

# Banning the Box in Tennessee: Embracing Fair Chance Hiring Policies for Ex-Offenders

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## I. INTRODUCTION

In 2014, there were 636,346 people released from jail or prison in the United States, including 15,556 prisoners released in Tennessee.<sup>1</sup> In the most recent statewide recidivism study in Tennessee, forty-six percent of people released from jail or prison were re-incarcerated within just three years.<sup>2</sup> Recidivism, returning to prison for a new crime, stems in part from the inability of people with convictions to effectively assimilate back into the law-abiding community.<sup>3</sup> To combat recidivism, communities need to aid the flood of ex-offenders in their reentry to both the workplace and society at large.<sup>4</sup>

Over one hundred municipalities and twenty-four states have recently adopted a growing fair chance hiring policy called “ban the box,” which refers to the commonly-used check box on job applications inquiring into an applicant’s prior criminal record.<sup>5</sup> Ban the box laws mandate that employers remove the question from employment applications asking, “Have you ever been convicted for violation of the law other than minor traffic offenses?”

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1. E. ANN CARSON, U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 2014 10 tbl.7 (2015).

2. CHRISTINE HERRMAN ET AL., VERA INST. OF JUSTICE, REPORT OF THE VERA INSTITUTE OF JUSTICE TO THE TENNESSEE GOVERNOR’S TASK FORCE ON SENTENCING AND RECIDIVISM 3 (2015).

3. *Id.* at 4.

4. Nancy B. Sasser, “*Don’t Ask, Don’t Tell*”: *Negligent Hiring Law in Virginia and the Necessity of Legislation to Protect Ex-Convicts from Employment Discrimination*, 41 U. RICH. L. REV. 1063, 1063 (2007).

5. MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT’L EMP’T LAW PROJECT, BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS 1 (2016) [hereinafter CITIES, COUNTIES, AND STATES], <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>. Five states—Louisiana, Missouri, Oklahoma, Tennessee, and Wisconsin—just adopted Ban the Box policies in 2016, and Vermont amended its Ban the Box policy to apply to public employers as well as private employers in 2016. *Id.*

If yes, state the nature of the offense[.]”<sup>6</sup> The standard ban the box law removes this box on the employment application, ensuring that employers consider applicants on their merits before taking any past mistakes into consideration.<sup>7</sup> For example, Connecticut’s ban the box policy requires employers to deem a potential employee as otherwise qualified for the position before conducting a criminal background check.<sup>8</sup> So, an employer is not prohibited from ever looking into the employee’s criminal history; the employer must simply postpone the background check until some time after the initial application. This usually happens once the employer has deemed the employee otherwise qualified for the job, which can be evidenced by a conditional offer of employment.<sup>9</sup> If, after the employer has given a conditional offer of employment, the background check reveals a prior conviction or arrest history, the employer must then consider factors derived from *Green v. Missouri Pacific Railroad Company*.<sup>10</sup> In *Green*, the court established a list of factors to guide an employer’s evaluation of whether to disqualify an applicant based on a prior criminal offense.<sup>11</sup> Under *Green*, an employer should consider: (1) the time elapsed since the conviction; (2) the nature and seriousness of the crime in relation to the job sought; (3) the degree of the individual’s rehabilitation; and (4) the circumstances under which the crime was committed.<sup>12</sup>

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6. Joey Garrison, *Metro Adopts ‘Ban the Box’ for Most City Job Applications*, THE TENNESSEAN (Nov. 10, 2015, 5:26 PM), <http://www.tennessean.com/story/news/politics/2015/11/10/metro-adopts-ban-box-policy-most-city-jobs/75515562/>.

7. See Michelle Natividad Rodriguez & Anastasia Christman, *The Fair Chance / Ban the Box Toolkit*, NAT’L EMP’T LAW PROJECT (Apr. 2, 2015), <http://www.nelp.org/publication/the-fair-chance-ban-the-box-toolkit/>.

8. CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013).

9. See *id.*; *Criminal Background Screenings and Employment – Fact Sheet for Job Applicants*, OFFICE OF HUMAN RIGHTS, D.C., [http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/ApplicantFAQ\\_FINAL\\_120914.pdf](http://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/ApplicantFAQ_FINAL_120914.pdf) (last updated Dec. 11, 2014).

10. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975); see also CONN. GEN. STAT. ANN. § 46a-80(c) (West 2009 & Supp. 2013).

11. *Green*, 523 F.2d at 1297.

12. See *Green*, 523 F.2d at 1297 (affirming an Iowa district court ruling that condemned employment practices that banned applicants with criminal records when “no consideration is given to the nature and seriousness of the crime in relation to the job sought, [t]he time elapsing since the conviction, the

These factors ensure that an employer has a legitimate business reason for disqualifying a potential employee based on his prior criminal history rather than systematically excluding all people with conviction histories. States need to implement this added protection because, while Title VII and the Fair Credit and Reporting Act provide some protection, there are still many holes in whom the law protects.<sup>13</sup> Ban the box policies offer fair chances for job opportunities to those with prior criminal records, which encourages rehabilitation, promotes community development, and reduces the recidivism rate.<sup>14</sup>

Throughout the United States, over 100 states and municipalities have already adopted hiring practices that prohibit employers from inquiring into an applicant's criminal history on an initial employment application.<sup>15</sup> As of 2016, twenty-four states from almost every region of the country had adopted some form of policy limiting employer inquiry into criminal backgrounds of job applicants.<sup>16</sup>

This Note will argue that Tennessee should enact a statute guiding both public and private employers in their use of criminal history in job applications. The proposed statute will serve as a means to encourage incorporation of ex-offenders into the workplace and into a productive community by allowing them to be considered for jobs. Municipalities in Tennessee, such as Nashville, Memphis, and Chattanooga, have already begun implementing ordinances governing employer use of criminal history in the hiring process.<sup>17</sup> A statewide statute embracing the goals of reducing recidivism and incorporating ex-offenders into the productive workforce is necessary to address this fast-growing national issue. Further, in what is likely to be a huge step for Tennessee, the state

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degree of the felon's rehabilitation, and the circumstances under which the crime was committed . . ."); *see also* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013); D.C. CODE ANN. § 32-1342(d) (West, Westlaw through 2016).

13. *See infra* Part IV.

14. *See* Michelle Natividad Rodriguez, "Ban the Box" Is a Fair Chance for Workers with Records, NAT'L EMP'T LAW PROJECT (Aug. 1, 2015) [hereinafter *Fair Chance*], <http://www.nelp.org/publication/ban-box-fair-chance-workers-records/>.

15. CITIES, COUNTIES, AND STATES, *supra* note 5, at 1.

16. *Id.*

17. *See, e.g.*, MEMPHIS, TENN., CITY CODE § 3-4-4 (2016).

legislature recently passed a ban the box law applying to all *state employers*, prohibiting them from inquiring into criminal history on an initial job application, with some exceptions.<sup>18</sup> The new Tennessee ban the box statute prevents a state employer from inquiring into an applicant's criminal history on the initial job application but allows the state to inquire about an applicant's criminal history after the initial screening if the applicant has the opportunity to explain the circumstances around the conviction.<sup>19</sup> However,

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18. See TENN. CODE ANN. § 8-50-112 (2016); see also Kitty Capelle, "Ban the Box" Bill Passes Senate in Tennessee, LOCAL 8 (Mar. 8, 2016, 11:50 AM), <http://www.local8now.com/content/news/Ban-the-Box-bill-passes-Senate-in-Tennessee-371401731.html>. Governor Haslam subsequently signed this bill into law. See Joel Ebert, *House Sends 'Ban the Box' Bill to Haslam*, THE TENNESSEAN (Mar. 14, 2016, 10:17 PM), <http://www.wbir.com/news/local/house-sends-ban-the-box-bill-to-haslam/82838484> ("Before the chamber's vote, Gov. Bill Haslam said he supported the bill and would likely sign the legislation."). But he signed a companion bill first on March 31, 2016, prohibiting any local government in Tennessee from prohibiting a private employer from requesting certain information on an employment application or during the hiring process. See Act of Mar. 31, 2016, Pub. Ch. No. 606 (to amend TENN. CODE ANN. § 7-51-1802). The Act states:

Except as otherwise provided by state or federal law, a local government shall not, as a condition of doing business within the jurisdictional boundaries of the local government or contracting with the local government, prohibit an employer from requesting any information on an application for employment or during the process of hiring a new employee.

*Id.* So, before passing the proposed statewide ban the box statute for public employers, Tennessee first banned local governments from extending any ban the box policy to private employers. See *id.* This is at odds with the ultimate goal behind the ban the box movement—to offer fair chances of employment to ex-offenders and reduce the recidivism rate. Tennessee should not limit its fair chance hiring policies to public employers before it has had any chance to evaluate how a statewide ban the box policy for public employers affects recidivism.

19. TENN. CODE ANN. § 8-50-112(b) (2016) provides that:

If an employer announces a position for employment that is not a covered position, the employer shall not inquire about an applicant's criminal history on the initial application form. An employer may inquire about an applicant's criminal history after the initial screening of applications. If an employer inquires about an applicant's criminal history, the employer shall provide the applicant with an opportunity to provide an explanation of the applicant's criminal history to the employer.

this new Tennessee statute does not apply to private employers, leaving many jobs completely unattainable for those with criminal records.<sup>20</sup> This Note will argue that a statute applying to both public and private employers is more in line with current public policy throughout the nation and best serves the goals of reducing recidivism and encouraging post-arrest employment in Tennessee.<sup>21</sup>

Part II of this Note will provide an overview of how criminal history affects job opportunities for ex-offenders. Part III will outline different interests of employers in the hiring process, focusing mainly on negligent hiring and how it relates to criminal background checks. Part IV will examine the different federal implications relating to criminal background checks in the hiring process, specifically Title VII, the Equal Employment Opportunity Commission (“EEOC”), and the Fair Credit and Reporting Act. Part V will examine different ban the box laws in other states, as well as the Memphis, Tennessee, ban the box ordinance. Part V will then argue that the ban the box movement is imminent for Tennessee because of various underlying policy ramifications. Finally, Part VI will provide the elements of a proposed ban the box law for Tennessee.

## II. OVERVIEW OF CRIMINAL HISTORY AFFECTING JOB PLACEMENT

### *A. Implications of Ban the Box*

As many as 70 million adults in the United States have a prior arrest or conviction, and it is nearly impossible for those individuals to find employment in a time when employers can easily access background checks through the Internet, thereby systematically excluding anyone from employment who has a conviction

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*Id.*

20. *See id.*

21. While the policies that have already been implemented prohibiting state and local government employers from inquiring into criminal history on initial job applications show that Tennessee is receptive to the idea of fair chance hiring policies, the recent legislation prohibiting localities in Tennessee from limiting private employers does not embrace the underlying goals of such legislation and is not in accordance with the direction these laws are moving. *See supra* note 18, Act of Mar. 31, 2016, Pub. Ch. No. 606 (to amend TENN. CODE ANN. § 7-51-1802) (banning local governments in Tennessee from extending ban the box policies to private employers).

record.<sup>22</sup> A majority of employers currently use criminal background checks as an integral part of their hiring processes, and this trend has continued to increase in the last several years.<sup>23</sup> Particularly in the aftereffects of September 11, 2001, background checks have become both easily accessible and inexpensive, making them a popular tool for employers.<sup>24</sup> One survey found that as many as ninety-two percent of employers use background checks when making hiring decisions.<sup>25</sup> Criminal background checks can promote safety in the workplace by allowing employers to exclude anyone with a criminal history, but it is still up to the employer to become informed about the individual it is hiring. “However, imposing a background check that denies *any* type of employment for people with criminal records is not only unreasonable, but it can also be illegal under civil rights laws.”<sup>26</sup> Employers who use “blanket exclusions fail to take into account critical information, including the nature of an offense, the age of the offense, or even its relationship to the job.”<sup>27</sup> This is important because blanket

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22. NAT’L EMP’T LAW PROJECT, SEIZING THE “BAN THE BOX” MOMENTUM TO ADVANCE A NEW GENERATION OF FAIR CHANCE HIRING REFORMS 2 (2014) [hereinafter SEIZING MOMENTUM] <http://www.nelp.org/content/uploads/2015/03/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf> (estimating that 70 million U.S. adults have some arrest or conviction that makes the likelihood of a callback interview for an entry level position drop by fifty percent).

23. See MICHELLE NATIVIDAD RODRIGUEZ & MAURICE EMSELLEM, 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/content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf?nocdn=1](http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf?nocdn=1) (noting that the criminal background check industry has grown in recent years, providing access to more employers and further limiting the pool of jobs that ex-offenders can attain).

24. See *id.*

25. See SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010) [hereinafter CONDUCTING CRIMINAL BACKGROUND CHECKS], <https://perma.cc/4MKV-YKY7> (displaying the findings of a survey conducted by the largest association of human resources personnel of which the members consist mostly of large employers).

26. RODRIGUEZ & EMSELLEM, *supra* note 23, at 1.

27. *Id.*

exclusions that fail to take such information into account could be unconstitutional.<sup>28</sup>

For example, a fifteen-year-old *nonviolent* drug charge will likely have no effect on the job performance of a potential employee at a grocery store but can serve as a barrier to employment at the grocery store. Johnny Magee found himself in exactly this situation.<sup>29</sup> He was a developmentally disabled man in Dublin, California, who picked up a package for his uncle; Magee was completely unaware that the package contained drugs.<sup>30</sup> Although Magee had never used drugs or been convicted of any other offense, he was arrested and convicted of conspiracy to commit a drug offense in 1999.<sup>31</sup> Magee had held the same landscaping job for six years, but budget cuts forced him to search for a new job in 2008.<sup>32</sup> He applied to be a garden center attendant at Lowe's Home Improvement store in 2008, nearly ten years after his arrest.<sup>33</sup> Despite Magee's years of prior experience in the industry and good job performance, Lowe's denied Magee the job because of his single conviction.<sup>34</sup> Magee never had an opportunity to explain the circumstances of his arrest or demonstrate his fitness for the job.<sup>35</sup> Later, Magee petitioned the court for a dismissal of his conviction, which the court granted, setting aside his finding of guilt.<sup>36</sup> Companies with blanket-exclusion hiring policies for those with any arrest history deny employment to potentially better-qualified applicants without even reaching the applicant's qualifications or providing an opportunity for the applicant to explain the circumstances around his or her conviction.

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28. See *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297–98 (establishing the list of factors for an employer to evaluate a prior criminal offense and reasoning that failing to consider these factors is likely to result in “an unnecessarily harsh and unjust burden” on certain racial groups, particularly black males).

29. See RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*



Ban the box laws reduce discrimination in the hiring process by allowing a fair chance for ex-offenders to attain employment or to at least be considered for the position.<sup>37</sup> Ban the box laws encourage numerous goals: (1) they promote hiring based on qualifications for the job rather than placing a complete bar on employment due to a prior conviction; (2) they encourage individualized assessment of applicants, potentially leading to more efficient hiring practices; (3) they reduce the recidivism rate by increasing job opportunities for people with convictions; and (4) they incorporate ex-offenders back into the workplace.

### 1. Promote Hiring Based on Qualifications for the Job

Ban the box laws promote hiring decisions based on qualifications for the job rather than criminal histories.<sup>38</sup> “Ban the box laws do not preclude employers from ever looking into an applicant’s criminal history, but do postpone the inquiry until later in the hiring process.”<sup>39</sup> The rationale behind postponing an employer’s inquiry into an applicant’s criminal history is to promote hiring based on qualifications for the job, such as prior experience in the industry or educational background, rather than systematically denying every applicant with a conviction history.<sup>40</sup> The conviction may have been a youthful indiscretion that is remote in time and easily explained, or it may be a situation like Johnny Magee’s, in which a court later set aside his finding of guilt.<sup>41</sup> Moreover, society should not continue to hold people accountable when they have already served their time and paid their debt to society; the criminal justice system does not intend a conviction to forever bar an individual from employment.<sup>42</sup>

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37. See SEIZING MOMENTUM, *supra* note 22, at 2.

38. See *Fair Chance*, *supra* note 14.

39. Barbara L. Johnson & Stefanee J. Handon, *State Employment Law Developments* II.B. Mar. 26–28, 2015, Westlaw SW025 ALI-CLE 1441.

40. *Id.*

41. See RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

42. See, e.g., SEIZING MOMENTUM, *supra* note 22, at 1 (“Fair chance hiring policies are positioned like never before to change minds and open up job opportunities for the millions of people who have been unfairly locked out of the job market.”).

Opponents of ban the box laws argue that employers should retain full discretion over hiring persons with criminal records, regardless of the effect on recidivism. Their concern is not without merit, but “[b]an the [b]ox laws do not *require* employers to hire people with criminal records.”<sup>43</sup> Employers still retain control over the hiring process, and specific exceptions, such as sensitive jobs or jobs involving contact with vulnerable populations, would allow initial background checks.<sup>44</sup> Many ban the box laws provide a list of factors for employers to take into account when evaluating whether an employee is fit for the job.<sup>45</sup> These factors provide a framework for employers to evaluate potential employees based on qualifications for the job rather than criminal history alone; they also reduce employer liability under negligent hiring laws by requiring the employer to be aware of potential risks associated with each particular position and potential employee.<sup>46</sup>

Many of the factors employers must take into account in making employment decisions under ban the box laws stem from the factors the Eighth Circuit set out in *Green v. Missouri Pacific Railroad Company*.<sup>47</sup> In *Green*, the court struck down an employment practice that refused to consider any applicant convicted of a crime other than a minor traffic offense.<sup>48</sup> The court opined that:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is

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43. Johnson & Handon, *supra* note 39 at II.B. (emphasis added).

44. *Id.* at II.E.2.; *see also infra* note 133 (indicating the exception under New York law); *infra* note 161 (indicating the exception under the Memphis, Tennessee, City Code).

45. *See* D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016); N.Y. CORRECT. LAW § 753 (McKinney, Westlaw through L.2016).

46. *See* James R. Todd, Comment, “*It’s Not My Problem*”: *How Workplace Violence and Potential Employer Liability Lead to Employment Discrimination of Ex-convicts*, 36 ARIZ. ST. L.J. 725, 727–28 (2004) (examining the factors an employer needs to take into account when deciding whether to hire a new employee, especially when looking to hire an ex-convict).

47. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975).

48. *Id.*

particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To 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.<sup>49</sup>

When evaluating whether an employer should disqualify an applicant based on a criminal offense, the employer should look at the time elapsed since the conviction, the nature and seriousness of the crime in relation to the job sought, the degree of the individual's rehabilitation, and circumstances under which the crime was committed.<sup>50</sup> These factors have become a basis of various topics in employment law, including suggested employment practices. For example, the EEOC has incorporated these factors into its guidelines for consideration of arrest and conviction records in employment decisions.<sup>51</sup> The EEOC guidelines outline "Targeted Exclusions that Are Guided by the *Green* Factors."<sup>52</sup> The *Green* factors and their salience in ban the box legislation are important for weight of authority reasons. They demonstrate that ban the box is justified by the judiciary and is not an entirely legislatively-created doctrine.

## 2. Encourage Individualized Assessment

Ban the box laws encourage individualized assessment by potential employers, which should result in the hiring of employees more suited to each job.<sup>53</sup> Under ban the box laws, employers

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49. *Id.* at 1298.

50. *Id.* at 1297.

51. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE: CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [hereinafter EEOC ENFORCEMENT GUIDANCE], [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

52. *Id.*

53. See SEIZING MOMENTUM, *supra* note 22, at 2 ("The most effective fair chance hiring policies not only remove the conviction and arrest history questions from the application, they also ensure that employers take into account other important factors when considering an applicant's conviction history, in-

cannot place a blanket ban on employment because of a conviction, so this allows the employer an opportunity to interview the candidate, observe his demeanor, and, if allowed by the particular statute, have him explain the circumstances around any conviction or arrest.<sup>54</sup> As discussed in Part III, this could also serve as protection against employer liability for negligent hiring because the employer did take time during the hiring process to assess the individual and his or her suitability for the particular job.<sup>55</sup> Part V discusses specific factors involved in ban the box laws that are supported by both the EEOC guidelines and case law.

### 3. Reduce Recidivism by Increasing Job Opportunities

Ban the box laws reduce recidivism by increasing employment opportunities for people with convictions. Studies suggest that up to seventy-seven percent of ex-offenders will be reincarcerated within five years of initial release.<sup>56</sup> Allowing more job opportunities for ex-offenders has numerous and far-reaching benefits, including promoting public safety, saving costs associated with the criminal justice system such as court costs and prison costs, increasing tax revenue by generating more income tax, and improving the family lives of persons related to ex-offenders.<sup>57</sup> According to the National Employment Law Project, a nonprofit

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cluding the age of the offense, the relationship of the individual's record to the job duties and responsibilities, and evidence of rehabilitation.”).

54. *Id.*

55. *See generally* *Marshalls of Nashville, Inc. v. Harding Mall Assocs.*, 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990) (holding that defendant was not negligent in hiring).

56. *See* Press Release, Bureau of Justice Statistics, 3 in 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), <http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm> (stating that two-thirds of a sample of prisoners released were arrested for a new crime within three years, and three-fourths were arrested within five years).

57. Christina O'Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 *FORDHAM L. REV.* 2801, 2805–06 (2015); *see also* Anastasia Christman & Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies*, NAT'L EMP'T LAW PROJECT (Aug. 1, 2016), <http://www.nelp.org/publication/research-supports-fair-chance-policies/> (noting that nearly 700,000 people return to their home communities from incarceration every year).

organization that continually researches relevant issues in employment law:

The reality that over one in four U.S. adults has a criminal record brings this issue and its public safety and economic consequences to the doorstep of every home in America. As U.S. Secretary of Labor Hilda L. Solis recently stated, “Stable employment helps ex-offenders stay out of the legal system. Focusing on that end is the right thing to do for these individuals, and it makes sense for local communities and our economy as a whole.”<sup>58</sup>

When individuals are employed, recidivism goes down.<sup>59</sup> The Safer Foundation, an organization that helps to incorporate formerly incarcerated individuals back into productive society, offers a staffing service for people with criminal records.<sup>60</sup> The program offers initial transitional employment in ninety-day time slots and then offers support as participants move towards permanent employment.<sup>61</sup> The program started in 2005, and, in 2011, Loyola University conducted a recidivism study of the Safer Foundation’s outcomes, finding that the program’s recidivism rate was sixty-three percent lower than the statewide rate when the individuals maintained an initial employment for at least thirty days.<sup>62</sup>

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58. See RODRIGUEZ & EMMELM, *supra* note 23, at 4 (quoting Press Release, U.S. Dep’t of Labor, US Department of Labor Announces Grant Competition to Help Former Offenders Gain Career Skills and Rejoin Community Life (Feb. 10, 2011), <http://www.dol.gov/opa/media/press/eta/ETA20110185.htm>).

59. See John M. Nally et al., *The Post-Release Employment and Recidivism Among Different Types of Offenders with a Different Level of Education: A 5-Year Follow-Up Study in Indiana*, 9 JUST. POL’Y J. 1, 20 (2012) (finding that “the ‘employed’ offenders had a lower recidivism rate than the ‘unemployed’ offenders after release from prison” and “African American males were likely to be recidivist offenders after release from IDOC custody”).

60. *Transitional Employment Program*, SAFER FOUNDATION, <http://www.saferfoundation.org/services-programs/transitional-employment-program> (last visited Oct. 20, 2016).

61. *Id.*

62. *Id.*

#### 4. Incorporate Prior-Convicts Back into the Workplace

Ban the box laws help to incorporate prior convicts back into both the workforce and society. Initiatives like ban the box laws

reduce barriers to employment, so that people with past criminal involvement – after they have been held accountable and paid their dues – can compete for appropriate work opportunities in order to support themselves and their families, pay their taxes, and contribute to the economy.<sup>63</sup>

Research of ban the box laws shows that employment of ex-offenders reduces recidivism, helps to strengthen family life, and allows parents to maintain child support.<sup>64</sup> Research also indicates that where ban the box policies do exist, there is an “unmistakable impact on employer hiring practices benefiting people with arrest and conviction histories.”<sup>65</sup> In Minneapolis, “city officials found that removing the conviction or arrest history check-box from initial applications and postponing background checks until after a conditional offer of employment resulted in more than half of applicants with a conviction being hired.”<sup>66</sup> Moreover, city officials in Atlanta discovered that ten percent of new hires were people with convictions due to its fair hiring policy.<sup>67</sup> These studies show that ban the box policies already in place are accomplishing their goal of encouraging productive employment for people with convictions.

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63. Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

64. SEIZING MOMENTUM, *supra* note 22, at 2.

65. *Id.*

66. *Id.*

67. *Id.*

### III. EMPLOYERS' INTERESTS: THE TORT OF NEGLIGENT HIRING

#### A. *Negligent Hiring in General*

Opponents of ban the box movements, particularly ban the box policies that apply to private employers, may fear that policies limiting employer inquiry into criminal history put employers at risk for the tort of negligent hiring. But this risk is both minimal and unlikely because ban the box policies provide additional incentive and guidelines for employers to thoroughly interview potential employees before giving a conditional offer.

Employers can face liability for negligent hiring when an employer is negligent in employing an individual who poses an unreasonable risk of harm to others.<sup>68</sup> This liability is based in tort law rather than under an agency theory.<sup>69</sup> Liability under negligent hiring turns on whether a plaintiff can prove that the employer knew or should have known that an employee was unfit or possessed otherwise dangerous characteristics at the time of hiring.<sup>70</sup> Some jurisdictions involve unreasonable or foreseeable risk of harm as an additional element.<sup>71</sup>

#### B. *Negligent Hiring Laws in Tennessee*

To recover under a negligent hiring claim in Tennessee, a plaintiff must establish the elements of a negligence claim and that the employer had knowledge of the employee's unfitness for the job.<sup>72</sup> The prima facie elements of negligence in Tennessee are: "(1) a duty of care owed by defendant to plaintiff; (2) conduct below the applicable standard of care that amounts to a breach of that

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68. 27 AM. JUR. 2D *Employment Relationship* § 372, Westlaw (database updated Sept. 2016) (citations omitted).

69. *Id.* (citations omitted).

70. *Id.* (citations omitted).

71. *Id.* (citations omitted).

72. See *Marshalls of Nashville, Inc. v. Harding Mall Assocs.*, 799 S.W.2d 239, 243 (Tenn. Ct. App. 1990) (holding that defendant was not negligent in hiring the independent contractor because the plaintiff did not prove that the defendant knew or ascertained by reasonable means that the independent contractor was not qualified).

duty; (3) an injury or loss; (4) cause in fact; and (5) proximate, or legal, cause.”<sup>73</sup>

“The tort of negligent hiring stems from the principle that a person conducting an activity through employees is liable for harm resulting from the negligent conduct in the employment of improper persons . . . involving risk of harm to others.”<sup>74</sup> The risk described is a foreseeable one;<sup>75</sup> thus, in-depth interviews of candidates inherently reduce the foreseeable risk by ensuring that the employer takes the opportunity to find out additional information about the candidate, observing his demeanor during the interview, and otherwise assessing how good a fit the applicant would be for the job at issue. Antidiscrimination laws concerning criminal background explicitly address this concern by providing incentives to conduct in-depth interviews of potential employees and also by providing factors under which to evaluate a conviction if one is discovered.<sup>76</sup>

### *C. Ban the Box and Negligent Hiring*

Ban the box laws create further incentive for employers to conduct in-depth job interviews in order to determine whether applicants pose foreseeable risks. Ban the box laws do not mandate that employers hire ex-offenders; they merely provide guidelines for use of information regarding criminal history in the hiring process and some timing requirements for obtaining that information.<sup>77</sup> Even though some might object to ban the box policies because of negligent hiring liability, a negligent hiring suit is unlikely under a ban the box policy.<sup>78</sup> Under a ban the box policy,

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73. *Giggers v. Memphis Hous. Auth.*, 277 S.W.3d 359, 364 (Tenn. 2009) (quoting *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995)).

74. *Phipps v. Walker*, No. 03A01-9508-CV-00294, 1996 WL 155258, at \*2 (Tenn. Ct. App. Apr. 4, 1996) (citation omitted).

75. *See Doe v. Catholic Bishop for the Diocese of Memphis*, 306 S.W.3d 712, 714 (Tenn. Ct. App. 2008).

76. *See infra* Part V.

77. *Johnson & Handon*, *supra* note 39.

78. An employer is allowed to revoke a conditional offer to a potential employee if he concludes that the nature and seriousness of the crime relate to the job sought. *See Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975) (quoting *Butts v. Nichols*, 381 F. Supp. 573, 580 (S.D. Iowa 1974)) (“There is no doubt that the State could logically prohibit and refuse employ-



employer liability based on negligent hiring is a small risk because the employer uses the *Green* factors and individualized assessments to thoroughly evaluate potential employees.<sup>79</sup> Therefore, it is unlikely that this thorough investigation would be found negligent.

#### IV. FEDERAL ISSUES: TITLE VII AND THE FAIR CREDIT AND REPORTING ACT

##### A. Title VII and the EEOC

Ban the box laws provide protection for classes not fully shielded from discrimination by federal laws. This includes ex-offenders who cannot easily recover as part of a protected class, such as white males or women with criminal records.

While courts recognize both disparate impact and disparate treatment liability under Title VII, ban the box policies deal only with disparate impact. Under a disparate impact analysis, Title VII prohibits employment practices that, although facially neutral, exclude a “disproportionate percentage” of minorities unless the employer can prove that there was a “business necessity.”<sup>80</sup> Under the burden-shifting analysis, a plaintiff must first establish a “prima facie case of substantially disparate impact.”<sup>81</sup> Once the plaintiff establishes the prima facie case, the burden then shifts to the employer to demonstrate that the employment practice at issue is justified as a business necessity.<sup>82</sup>

An employment policy that uses an applicant’s criminal background as a bar to employment could face a Title VII challenge based on a discriminatory impact on race.<sup>83</sup> Title VII claims are prevalent due to the high rate of individuals in prisons belonging to protected classes.<sup>84</sup> In *Green*, the court found the railroad

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ment in certain positions where the felony conviction would directly reflect on the felon’s qualifications for the job . . .”).

79. See *Green*, 523 F.2d at 1297–98.

80. *Id.* at 1293 (citations omitted).

81. *Id.* (citations omitted).

82. *Id.* (citations omitted).

83. O’Connell, *supra* note 57, at 2808.

84. *Inmate Race*, Fed. Bureau of Prisons, [https://www.bop.gov/about/statistics/statistics\\_inmate\\_race.jsp](https://www.bop.gov/about/statistics/statistics_inmate_race.jsp) (last updated Oct. 20, 2016).

company's employment practice of placing an absolute bar on employment for applicants with conviction records had a discriminatory impact on race and, therefore, violated Title VII.<sup>85</sup> Further, Johnny Magee<sup>86</sup> filed Title VII charges with the EEOC against Lowe's after the home improvement store denied him employment based on his criminal conviction record.<sup>87</sup> An ex-offender can prevail under Title VII if he can show that the particular hiring practice of the business had a disparate impact on a protected class and that the employer cannot prove a business necessity.<sup>88</sup> Courts have held that a criminal conviction is not prima facie job related and requires a more in-depth analysis of the nature of the specific criminal behavior compared to the nature of the job for which the individual is applying.<sup>89</sup> This means that an individual cannot bring an action under Title VII solely because a policy discriminated against people with convictions.

Disparate impact claims only come into play if the employment practice has a significant impact on a protected class.<sup>90</sup> Ex-offenders are not a protected class under Title VII.<sup>91</sup> Further, disparate impact liability does not protect classes such as women

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85. *Green*, 523 F.2d at 1298–99.

86. *See supra* Part II.

87. *See* RODRIGUEZ & EMSELLEM, *supra* note 23, at 4.

88. *See* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (“If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.”); *see also* 42 U.S.C.A. § 2000e-2(k)(1)(A)(i) (2013) (“[A] complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.”).

89. *Compare* *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232 (3rd Cir. 2007) (holding that an aggressive crime could disqualify an applicant from a job involving transporting disabled persons), *with Green*, 523 F.2d at 1298 (striking down an employment practice that refused to consider any applicant convicted of a crime other than a minor traffic offense because “fear of cargo theft,” “employment disruption caused by recidivism,” and “alleged lack of moral character” were not business necessities).

90. 42 U.S.C.A. § 2000e-2 (2013) (enumerating “race, color, religion, sex, and national origin” as the categories of which discrimination is expressly prohibited).

91. *Id.*

or white citizens.<sup>92</sup> This is one of the holes in federal protection. In a state such as Tennessee without additional state law protection for ex-offenders, many prospective employees who are discriminated against based on having a criminal record only have a claim through state versions of Title VII *as a member of a protected class*.<sup>93</sup> White citizens, females, and certain other minorities are unlikely to be able to prove the prima facie case of significant impact. This leaves them without a remedy in states that lack additional anti-discrimination protection.<sup>94</sup>

The EEOC endorsed the movement to limit inquiry into criminal records on job applications in its Enforcement Guidance of 2012.<sup>95</sup> Courts typically look to EEOC guidelines as guiding and very persuasive authority. The EEOC's guidance states, "As a best practice, and consistent with applicable laws, the Commission recommends that employers do not ask about convictions on job applications . . . ."<sup>96</sup> The EEOC provides stricter guidelines for employer consideration of arrest and conviction records in relation to Title VII.<sup>97</sup> The EEOC notes that an arrest, as opposed to a conviction, does not establish that the individual has engaged in criminal conduct and does not prove a business necessity.<sup>98</sup> However, "an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position."<sup>99</sup> In most circumstances, a conviction (as opposed to an arrest) can be "sufficient evidence" that an applicant engaged in criminal activity, and, when otherwise allowed by the guidelines, an employer may rely on the conviction when considering potential employees.<sup>100</sup>

Employment practices not conforming to the EEOC guidelines might be subject to Title VII challenges. Because the EEOC and private parties file suits in this area based on disparate treatment and disparate impact of the hiring process, the guidance thor-

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92. *Id.*

93. Todd, *supra* note 46, at 744.

94. *See generally Green*, 523 F.2d at 1293.

95. EEOC ENFORCEMENT GUIDANCE, *supra* note 51.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

oughly discusses when a potential violation may occur.<sup>101</sup> A disparate treatment violation may occur if an employer treats conviction or arrest history differently for different applicants based on race.<sup>102</sup> A disparate impact violation may also occur if an employer's facially neutral employment practice disproportionately impacts a protected class and there is no legitimate business necessity.<sup>103</sup> Factors the EEOC consistently recognizes as job related and as a business necessity are: (1) whether the employer's policy follows the Uniform Guidelines on Employee Selection Procedures or (2) whether the "targeted screen considers at least the nature of the crime, the time elapsed, and the nature of the job."<sup>104</sup> The second factor above provides for individualized assessment and notes that, while not required, "individualized assessment" significantly decreases the likelihood of a Title VII violation.<sup>105</sup>

The EEOC outlined suggestions for best employer practices, including:

Eliminate policies of practices that exclude people from employment based on any criminal record. Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination . . . . Develop a narrowly tailored written policy for screening potential applicants and employees for criminal conduct . . . . Determine the specific offenses that may demonstrate unfitness for performing such jobs . . . . Include an individualized assessment . . . . When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.<sup>106</sup>

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101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* Note that these are the factors identified by the Eighth Circuit in *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1297 (8th Cir. 1975).

105. *Id.*

106. *Id.*

State ban the box statutes reflect many of these factors and guidelines.<sup>107</sup> These guidelines signal the EEOC's intent to monitor and pursue litigation in the area described in the above section more aggressively.<sup>108</sup> The EEOC's intent is also evidenced by the EEOC's recent increase in litigation in the area of employer use of criminal background checks.<sup>109</sup> The EEOC's growing concern in the area of criminal background checks in the employment process shows that public policy is moving towards broader protection, such as ban the box laws, for people with convictions.

### B. Fair Credit and Reporting Act

The Fair Credit and Reporting Act (FCRA) also provides some protection against absolute bans on employment based on prior convictions or arrests, but, like Title VII, it fails to provide enough protection for ex-convicts. The FCRA regulates both employer use of criminal background information and also the credit reporting agencies (CRAs) that compile criminal background information.<sup>110</sup> The FCRA's goal is to "monitor accuracy in credit reporting by regulating CRAs and employer disclosure once a report is consulted."<sup>111</sup> The FCRA requires employers to provide notice of adverse actions to applicants along with an opportunity to correct the information.<sup>112</sup> The FCRA uses three main guidelines to regulate certain aspects of employer use of background checks: (1) the applicant must provide the employer with signed permission before conducting the background check; (2) if the employer intends to use information gleaned from the background check to deny employment, the employer must provide the applicant with a report and a summary of the applicant's FCRA rights; and (3) the

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107. See, e.g., D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

108. See EEOC ENFORCEMENT GUIDANCE, *supra* note 51; see also Theodore W. Reuter, *Equal Employment Opportunity Commission's War on Background Checks*, 57 ADVOCATE 24 (2014); Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 62 (reporting that the EEOC filed suit against both BMW and Dollar General for using criminal background policies resulting in disproportionate exclusion of African Americans).

109. See Press Release, U.S. Equal Emp't Opportunity Comm'n, *supra* note 63.

110. O'Connell, *supra* note 57, at 2812.

111. *Id.*

112. Johnson & Handon, *supra* note 39.

employer must provide notice if he intends to take adverse action against the applicant based on the background check.<sup>113</sup>

The FCRA, however, is relatively narrow in its scope and application to criminal background checks and employment applications. First, the FCRA only provides a private cause of action to individuals who can show that a CRA was negligent or willfully noncompliant.<sup>114</sup> Second, courts require a high showing of error or inaccuracy in the reporting itself to provide a cause of action under the FCRA.<sup>115</sup> The remedy is based on the presence of a misleading report, not just the use of a report in general.<sup>116</sup> Moreover, courts are reluctant to hold the credit reporting agencies liable since the Federal Trade Commission has failed to provide adequate guidelines in evaluating inaccuracies.<sup>117</sup> Because the FCRA does not provide significant protection for people with convictions, many states have enacted policies like ban the box laws to provide additional opportunities for people with convictions to attain employment.

States and localities have increasingly passed laws governing the use of criminal histories in employment applications because, under Title VII and the FCRA, federal law fails to provide adequate protection for individuals with criminal histories to allow them to assimilate back into productive society.<sup>118</sup>

#### V. BAN THE BOX INITIATIVES ALREADY IN PLACE

Throughout the United States, twenty-four states and over 150 cities and counties have adopted ban the box policies.<sup>119</sup> Most states have policies that remove the conviction history question on

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113. See 15 U.S.C. § 1681b(b)(2)–(b)(3) (2014); O’Connell, *supra* note 57, at 2813.

114. O’Connell, *supra* note 57, at 2814.

115. *Id.*

116. See 15 U.S.C. § 1681(b) (providing that the FCRA’s purpose is “to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information. . .”).

117. O’Connell, *supra* note 57, at 2814.

118. Johnson & Handon, *supra* note 39.

119. See CITIES, COUNTIES, AND STATES, *supra* note 5, at 1.

job applications for public employers only, but nine states and the District of Columbia have policies that extend to both public and private employers, representing a new and crucial step in the movement.<sup>120</sup>

*A. Ban the Box Laws that Apply to Public Employers*

The states that prohibit initial inquiry into criminal history by public employers are: California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Vermont, Virginia, and Wisconsin.<sup>121</sup> Along with these states, many cities and municipalities have ban the box policies that apply to public employers.<sup>122</sup> In Tennessee, these include Memphis, Nashville, and Chattanooga.<sup>123</sup>

Connecticut's ban the box policy, like many others, requires public employers to deem a potential employee otherwise qualified for the position before conducting a criminal background check.<sup>124</sup> Connecticut is a good example of a recently adopted ban the box statute because it contains a standard list of factors or guidelines that an employer must consider when evaluating an applicant's criminal history. If the background check reveals a prior conviction or arrest, the employer must consider: "(1) the nature of the crime and its relationship to the job for which the person has applied; (2) information pertaining to the degree of rehabilitation of the convicted person; and (3) the time elapsed since the conviction or release . . . ."<sup>125</sup>

Connecticut's ban the box statute is also a good example of the policy underlying the movement. The statute provides that:

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120. *Id.*

121. *Id.*

122. *See, e.g.*, MEMPHIS, TENN., CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; Valeria Sistrunk, *City Council Votes to "Ban the Box"*, WDEF.COM, (Dec. 1, 2015, 11:02 PM), <http://www.wdef.com/2015/12/01/city-council-votes-to-ban-the-box/>.

123. *See* MEMPHIS, TENN. CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; Sistrunk, *supra* note 122.

124. *See* CONN. GEN. STAT. ANN. § 46a-80(b) (West 2009 & Supp. 2013).

125. *Id.* § 46a-80(c).

The General Assembly finds that the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community. It is therefore the policy of this state to encourage all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records.<sup>126</sup>

The Connecticut statute embodies the movement towards incorporating ex-offenders back into society and recognizes the positive impact on the rest of the public that occurs by allowing these individuals to find gainful employment. Further, it is noteworthy here that the house and the senate both unanimously passed the ban the box bill and overrode a veto by the governor.<sup>127</sup> This demonstrates the receptiveness of many state legislators to adopt fair hiring practices that provide a chance for ex-offenders to attain gainful employment. It also reveals the significance of the underlying goals of these policies—to return ex-offenders to gainful employment and to reduce the recidivism rate. These goals are best served by policies applying to both public and private employers. Dual policies provide a larger pool of jobs and a better opportunity to reincorporate ex-convicts into productive society, thereby reducing the recidivism rate and bettering the public good.

*B. Ban the Box Laws That Apply to Both Public and Private Employers*

The states that prohibit initial inquiry into criminal history by public and private employers are: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New York, Oregon, Rhode Island, and Vermont, and also the District of Columbia.<sup>128</sup>

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126. *Id.* § 46a-79.

127. *Connecticut's Fair Chance Law*, VERIFYPROJECT.COM, <http://www.verifyprotect.com/ban-the-box/connecticut/> (last visited Oct. 20, 2016).

128. *See* CITIES, COUNTIES, AND STATES, *supra* note 5.



New York's Antidiscrimination Statute is an example of a fair chance hiring policy that applies to both public and private employers, but it focuses more on the reasons for using criminal history in an employment decision rather than the timing of when an employer can use that information.<sup>129</sup> This statute is a good example of the goals behind fair chance hiring policies—allowing job opportunities for ex-convicts while still protecting employers and preserving their control over hiring decisions.

New York's statute applies to:

any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction . . . . Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment.<sup>130</sup>

New York's antidiscrimination statute prohibits an employer from rejecting an applicant convicted of a crime, or from finding a lack of "good moral character" based solely on the fact that the applicant was convicted of the crime.<sup>131</sup> New York's statute prohibits a blanket denial of employment based on a prior conviction.<sup>132</sup> The statute then lays out exceptions to the prohibition:

(1) there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to

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129. See N.Y. CORRECT. LAW § 751 (McKinney, Westlaw through L.2016).

130. *Id.*

131. *Id.* § 752.

132. *See id.*

property or to the safety or welfare of specific individuals or the general public.<sup>133</sup>

In considering a potential employee, the public agency or private employer must look to several factors: (a) New York's public policy to "encourage the licensure and employment of persons previously convicted of one or more criminal offenses"; (b) the duties and responsibilities related to the employment; (c) the effect the crime for which the applicant was convicted will have on performance of the job; (d) the time elapsed since the crime; (e) the age of the person at the time of the criminal offense; (f) the seriousness or nature of the offense; (g) any information related to the potential employee's rehabilitation and good conduct; (h) "[t]he legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."<sup>134</sup>

In making an employment determination, the employer must also consider any "certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein."<sup>135</sup> Note that the certificate of good conduct is similar to the certificate of employability in Tennessee, which provides judicial authorization that a specific individual has rehabilitated to a substantial degree and will be able to contribute and perform in employment.<sup>136</sup> This further demonstrates the need for a similar statute in Tennessee—Tennessee has already taken one of the crucial steps listed in the New York Anti-discrimination Statute.<sup>137</sup>

Washington D.C.'s ("D.C.") Antidiscrimination Statute is an example of a statute that has specific and individualized assessment requirements.<sup>138</sup> D.C.'s antidiscrimination statute prohibits an employer from inquiring about or requiring an application to reveal an arrest or criminal accusation.<sup>139</sup> Employers cannot ask

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133. *Id.*

134. *Id.* § 753(1).

135. *Id.* § 753(2).

136. TENN. CODE ANN. § 40-29-107 (2015).

137. *See id.*

138. D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

139. *Id.* § 32-1342(a).

an employee or require disclosure of a criminal conviction until after a conditional offer of employment is given.<sup>140</sup> A conditional offer of employment is defined as an offer that is conditional based only on results of subsequent inquiry into a criminal background or another “employment-related contingency expressly communicated to the applicant at the time of the offer.”<sup>141</sup> Employers may only revoke conditional offers for a legitimate business reason, which must be reasonable in light of the following factors:

- (1) The specific duties and responsibilities necessarily related to the employment sought or held by the applicant;
- (2) The bearing, if any, of the criminal offense for which the applicant was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
- (3) The time which has elapsed since the occurrence of the criminal offense;
- (4) The age of the applicant at the time of the occurrence of the criminal offense;
- (5) The frequency and seriousness of the criminal offense; and
- (6) Any information produced by the applicant, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct since the occurrence of the criminal offense.<sup>142</sup>

These factors are nearly identical to the factors in the New York Anti-discrimination statute, and they are also consistent with the business necessity defense in similar actions under federal law, particularly Title VII actions of discriminatory impact.<sup>143</sup>

The D.C. statute exempts companies that employ people who will work in sensitive industries or with vulnerable populations.<sup>144</sup> For example, the statute exempts employers “[w]here a federal or District law or regulation requires the consideration of an applicant’s criminal history for the purposes of employment”

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140. *Id.* § 32-1342(b).

141. *Id.* § 32-1341(3).

142. *Id.* § 32-1342(d).

143. *See* N.Y. CORRECT. LAW § 753 (McKinney, Westlaw through L.2016); *see also supra* Part IV.A.

144. D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

and employers that “provide[] programs, services, or direct care to minors or vulnerable adults.”<sup>145</sup>

*C. Why Ban the Box is Imminent for Tennessee*

In March 2016, both houses of the Tennessee legislature voted in favor of a ban the box bill applying to all state employers in Tennessee.<sup>146</sup> The law provides that any state employer announcing an employment position that is not covered shall *not* inquire into an applicant’s criminal history on the application form, but “[a]n employer may inquire about an applicant’s criminal history after the initial screening of applications.”<sup>147</sup> However, this does not apply to private employers.<sup>148</sup> During the inquiry, an employer must provide the applicant an opportunity to explain any conviction, and the employer must consider factors such as:

- (1) The specific duties and responses of the position;
- (2) The bearing, if any, that an applicant’s criminal history may have on the applicant’s fitness or ability to perform the duties required by the position;
- (3) The amount of time that has elapsed since the applicant’s conviction or release;
- (4) The age of the applicant at the time of the commission of each offense;
- (5) The frequency and seriousness of each offense;
- (6) Any information produced by the applicant regarding the applicant’s rehabilitation and good conduct since the occurrence of an offense; and

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145. *Id.*

146. S.B. 2440, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016); H.B. 2442, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016), which became TENN. CODE ANN. § 8-50-112 (2016).

147. TENN. CODE ANN. § 8-50-112(b) (2016).

148. *See id.* § 8-50-112(f)(2) (“‘Employer’ [m]eans the state and any agency, authority, branch, bureau, commission, corporation, department, or instrumentality of the state. . .”).

(7) Any public policy considerations with respect to the benefits of employment for applicants with criminal histories.<sup>149</sup>

A “[c]overed position” in Tennessee would be “a position for employment for which a criminal background check is required under federal law or for which the commission of an offense is a disqualifying event for employment under federal or state law[.]”<sup>150</sup>

The Tennessee ban the box law represents a huge milestone for Tennessee in embracing fair chance hiring policies for ex-offenders.<sup>151</sup> While this is a significant step in the right direction for reducing recidivism and incorporating ex-convicts back into productive society, evidence shows that the best way to fulfill these goals is through a fair chance hiring policy that applies to *both* public and private employers.<sup>152</sup> The current legislation alone shows that the ban the box movement is imminent for Tennessee. And evidence of localities in Tennessee willingly embracing fair chance hiring policies is further proof that Tennessee should adopt a statewide ban the box policy.

The National Employment Law Project, which researches the latest developments in fair hiring practices and widely promotes ban the box laws, recently outlined several “Lessons Learned from Fair Chance Hiring Campaigns[.]”<sup>153</sup> The study found that it is helpful to establish strong ban the box policies in major metropolitan areas in a state before enacting a statewide reform.<sup>154</sup> Many of the current statewide ban the box laws were passed following enactment of local ordinances (California, Connecticut, Illinois, Massachusetts, Minnesota, and Rhode Island are

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149. *Id.* § 8-50-112(c). Note the similarities to the *Green* factors. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975).

150. *Id.* § 8-50-112(f)(1).

151. *See id.*

152. *See supra*, Part II.A. Further, the thousands of individuals released from prison in Tennessee each year will likely be applying for jobs not limited to state employment. To best meet the goals of these policies, a Tennessee ban the box policy should apply to both public and private employers, encouraging employment for individuals fit for the job across the board, not just in government jobs.

153. SEIZING MOMENTUM, *supra* note 22, at 4–5.

154. *Id.* at 5.

a few examples).<sup>155</sup> The study found that this “is especially true in more politically conservative states, like Georgia, Florida, Indiana, Michigan, North Carolina, Texas, and Wisconsin, where there are local campaigns that can help lay the groundwork for statewide initiatives.”<sup>156</sup>

Memphis, for example, has a ban the box law applying to the city as an employer.<sup>157</sup> This demonstrates that some Tennessee citizens, through their legislatures, have been thinking about, and are receptive to, the idea of promoting job opportunities for individuals with criminal records.<sup>158</sup> The Memphis ordinance bans inquiry by the city into an applicant’s criminal history until “after it has been determined that the applicant is otherwise qualified for the position.”<sup>159</sup> This prohibits initial, automatic disqualification of an applicant based solely on criminal record. The ordinance also explicitly prohibits the “box” on the job application regarding inquiry into criminal history.<sup>160</sup> It specifically excludes “police, fire and emergency medical services positions,” allowing those positions to have initial background checks for safety reasons.<sup>161</sup> This is similar to the exceptions in statewide statutes for sensitive jobs.

The Memphis ordinance then outlines the specific steps an employer must make to inquire into a criminal background once a candidate has been deemed otherwise qualified for the position.<sup>162</sup> The employer must give a conditional offer of employment, pending a history check, and the applicant must complete a form listing any previous convictions.<sup>163</sup> The city then must provide the applicant with written notification: (1) that a criminal background check will be conducted, (2) that the applicant has an opportunity to rebut a decision of withdrawal of the conditional offer, and (3) what evidence the applicant can provide to rebut information.<sup>164</sup> If

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155. *Id.*

156. *Id.*

157. MEMPHIS, TENN. CITY CODE § 3-4-4 (2016).

158. *See id.*

159. *Id.* § 3-4-4(B).

160. *Id.*

161. *Id.*

162. *Id.* § 3-4-4(C).

163. *Id.*

164. *Id.* § 3-4-4(C).

the city does choose to rescind an offer after the criminal background check, it must provide a copy of the background check with the specific incident disqualifying employment highlighted.<sup>165</sup> The applicant then has ten days to rebut the denial of employment.<sup>166</sup>

The Memphis ordinance identifies factors the city may use to evaluate previous convictions: (1) the nature of the crime in relation to the job at issue, (2) information concerning the applicant's rehabilitation, (3) time elapsed since the conviction, (4) other information about the degree of rehabilitation or good conduct, (5) the applicant's age at the time of the conviction, (6) the gravity of the offense, and (7) the public policy of the city to encourage employment for ex-offenders.<sup>167</sup>

Other Tennessee cities also support ban the box policies. For instance, Nashville has a significant ban the box movement, and efforts to add a ban the box referendum for all Nashville employers to the August 2015 ballot nearly passed.<sup>168</sup> The Nashville Metro Civil Service Commission recently adopted a ban the box statute effective January 1, 2016, that applies to all potential employees for the Metro Civil Service Commission.<sup>169</sup> Further, Chattanooga voted to remove the criminal history question on city job applications in December 2015.<sup>170</sup> The presence of ban the box legislation in all of the major metropolitan areas in Tennessee, along with the newly-passed statewide ban the box policy for public employers, demonstrates that Tennessee is receptive to the goals behind this movement. A statewide ban the box policy

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165. *Id.* § 3-4-4(D)(1).

166. *Id.* § 3-4-4(D)(2) (“The applicant or current employee shall have ten business days, after notice and the photocopy of the conviction history report from the city, to respond to the city regarding the conviction history report. The city shall provide the applicant with an opportunity to present information rebutting the accuracy and/or relevance of the conviction history report, including information pertaining to any of the factors listed in this subsection D. The city must review all information and documentation received from the applicant prior to taking any final action as to whether to hire said applicant.”).

167. *Id.* § 3-4-4(E). Again, note the similarities to the *Green* factors. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975).

168. *See* Garrison, *supra* note 6.

169. Garrison, *supra* note 6.

170. Sistrunk, *supra* note 122.

would align with current views and promote uniformity across the state.

Moreover, in 2014, Tennessee enacted a law to “help reformed former felons find employment and lead lawful lives as productive members of society.”<sup>171</sup> The law creates a certificate of employability, in which a judge determines that a specific person with a conviction is sufficiently rehabilitated to be deemed fit for employment.<sup>172</sup> The certificate is meant to help create jobs for those with criminal histories, reduce crime by decreasing the recidivism rate, and protect employers from claims of negligent hiring.<sup>173</sup> When determining whether to grant the certificate of employability, the judge will consider whether the petitioner has sustained an honest, respectable character and whether granting of the petition will materially assist the petitioner in attaining gainful employment; the judge will also ensure that the petitioner does not pose an unreasonable risk to public safety or the safety of any individual.<sup>174</sup>

While the certificate of employability is a step in the right direction, it does not fully address the issue.<sup>175</sup> The certificate neither guarantees hiring nor prevents an employer from inquiring into the criminal background of the applicant; it is more so aimed at providing legal protection to the employer.<sup>176</sup> It also puts a financial burden on the applicant by requiring a filing fee of up to \$450.<sup>177</sup> This is a huge burden for a person who has been incarcerated and is seeking a job. Further, the process requires an individual to prepare a petition, find references, and appear before a court; some situations may even require the petitioner to hire an attor-

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171. Suzanne Robertson, *Senate Approves Bill for Felons' Employability Certificate*, TENN. B. ASS'N (Mar. 11, 2014, 4:15 PM) <http://www.tba.org/news/senate-approves-bill-for-felons-employability-certificate>; see also TENN. CODE ANN. § 40-29-107 (2015).

172. See TENN. CODE ANN. § 40-29-107 (2015).

173. Robertson, *supra* note 171.

174. See TENN. CODE ANN. § 40-29-107(2015).

175. Josh Spickler, *New Certification Law Seeks to Give Tennesseans with a Record a Better Chance in the Job Market*, SHELBY COUNTY PUB. DEFENDER (July 18, 2014), <http://defendshelbyco.org/new-certification-law-seeks-to-give-tennesseans-with-a-record-a-better-chance-in-the-job-market/>.

176. See *id.*

177. *Id.*



ney.<sup>178</sup> A certificate of employability, though, is one way states begin to address the problem of recidivism and incorporating ex-convicts back into the workforce. Tennessee has already adopted the certificate of employability, which shows that Tennessee is ready to address recidivism and incorporate ex-convicts into the workplace.

In addition to the evidence within Tennessee showing the state is receptive to the policies behind the ban the box movement, there is evidence of similar states embracing ban the box laws. Georgia, a similar southern and conservative state, has a ban the box law that applies to public employers.<sup>179</sup> Georgia became the first state in the South to ban the box in 2015 when Governor Nathan Deal signed the policy into law through an executive order.<sup>180</sup> In Atlanta, Georgia, research showed that a separate city-wide fair chance hiring policy resulted in people with previous arrest or conviction histories making up ten percent of the City's new employees between March and October of 2013.<sup>181</sup> In North Carolina, another southern and conservative state with a similar policy background, many counties and cities have adopted ban the box laws as well: Charlotte, Carrboro, Durham County, Durham City, Spring Lake, Cumberland County.<sup>182</sup>

Throughout the United States, the trend among both public and private employers is to move away from initially inquiring into criminal history in order to promote effective assimilation into the workplace for ex-offenders. In addition to similar southern states moving towards fair chance hiring policies, some private sector companies have abandoned inquiry into criminal history on job applications, which shows how broad and far-reaching this issue is. For example, nationwide employers such as Target are enacting ban the box policies to increase job opportunities for those who

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178. *Id.*

179. *Victory! Georgia Becomes the First State in the South to "Ban the Box" on State Employment Applications*, GA. JUST. PROJECT (Feb. 23, 2015), <http://www.gjp.org/news/victory-georgia-becomes-the-first-state-in-the-south-to-ban-the-box-on-state-employment-applications/>.

180. *Id.*

181. *See* SEIZING MOMENTUM, *supra* note 22, at 2.

182. *See North Carolina's Fair Chance Law: Cities or Counties with a Fair Chance Policy*, VERIFYPROJECT.COM, <http://www.verifyprotect.com/ban-the-box/north-carolina/> (last visited Oct. 20, 2015).

have served their time for an offense and are ready to assimilate back into productive society.<sup>183</sup> Because many private sector companies and states have implemented fair hiring practices like ban the box, employers already have to comply with numerous variations in fair hiring practices.<sup>184</sup> Montserrat Miller, a partner in the D.C. office of Arnall Golden Gregory, who deals closely with varying ban the box policies, advised, “[t]he trend on passage of ban-the-box measures will continue at the state levels and should therefore be considered holistically by companies as they consider their overall hiring and retention practices with respect to the use of criminal history records.”<sup>185</sup>

State ban the box statutes serve as a remedy for those affected by this largely unregulated area of federal law. Because ban the box laws help to solve significant problems, and are gaining nationwide attention, the Tennessee legislature should adopt a statewide ban the box policy applying to both public and private employers. This will provide avenues of aid to those, such as white males, who have no other remedies under Tennessee law for employment discrimination based on criminal convictions. It will also aid tremendously in reducing the recidivism rate and paving the way for more stable communities.

## VI. PROPOSED BAN THE BOX LAW FOR TENNESSEE

To accommodate for the integration of the 15,556 individuals who were released from incarceration in Tennessee in 2014 (along with the tens of thousands of individuals released from prison in Tennessee in previous years), who will need to assimilate back into society and the workforce, the Tennessee legislature should enact a policy that restricts the use of criminal convictions and arrest records in the hiring process for both public and private

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183. Maxwell Strachan, *Target to Drop Criminal Background Questions in Job Applications*, HUFFINGTON POST (Oct. 30, 2013, 6:24 PM), [http://www.huffingtonpost.com/2013/10/29/target-criminal-history-questions\\_n\\_4175407.html](http://www.huffingtonpost.com/2013/10/29/target-criminal-history-questions_n_4175407.html).

184. See Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC’Y FOR HUM. RESOURCE MGMT., <http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/ban-the-box-movement-viral.aspx> (last visited Oct. 21, 2016).

185. *Id.*

employers.<sup>186</sup> The national ban the box movement, supported by federal institutions such as the EEOC, has been steadily gaining momentum in Tennessee. This is evidenced by Nashville, Memphis, and Chattanooga passing city ordinances banning the box for public employers and the Tennessee legislature voting in favor of a ban the box law applying to all state employers.<sup>187</sup> Taking into account the effectiveness of laws in other states, as well as the enforcement guidelines provided by the EEOC, this Note proposes a ban the box law to apply across the state of Tennessee.

The proposed Tennessee law will apply to both public and private employers. This is important because it provides the most significant protection for ex-offenders and best accommodates the policies behind the ban the box movement—decreasing recidivism by increasing employment opportunities. A law applying to only state employers increases the job opportunities available to individuals released from incarceration, but it leaves out a significant portion of jobs for which those individuals could apply and possibly attain. This proposed law does not mandate that any private employer hire people with convictions. It would simply allow the opportunity for all persons deemed otherwise fit for the job to be interviewed and given a chance for employment. The timeline for my proposed Tennessee law provides that employers may not inquire into criminal history until the employer has determined that the applicant is otherwise qualified for the position. This will provide an opportunity for the candidate to explain or provide other evidence relating to the conviction. Further, only a relevant conviction will be used as grounds for denial of a position.

The law will provide exceptions for sensitive jobs or jobs associated with vulnerable populations, meaning that the ban the box law will not apply to those positions. This will be developed on a case-by-case basis rather than specifically listing the jobs that come into contact with vulnerable populations, but the statutory comments will purposely mention several examples.<sup>188</sup> The statute will also provide an exception for employers that “provide[] pro-

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186. See CARSON, *supra* note 1, at 10 tbl.7.

187. See MEMPHIS, TENN. CITY CODE § 3-4-4 (2016); Garrison, *supra* note 6; see also Capelle, *supra* note 18.

188. Some examples could include teachers, social workers, firefighters, and child care providers.

grams, services, or direct care to minors or vulnerable adults,” or any job required by state or federal law to have a background check.<sup>189</sup> This provision includes teachers and adult caregivers, along with positions such as therapists, doctors, or other positions of significant fiduciary authority.

My proposed Tennessee ban the box law will also provide an exemption for employers who have ten or fewer employees. This is meant to protect and encourage small businesses that do not have the resources to screen potential employees, in contrast to larger businesses with dedicated human resources departments.

When the employer, in compliance with the rest of the statute, has otherwise deemed a potential employee fit for the position, the employer may then conduct a background check into the applicant’s criminal history. If the background check reveals a prior arrest or conviction, the employer must use the following guidelines to evaluate the offense:<sup>190</sup> (1) specific duties and responsibilities necessarily related to the position sought by the applicant; (2) whether the prior conviction will bear upon the applicant’s fitness or ability to perform a duty or responsibility of the position; (3) the time elapsed since the criminal offense; (4) the applicant’s age at the time of the offense; (5) the frequency and seriousness of the offense; and (6) any information produced by the applicant or on his or her behalf regarding rehabilitation and good conduct since the offense.<sup>191</sup> These factors align with those set forth in the guidelines provided by the EEOC and the *Green* factors recognized by federal courts in determining a business necessity.<sup>192</sup>

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189. See D.C. CODE ANN. § 32-1342(c) (West, Westlaw through 2016).

190. See, e.g., D.C. CODE ANN. § 32-1342(d) (West, Westlaw through 2016) (“legitimate business reason” factors); N.Y. CORRECT. LAW § 753(h) (McKinney, Westlaw through L.2016); MEMPHIS, TENN. CITY CODE § 3-4-4(E) (2016).

191. See TENN. CODE ANN. § 40-29-107 (2015) (providing for a certificate of employability if a judge determines certain factors of rehabilitation are met); see also *Green v. Mo. Pac. R. Co.*, 523 F.2d 1290, 1297 (8th Cir. 1975) (identifying factors to consider when assessing whether an exclusion is consistent with a business necessity: the nature and gravity of the offense, time passed since the offense, and the nature of the job held or sought).

192. See *Green*, 523 F.2d at 1298 (striking down an employment practice refusing to consider any applicant convicted of a crime other than a minor traffic offense because “fear of cargo theft,” “employment disruption caused by recidi-

If an employer follows the above guidelines but deems the applicant unfit for the position, the employer must provide written notice to the applicant containing the reason (the specific factor that the applicant did not meet) for refusing the position.<sup>193</sup> The written notice requirement will align with the guideline from the EEOC that provides for identifying the specific offenses that would make a candidate unfit for the particular job.<sup>194</sup> It would also ensure that the employer thoroughly assessed the candidate and provide some protection against misuse of the guidelines. Understandably, many may argue that this proposed law is a meaningless hurdle for employers who will likely just dismiss the applicant from consideration as soon as the law will allow them to, but, as mentioned previously, statistics taken from other states and municipalities suggest that such an argument is likely to fail because ban the box policies have led to employers hiring more people with convictions.<sup>195</sup> Opponents of ban the box policies may also argue that a policy limiting inquiry into criminal background during the application process puts an undue burden on small businesses without human resources offices because they will be forced to waste valuable resources interviewing potential candidates and providing conditional offers to later discover a hurdle to employment because of a criminal history.<sup>196</sup> However, concerns like these are not as significant as they might seem because many ban the box laws, including my proposed law for Tennessee, exempt employers who have ten or fewer employees, recognizing their lack of

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vism,” and “alleged lack of moral character” were not business necessities); EEOC ENFORCEMENT GUIDANCE, *supra* note 51.

193. See MEMPHIS, TENN. CITY CODE § 3-4-4(D) (2015) (providing guidelines for how a public employer must inform the potential employee of revocation of the conditional offer).

194. EEOC ENFORCEMENT GUIDANCE, *supra* note 51.

195. See SEIZING MOMENTUM, *supra* note 22, at 2 (describing how city officials in Atlanta discovered that, in the seven months after the ban the box policy took force, ten percent of new hires were people with convictions).

196. *Tennessee Considers Ban the Box*, NAT’L FED’N OF INDEP. BUS. (Mar. 31, 2015), <http://www.nfib.com/article/tennessee-considers-ban-the-box-68581/>. Josh Boyd, a small business owner in Nashville, indicates that ban the box will cause him to waste “hours of time” on the wrong candidate, increase the likelihood of his hiring a felon, and will overall make work environments more dangerous due to the risk of hiring a prior felon. *Id.*

resources to conduct such in-depth hiring practices.<sup>197</sup> This exemption of small businesses, along with the exemption for sensitive jobs or those associated with vulnerable populations, stems from balancing the concern of safety against the concern of improving job opportunities for ex-offenders.<sup>198</sup> Current ban the box laws take into account the conflicting concerns of the employer's interest in hiring the best candidate for the job and protecting against negligent hiring versus the public concern for ex-convicts to assimilate back into the productive workforce, reducing the recidivism rate and improving the overall public good.

## VII. CONCLUSION

Tennessee should adopt a statewide ban the box law applying to both public and private employers to encourage employment and assimilation back into productive society of individuals who do not pose a threat to others and who have already served time for their prior offenses. The nationwide trend is to move towards fair hiring practices for those with criminal convictions and arrest records, and there is also significant evidence that Tennessee is ready to embrace an expanded policy. Other states have adopted statewide ban the box policies after a major metropolitan area in the state enacted a ban the box ordinance. For example, Tennessee's fellow southern state, Georgia, enacted a statewide ban the box policy on February 23, 2015, less than a year after Atlanta had enacted its own city ordinance limiting inquiry into criminal history on job applications.<sup>199</sup> In Tennessee, Nashville, Memphis, and Chattanooga have all adopted ban the box policies that apply to public city employers, demonstrating that Tennesseans are receptive to the idea and setting the stage for a statewide ban the box policy. The Tennessee legislature seemingly took a huge step for-

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197. *See id.*

198. *See* D.C. CODE ANN. § 32-1342 (West, Westlaw through 2016).

199. *See* Roz Edward, *Atlanta City Council Approves Ban the Box Legislation*, ATLANTA DAILY WORLD, <http://atlantadailyworld.com/2014/10/06/atlanta-city-council-approves-ban-the-box-legislation/> (last visited Oct. 21, 2016); Mollie Reilly, *Georgia Governor Signs 'Ban the Box' Order Helping Ex-Offenders Get Jobs*, HUFFINGTONPOST (Feb. 24, 2015, 4:17 PM), [http://www.huffingtonpost.com/2015/02/24/georgia-ban-the-box\\_n\\_6746006.html](http://www.huffingtonpost.com/2015/02/24/georgia-ban-the-box_n_6746006.html).

ward by passing a statewide ban the box bill applying to public employers.<sup>200</sup> This has the potential, based on statistics from other states, to significantly increase job opportunities for people with convictions. But to fully meet the goals of reducing recidivism and bettering the public good by incorporating ex-convicts into the productive workforce, Tennessee should enact a statewide ban the box policy applying to both public and private employers.

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200. See TENN. CODE ANN. § 8-50-112 (2016).