³

Existing state judicial and legal methods for reducing the collateral consequences of past convictions include expungement, sealing of records, and gubernatorial pardons.¹⁰⁴ While expungement and record sealing are available in some states, such procedures are often reserved for minor crimes and first-time offenses.¹⁰⁵ Pardons, the strongest form of state-certified relief, are extremely rare.¹⁰⁶ In

98. Pinard, *supra* note 29, at 989–97. Note that these factors are substantially similar to the *Green* factors that the EEOC recommends employers consider so as to avoid Title VII liability for disparate impact based on race in hiring practices.

99. Margaret Love & April Frazier, *Certificates of Rehabilitation and Other Forms of Relief from the Collateral Consequences of Conviction: A Survey of State Laws*, 2006 ABA COMM'N ON EFFECTIVE CRIM. SANCTIONS 1.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 1–6.

104. *Id.* at 2.

105. *Id.* The increase in criminal background technology also removes the guarantee that “employers will not discover a person’s criminal history.” Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 749–50 (2012). Somewhat ironically, advances in the availability of criminal records in databases have not produced advancements in the ability of background check companies to update expunged or pardoned records. *Id.*

106. Love & Frazier, *supra* note 99, at 2, 5.

California, while Governor Brown has used the pardon power more liberally than past Governors,¹⁰⁷ the chance of a pardon is not a reality for most ex-offenders¹⁰⁸ given the number of those convicted of crimes in California.

Scholars agree that more expansive procedures are necessary to help allow employers to recognize that ex-offenders have moved on from their convictions and have rehabilitated themselves.¹⁰⁹ “People who have successfully completed their court-imposed sentences need to be able to reestablish themselves as law-abiding members of society. At the same time, employers and other decision-makers need to have some reassurance of a person’s reliability.”¹¹⁰ An effective and enforceable system of official administrative or judicial certificates of rehabilitation would reduce fears of negligent hiring and encourage employers to consider an applicant fairly without giving too much weight to an old conviction from which the applicant has moved on.¹¹¹ In addition to facilitating employment for those with conviction histories, the result would also “ameliorate the disproportionate impact of criminal records on poor individuals of color.”¹¹²

2. New York’s Landmark Certificate of Rehabilitation Program

While all jurisdictions have in place at least some form of relief from the collateral consequences of past convictions,¹¹³ New York’s administrative certificate of rehabilitation program was the original model and is the most redemptive in scope and effect.¹¹⁴ Instead of expunging, sealing, or pardoning a conviction, the scheme effectively places a caveat on an applicant’s criminal history by showing that the offender has been rehabilitated.¹¹⁵

The program allows for two types of certificates: a “Certificate of Relief from Disabilities” for misdemeanants and first-time felony offenders, and a “Certificate of Good Conduct” for repeat felony

107. See Jeremy B. White, *Gov. Jerry Brown Pardons 104 for Christmas*, THE SACRAMENTO BEE (Dec. 24, 2014), <http://www.sacbee.com/news/politics-government/capitol-alert/article4928388.html>.

108. See Love & Frazier, *supra* note 99, at 5; Pinard, *supra* note 29, at 990.

109. See Pinard, *supra* note 29, at 989; Radice, *supra* note 105, at 721.

110. Love & Frazier, *supra* note 99, at 1.

111. *Id.*

112. Pinard, *supra* note 29, at 992.

113. Love & Frazier, *supra* note 99, at 2.

114. See *id.* at 2–4; Radice, *supra* note 105, at 723.

115. See Love & Frazier, *supra* note 99, at 3–4; Radice, *supra* note 105, at 722.

offenders.¹¹⁶ The first type of certificate is awarded by a sentencing court when no prison term is imposed or by the Board of Parole after release.¹¹⁷ The second type may only be awarded by the Board of Parole after a person's one to five year period of good conduct, which varies according to the offense.¹¹⁸

Though the two forms of certificates differ in their eligibility requirements, they both create a legally enforceable presumption of rehabilitation that an employer *must* consider while evaluating the applicant's conviction history.¹¹⁹ The burden then shifts to the employer to rebut the presumption.¹²⁰ Convicts may challenge an employer's allegedly improper decisions in the New York Supreme Court.¹²¹

Both types of certificates serve important respective purposes for the facilitation of post-conviction employment. Certificates of Relief have immediate effect after a conviction and therefore reduce the type of knee-jerk recidivism so common to those convicted and unemployed.¹²² Although Certificates of Good Conduct take longer to satisfy than Certificates of Relief, they allow those with more serious criminal histories a fair chance at employment once they are deemed rehabilitated down the line.¹²³

Though it is the most robust of its kind, New York's certificate of rehabilitation scheme has its shortcomings. The approval system is highly discretionary,¹²⁴ lacks a mechanism for appeal of decisions,¹²⁵ and the statutory language is somewhat vague in its eligibility requirements and evidentiary standards.¹²⁶ These legal issues result in potentially arbitrary grants and denials without a sufficient system for review.

New York's system also faces significant administrative problems. Delay in decision-making by the Parole Board results in the certification process taking between six to eighteen months to

116. Love & Frazier, *supra* note 99, at 3.

117. *Id.*

118. *Id.*

119. Radice, *supra* note 105, at 726–27 (emphasis added).

120. *Id.* at 751–52.

121. *Id.* at 752.

122. *See id.* at 738.

123. *See id.* at 731.

124. *Id.* at 756–57.

125. *Id.* at 760–61.

126. *Id.* at 758–60.

complete.¹²⁷ The delay and long waiting period may be the result of insufficient devotion of resources to the program.¹²⁸ Knowledge of the delay may also lead to applicants not seeking certificates and judges not recommending them because of this administrative reality.¹²⁹

“Few people file certificate applications each year because potential applicants either do not know about certificates or they find the process too daunting.”¹³⁰ In fact, it has been argued that the main reason for the low number of certificates issued is because of a lack of knowledge of their availability.¹³¹ For New York’s system to reach its full potential, the option of certificates of rehabilitation must be made aware to judges and attorneys as well as to those facing convictions during trial and after release.¹³² While judges are required to inform defendants about the option of certificates of rehabilitation, they often do not do so.¹³³

In addition to a lack of awareness by judges and court actors, the applications for certificates are confusing and difficult to read for many applicants.¹³⁴ In short, New York’s Certificate of Rehabilitation program is the most robust of its kind, but is still faced with administrative, legal, and functional problems that must be addressed in a similar California system.

3. California’s Current Insufficient Certificates of Rehabilitation System

California currently has a statutory Certificate of Rehabilitation program,¹³⁵ but it is similar to New York’s system in name only.¹³⁶ A Certificate of Rehabilitation in California is available only as the first step in the State’s pardon process,¹³⁷ which as discussed, seldom results in the actual granting of a pardon. Certificates may be awarded to an applicant by a superior court on a showing of “an

127. See Love & Frazier, *supra* note 99, at 3; Radice, *supra* note 105, at 762.

128. See Radice, *supra* note 105, at 762.

129. See *id.* at 762, 765.

130. *Id.* at 765.

131. Love & Frazier, *supra* note 99, at 3–4.

132. See Radice, *supra* note 105, at 765–67.

133. *Id.*

134. *Id.* at 766. “Researchers have found that the applications are written at a ‘13th grade’ (beyond high school) reading level. The average reading level in the country is eighth grade, and seventy percent of people with convictions function below a sixth grade level.” *Id.*

135. CAL. PENAL CODE §§ 4852.01–.22 (West 2014).

136. See Radice, *supra* note 105, at 750–51.

137. Love & Frazier, *supra* note 99, at 5.

honest and upright life,” “sobriety and industry,” “good moral character,” and an obedience of “the laws of the land” during the rehabilitation period.¹³⁸ Outside of the pardon process, California’s certificates, unlike New York’s, provide no method for judicial enforcement against unfair employer practices and establish no effective change in an offender’s legal status.¹³⁹ The current system likewise provides no protection to employers from subsequent negligent hiring lawsuits.

In order to make California’s certificate of rehabilitation program effective, it must be expanded and redirected to have independent legal effect and judicial enforcement outside of the pardon system.¹⁴⁰ The program must also address the administrative, legal, and social issues that negatively affect New York’s program.¹⁴¹ In addition to providing clear directions and guidance for judicial officers and attorneys, the program must also make defendants and ex-offenders aware of the opportunity for certificates so that they are able to apply in a timely fashion and conform their conduct accordingly.¹⁴²

An effective certificate system requires the coupling of clearly defined legal standards and procedures for implementation of the program. After implementation, the granting agency must clarify and disseminate the rehabilitation and moral character requirements for receiving a certificate to ex-offenders, defense attorneys, and judges.

Most critically, employers must be instructed on the proper level of rehabilitation-presumption that a certificate confers on an ex-offender. If widely circulated, certificate standards will persuade private and public employers to consider applicants on their merits by providing assurance of ex-offenders’ judicially determined rehabilitation and reliability.

Certificates could be presented to an employer either upon application or after an unfair rejection. Ideally, if an employer disregards the certificate, the employee or prospective employee could bring judicial enforcement, at which point the employer would have to rebut the presumption of rehabilitation with contrary evidence. An employer who hired an ex-offender who subsequently

138. CAL. PENAL CODE § 4852.05.

139. See Radice, *supra* note 105, at 750–51.

140. See Love & Frazier, *supra* note 99, at 1.

141. See Radice, *supra* note 105, at 756.

142. See *id.* at 765–67.

acted in a way that subjects the employer to negligent hiring liability could also use the certificate as an affirmative defense against such liability.

In addition, the legal standard for eligibility for a certificate of rehabilitation should not be unreasonably high, at least in the initial period of implementation.¹⁴³ Evidence of good moral character must be shown, but the statutory rehabilitation period before which an ex-offender may apply should not be too long.¹⁴⁴ Using a set of standards that are attainable and not unduly burdensome to applicants would help to foster confidence in the program and encourage more ex-offenders to apply.¹⁴⁵

Utilizing a lower set of criteria for receiving a certificate would serve the State's interest in reducing unemployment and recidivism and facilitating reentry among ex-offenders.¹⁴⁶ As Professor Joy Radice warns:

If the criteria for certificates are set too high, certificates will only be awarded to people who can show exemplary evidence of rehabilitation. This could create two tiers of people with convictions. Only a select few will be relieved of civil punishments, and the vast majority will continue to face an unending debt to society. In this context, certificates could do more harm than good. Employers will begin to ask for certificates and only consider candidates who have earned higher status.¹⁴⁷

IV. CONCLUSION

Employers have more access to applicants' criminal histories today than ever before through the rise of a modern criminal background check industry and ever-advancing technology that accompanies it.¹⁴⁸ Coupled with concerns about negligent hiring lawsuits¹⁴⁹ and the economic effects of a recession, this trend has led to the widespread use of applicants' criminal histories in hiring

143. *See id.* at 738–39.

144. *See id.* at 769.

145. *See id.* at 777.

146. *See id.*

147. *Id.*

148. *See Smith, supra* note 6, at 198; NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY," *supra* note 2, at 1.

149. *See Smith, supra* note 6, at 198.

decisions, and, most troubling, has disproportionately affected applicants of color.¹⁵⁰

In response, federal, state, and local efforts have attempted to ameliorate the effects of collateral consequences on ex-offenders and minorities in particular, but none have proved effective in encouraging employers to rely less on an applicant's criminal record in deciding whether or not to hire that person. California's recently implemented "ban-the-box" legislation, Labor Code section 432.9, is similarly insufficient in addressing this issue by itself. Laws like section 432.9 must be more robust in the kinds of employer activity they proscribe and reach private as well as public employers.

In addition to more effective "ban-the-box" laws, California must implement and utilize more expansive relief mechanisms, such as a judicially enforceable certificate of rehabilitation program, in order to ensure employer confidence and compliance in fair hiring practices.

Convictions should certainly result in proportional consequences for those who commit them. But "[t]o deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden."¹⁵¹ Placing all ex-offenders in a box ignores a fundamental aspect of human existence: the ability and desire to change. Having the opportunity to attain and possess meaningful employment after past crimes should be considered a second chance, and in California everyone deserves a second chance.

150. Pinard, *supra* note 29, at 997; NAT'L EMP'T LAW PROJECT, 65 MILLION "NEED NOT APPLY," *supra* note 2, at 2.

151. *Green v. Mo. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) (enjoining Missouri Pacific Railroad's use of applicants' convictions as automatic bar to employment with the company).