

Report of the Employment Workgroup to the Ohio Ex-Offender Re-entry Coalition

D E C E M B E R 2 0 0 9

The Charge to the Coalition and to the Employment Workgroup

It has become exceptionally difficult for the growing number of Ohioans with criminal records to fully contribute to society. But investing in ex-offender re-integration can pay big dividends in the form of reduced recidivism and increased public safety, decreased corrections costs, and even the reducing poverty in households and whole neighborhoods that have a high concentration of ex-offenders. In 2008 alone, Ohio courts handed down over 320,000 criminal convictions.¹ As the number of Ohio citizens with criminal records swells dramatically, removing barriers to their full participation in society becomes a critical component to the economic vitality and public safety of *all* of our communities.

Recognizing this, the General Assembly created the Ohio Ex-Offender Re-entry Coalition last year.² The Coalition, made up of 17 state-agency leaders as well as community stakeholders, was charged with reporting to the legislature on the barriers affecting the successful re-entry of ex-offenders into the community. This mandate included analyzing the effects of those barriers on ex-offenders and on their children and other family members in various areas, including:

- Admission to public and other housing;
- Child support obligations and procedures;
- Parental incarceration and family reunification;
- Social security benefits, veterans' benefits, food stamps, and other forms of public assistance;
- Employment;
- Education programs and financial assistance;
- Substance abuse, mental health, and sex offender; treatment programs and financial assistance;
- Civic and political participation;
- And any other collateral consequences under the Revised Code or the Ohio administrative code law that may result from a criminal conviction.

The Coalition created this workgroup to focus on the *employment* barriers. We have begun an analysis of these barriers and of potential policy changes to reduce or remove those barriers. Our overarching purpose has been to find ways to effectively give people with criminal records greater access to jobs while maintaining or even improving public safety.

Workgroup Members (alphabetical)

Tom Dilling—Legislative Liaison, Board of Nursing

Stephen JohnsonGrove, co-chair—Attorney, Ohio Justice & Policy Center (Cincinnati)

Irene Lyons—Assistant Legislative Liaison, Department of Rehabilitation & Corrections (DRC)

Edward Little—Criminal Justice Consultant, Cuyahoga County Justice Affairs

Rob Manning—Parole Administrator, Department of Youth Services

Mike Miller—Policy & Governmental Affairs Officer, State Medical Board

Scott Neely—Legislative Liaison, DRC

Michael Nelson—Private Defense Attorney (Cleveland)

Ed Rhine—Deputy Director of Policy and Offender Re-entry, DRC

Jim Slagle—Criminal-Justice Section Chief, Office of the Attorney General

Joe Stan—Employment Specialist, Goodwill-Easter Seals of the Miami Valley (Dayton)

Wanda Suber, co-chair—Offender Job Linkage Administrator-North Region, DRC

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Progress Report: Clarifying the Issues, Exploring Solutions

This committee has met monthly since June to identify the primary issues preventing people with criminal records from entering the workforce and discuss solutions. Drawing on the extensive experience of workgroup members, we classified **three kinds of barriers** that citizens with criminal records face to becoming employed taxpayers:

Legal: Scattered throughout Ohio statutes and regulations are over 400 ‘collateral sanctions’—laws triggered by criminal records that absolutely bar or partially restrict access to employment, housing, and other social privileges. A related but distinct set of legal issues involve the accuracy of and access to criminal record information in the licensure and hiring processes.

Employer reluctance: Job applicants with criminal records often face company policies and hiring managers’ fears that presume such applicants are uniformly untrustworthy and dangerous. Often, these employers’ fears are rooted in the possibility that they will be sued for negligently hiring someone with a criminal record.

Lack of skills/social capital: A large portion (though certainly not all) of Ohio’s ex-offenders lack basic math and literacy skills. Also, many lack the technical (“hard”) and interpersonal (“soft”) skills necessary to succeed in the modern economy. This lack is most acute for those recently released from prison or jail.

Legal Barriers: Scope of the Issue

Though we have not conducted a complete, detailed review of all of Ohio’s collateral sanctions, a relatively recent catalog of these laws gave us a sense of their complexity and diversity.³ Some collateral sanctions are simple and absolute, though not entirely justifiable. For example, no one with any felony, no matter how old, can ever have an underground-tank inspection license⁴ or be a wildlife game protector.⁵ Other collateral sanctions are far more complex and appear to have been created with a more careful eye towards which offenses are actually relevant to the field of employment. For example, the Board of Education separately lists offenses that are absolute, permanent bars to licensure and offenses that bar licensure only if there are multiple offenses or only for a certain period of time; these rules also vary depending on how much direct responsibility a school employee has over school children.⁶ It was also clear from several examples that collateral sanctions are not only a problem for people recently released from prison with felony records—many of these legal restrictions can be triggered by misdemeanors and by very old criminal records.

Recent Board of Nursing data highlighted that, despite the strict rules governing criminal histories for health-care employees, very few nursing-license applicants were actually excluded on that basis. In 2007-2008, the Board of Nursing licensed approximately 10,000 nurses. Of those, 1,109 had a criminal history of some kind (convictions and/or non-convictions). The Board investigated 103 of those further, but in the end, permanently denied only 4 applicants based on their criminal record. **Similar data from other Coalition-member agencies would assist the entire Coalition and the legislature in understanding the real-life impact of the statutory and regulatory employment barriers.**

Our Initial Approach to Reducing Legal Barriers

To propose comprehensive reform to Ohio’s 400+ collateral sanctions, we recognized the need for a more up-to-date collection of these laws. A pending grant request to the Ohio State Bar Foundation, which appears likely to be awarded, would fund the creation of a collateral sanction database beginning early next year.

In the meantime, we discussed grouping all of the existing collateral sanctions into three rough categories: clearly overbroad, clearly appropriate as-is, and those in the gray area in-between. We acknowledged that even this loose categorization, however, would not be simple. The relevance of a particular offense is often in the eye of the beholder.

The main focus of our research and discussions for removing legal collateral sanctions was Employment Access Certificates, modeled on “certificates of rehabilitation” in New York and Illinois.⁷ We have not yet come to agreement on many of the details of how these Certificates would operate. In particular, we noted that asking licensing boards to give individualized consideration to Certificate-holders with certain criminal records—records that would otherwise trigger a mandatory bar—was potentially very disruptive to agencies that were comfortable with their existing regulatory scheme. We are eager to receive feedback from Coalition members on the framework we have developed thus far.

Framework for Employment Access Certificates	
Who would be eligible for a certificate?	<p>Anyone with a criminal record that has lived a sufficient time in the community <i>after the completion of their sentence</i> (not from date of conviction) without any new crimes:</p> <ul style="list-style-type: none"> ▶ Misdemeanors—1 years ▶ Non-violent felonies—3 years ▶ Violent felonies—5 years <p>*Anyone with a sex offense (misdemeanor or felony) or any 1st or 2nd degree felony would be <i>excluded</i> from eligibility.</p> <p>Time periods flexible, open for discussion.</p>
Limit on number	No limit on number of offenses so long as waiting periods were met.
Other criteria to be considered	<ul style="list-style-type: none"> ▶ The seriousness of the person’s convictions, how old the offenses are, how long it has been since they were committed, and how old the person was at the time of the offenses. ▶ Various life achievements since release: employment history, educational attainment, successful substance abuse treatment, completion of behavior-related programming, completion of job training or other classes, letters of recommendation. ▶ Anyone with personal knowledge of the applicant that wishes to oppose the granting of a certificate might also be allowed to submit relevant evidence or testimony. <p>Ohio Judicial Conference urged us to develop <i>objective</i> factors so that the decision-making process would be as clear as possible.</p>
Who would grant the Certificates?	<ul style="list-style-type: none"> ▶ <i>Local judges.</i> The Ohio Judicial Conference expressed strong reluctance to take on the responsibility of evaluating someone’s rehabilitation because it would involve knowing about years in which the court had no involvement in the certificate-applicant’s life; ▶ <i>Local re-entry coalitions</i> (already operational in several Ohio counties). These councils would have to be authorized by the State Reentry Coalition and would likely include seats designated for appointment by local courts, prosecutors, and other key players in the criminal justice system, along with other community members; ▶ <i>Local community corrections planning boards.</i> <p>Undecided, but we feel strongly that only <i>one</i> should be chosen. Overall, we agreed that it would be best to <i>keep the decision-maker local</i> so as to reinforce local ownership for re-entry success.</p>

Framework for Employment Access Certificates

Legal effect of certificate

- ▶ *Overcoming absolute bars to employment/licensure*
 - When a Certificate-holder applies for a state-regulated employment license and the relevant regulation contains an absolute bar for an offense that the Certificate-holder has, the licensing decision-maker would be required to give that applicant *individualized consideration*. That is, the licensing agency would be required to consider (and document in writing) whether the applicant is appropriate for that field of employment, given the age and nature of the offense(s), the person's age and culpability at the time of the offense, and how the person has been rehabilitated since then.
 - The certificate would act as a *rebuttable presumption* that the applicant is rehabilitated, that they are no longer considered dangerous or untrustworthy.
 - The licensing agency could still reject applicants in appropriate circumstances; a Certificate would never guarantee that a license would be granted.
- ▶ *Overcoming discretionary barriers.* The Certificate would also act as a rebuttable presumption of good moral character or rehabilitation that may be required by any discretionary rule governing employment or licensure.
- ▶ *Not federal.* The Certificate would not and could not affect employment restrictions based on federal law.

Incentives to employers that hire people with certificates

- ▶ Statutory *protection from negligent-hiring lawsuits* based on the hiring of someone with a criminal record (should be coupled with *regulation of business-insurance premiums* to ensure employers are not financially penalized for hiring certificate holders).
- ▶ State-backed *bond to protect employers* who hire certificate holders, modeled on highly successful federal bonding program (www.bonds4jobs.com).
- ▶ We discussed the possibility of a state *business-tax credit*, similar to federal Work Opportunity Tax Credit. This idea is currently embodied in **Senate Bill 21**.

Verifying currentness/revocation

- ▶ The Bureau of Criminal Identification and Investigation would be the central repository for the currentness of any individual's Certificate. A notation regarding the issuance of a Certificate to a person must be included on their BCI criminal background check.
- ▶ Revocation would be automatic upon conviction for new crime. Traffic offenses (other than OVI/DUI) and minor misdemeanors would not trigger revocation.

Data collection

To demonstrate the effectiveness of these certificates over time and to ensure accountability for their administration, it is *essential* that the statute mandate record keeping such as how many certificates are issued/denied, the kinds of offenses applicants had, and how many employment licenses were granted/denied by agencies to certificate holders.

Alternate names

Certificate of Access	Certificate of Rehabilitation
Certificate of Employability	Certificate of Relief from Disabilities
Employment Readiness Certificate	Civic Restoration Certificate

Our Initial Approach to Employer Reluctance

Beyond the legal collateral sanctions, the certificate model outlined above also attempts to directly impact factors that may be dissuading employers from hiring people with criminal records. We wanted to offer employers financial and legal protection from unreasonable and unfounded fears that could lead to liability. So, we discussed statutorily protecting employers that hire certificate holders from negligent-hiring lawsuits and creating a state-backed bond to insure employers against any loss caused by a certificate-holder on the job. The Attorney General's Office prepared a short research memo on negligent hiring under Ohio law and we obtained a similar memo from the Goodwill Industries national office (see Appendix). We also discussed a possible state tax credit. But before recommending such policies, we knew it was necessary to get feedback directly from employers about these ideas.

Learning More Directly from Employers

Over the course of several meetings, we invited a diverse group of employers and business people to tell us whether the various elements of the Employment Access Certificate would be relevant to real-life hiring decisions. That group included:

André Imbrogno, legislative liaison for the **Ohio Judicial Conference**;

Howard Warner, executive director of the **Ohio Barber Board**;

Jill Rizika, executive director of **Towards Employment**, a Cleveland non-profit providing training, case management, and supportive services to help low-income people become self-sufficient through employment;

Jay Gray, executive director of **Pilot Dogs**, a non-profit guide-dog training facility in Columbus;

Carlos Ellis, owner of **Son of the King**, LLC, a medium-sized construction company in Columbus;

Barry Peel, Vice President, **South Central Ohio Minority Supplier Development Council**;

Sean McGlone, Associate General Counsel & Director of Health Policy; and **Charlie Solley**, Manager of State Policy and Advocacy, **Ohio Hospital Association**.

We also received brief initial input from the Ohio State Bar Association (Steve Stover) and the Ohio Chamber of Commerce (then-government affairs liaison Anthonio Fiore).

This small but experienced group made it clear that our certificate model, no matter how well designed, would not be a silver bullet for the difficulties ex-offenders face in finding and maintaining employment. Several emphasized the essential importance of having a real feel for a job applicant—knowing their work history, volunteering, personal references—something they did not think would be fully communicated through a certificate. Several also emphasized that even with legal and financial protection from liability, the risk of an ex-offender doing damage to property or another person on the job was primarily a public-relations risk. They made clear that no certificate program could remedy damage to the precious public trust every business works hard to build and maintain.

Even considering the possibility that Certificates would have a modest effect on individual employer decisions, some in our group still believe that Certificates could have two intangible benefits. First, as a benchmark for ex-offenders to strive for—something that would give them hope that, if they worked hard to turn their lives around, society would welcome them back. Second, we considered that if the launch of a Certificate program was accompanied by significant employer and general-public education, it could help create a shift in our current culture of fear that casts a cloud of supposed dangerousness and untrustworthiness over anyone with a criminal record, no matter how old. In many ways, we recognized that such a shift in culture was the most difficult but most important thing that our efforts could accomplish.

Developing Necessary Skills in Returning Citizens: Transitional Jobs

Anyone who works one-on-one with people with criminal records who are struggling to find jobs quickly comes face-to-face with some of the root causes of crime, such as poverty, poor education, and lack of other social capital. These deficiencies also make it difficult for returning citizens to find, maintain, and advance in employment even after they have left their criminal past in the past.

Despite these challenges, many of our guests had hired people with criminal records or helped them find jobs, many with long-term success. Those that had hired ex-offenders stressed the value of developing a relationship with such an employee in a probationary or training period. Such a relationship-building period allowed the ex-offenders to develop the technical job skills and their interpersonal skills necessary for maintaining and advancing in a job. At Towards Employment, Ms. Rizika and her staff explicitly design training for their clients to include these ‘hard’ and ‘soft’ skills. Mr. Warner from the Barber Board also highlighted the importance of developing entrepreneurial skills in people with criminal records because they have so few options in the regular employment market.

We discovered that one of the most well-documented strategies for providing the intensive skill development needed by people recently released from incarceration, as well as for those on some form of supervision, is *transitional jobs*. The National Transitional Jobs Network defines this as an employment strategy that seeks to overcome employment barriers and transition people with labor market barriers into work using wage-paid, short-term employment that combines real work, skill development and supportive services.⁸ In many respects, Towards Employment in Cleveland is exactly that.⁹ Ms. Rizika disagreed slightly, saying that a true transitional job program actually paid worker wages while her program relied on public assistance during the training and supported employment phases before the worker graduated to unsubsidized, full-time employment.

Probably the best known and most successful transitional job program in the country is the Center for Employment Opportunities (CEO) in New York City.¹⁰ CEO works exclusively with people released from New York City jails and puts them to work maintaining municipal facilities based on contracts with city agencies. CEO recently underwent a rigorous evaluation using a random assignment research model. The study found this transitional job program resulted in more than a **10% reduction in new prison terms** for clients who had been recently released at the time they entered CEO’s program.¹¹ Though Towards Employment has not done as thorough tracking of long-term recidivism on its clients, but reported that of the 180 people with felony records they placed last year, they knew of **none that had re-offended in 11 months**. Instead, Towards Employment’s ex-offender clients had **62% job-retention at 180 days**,¹² well above some nationally recognized programs in a recent study.¹³ Other research has demonstrated that well-designed transitional jobs programs produce cost-savings for state governments and reduce reliance on welfare.¹⁴ Though there are not final findings yet, the Joyce Foundation is also in the midst of a four-city study on transitional jobs’ effectiveness as a re-entry strategy.¹⁵

In many ways, transitional jobs appeared to meet the needs identified by the employers we spoke with because it provides them with a more nuanced understanding of how the prospective employee will perform in a real-life work situation.¹⁶ Our workgroup is excited by the success of leading transitional job programs, but that excitement is tempered by the expense: transitional jobs cost a great deal per client-served because they require paying each client a wage in addition to providing case management and other supportive services. We intend to research this concept further before bringing it to the Coalition as a recommended policy strategy.

Improving Accuracy of and Restricting Access to Criminal Records

All state licensing agencies are required to request criminal background checks from the state Bureau of Criminal Identification and Investigation (“BCI”). Other private employers are also permitted to request BCI checks. By state law, BCI checks requested by state agencies are permitted to show expunged offenses and records of arrests that did not lead to a conviction.¹⁷ We also found that BCI checks always—and often only—report the *original charge* not the final disposition for any offense. That is, BCI reports whatever the prosecutor initially accused a person of, not what the person was actually convicted of. Several of our committee members—and many people in the community—feel strongly that this is misleading information that should not be used in employment decisions. We are intend to explore workable solutions to this problem in the coming months.

Coupled with reforms to BCI checks, we are working with Senator Shirley Smith (Cleveland) on her proposals for modest expansion to Ohio’s expungement law. Current ideas on the table include increasing the number and types of offenses that can be expunged. We have briefly looked into other models for restricting access to criminal records, such as a state-law enhancement to the Fair Credit Reporting Act (FCRA). The FCRA governs private, commercial background checking companies (not state background checking agencies like BCI). The FCRA used to prohibit private companies from reporting criminal offenses more than seven years old. But in 1996, Congress did away with any time limit on convictions (the seven-year limit remains for non-convictions). Some states, such as California, have reinstated the seven-year limit by state law. This mechanism has the benefit of being automatic, so that restored citizens are not required to file any paperwork or make a court appearance for their old criminal record to be removed from a prospective employer’s consideration. Our workgroup recognizes that expungement and FCRA-type restrictions are often resisted by employers and the news media who strongly advocate for open access to information. Again, our workgroup intends to explore whether restricting access to criminal records is a viable solution to the problem of ex-offender employment.

Conclusions

Early on, this workgroup defined its purpose as designing solutions **to increase public safety and the economic contributions of people with criminal records by reducing unnecessary employment barriers.** We remained committed to that goal. We are also well aware that the Coalition’s report to the legislature, including policy recommendations, is due in early April 2010.

While we initially focused on creating an effective (and politically viable) Employment Access Certificate program, we have reconsidered that objective in light of the insightful feedback we received from several employers. Still, we have not abandoned the Certificate concept; in the coming months, we will devote considerable thought, research, and discussion to see if we can develop a modest but workable model.

We also will deliver to the Coalition recommendations on the other topics highlighted in this report, supportive employment/transitional jobs as well as expungement and criminal records accuracy. If any Coalition member has thoughts or questions about these issues or our process going forward, please feel free to reach out to any member of our workgroup. We welcome your input.

Notes

- ¹ 2008 Ohio Courts Statistical Summary and Report, available at <http://www.supremecourt.ohio.gov/Publications/default.asp>. Note that this is the number of new *cases* ending in a conviction; it does not account for individuals with multiple offenses. To our knowledge, there is no data on the number of unique individuals with new criminal convictions in Ohio each year.
- ² House Bill 130, 127th General Assembly; now codified at Ohio Revised Code Section 5120.07.
- ³ http://law.utoledo.edu/students/lawreview/volumes/v36n3/mossoney_roecker.htm
- ⁴ Ohio Administrative Code Section 1301:7-9-11
- ⁵ Ohio Revised Code Section 1531.132
- ⁶ Ohio Administrative Code Chapter 3301-20.
- ⁷ <http://www.lac.org/toolkits/certificates/certificates.htm>
- ⁸ <http://www.heartlandalliance.org/ntjn/>
- ⁹ <http://www.towardsemployment.org/>
- ¹⁰ <http://www.ceoworks.org>
- ¹¹ http://www.ceoworks.org/images/CEO_Release_December_2007_Rebranded.pdf
- ¹² Based on data provided to author by Jill Rizika on 12/8/2009.
- ¹³ <http://www.nawdp.org/Content/NavigationMenu/ResearchReports/2009-1-Ready4WorkFinalResearchReport.pdf>
- ¹⁴ <http://www.heartlandalliance.org/ntjn/new-evidence-for-the-efficacy-of-tj-programs.pdf>
- ¹⁵ http://www.joycefdn.org/pdf/TJRD_Policy.pdf
- ¹⁶ The Safer Foundation in Chicago found similar needs in their focus groups with employers. See their report at http://www.saferfoundation.org/docs/Focus_Group_Reentry.pdf
- ¹⁷ Ohio's expungement law can be found at Revised Code Section 2953.31-.63. The statutes governing BCI and the information it releases is primarily located at Revised Code Section 109.57 *et seq.*

MEMORANDUM

TO: Jim Slagle
FROM: Thomas E. Madden
CC: Matt Kanai

Issue: The issue of concern is whether employers who hire felons are subject to possible liability?

In general, an employer cannot be sued for acts of an employee that are outside the scope of employment. *Byrd v. Faber*, 57 Ohio St.3d 56 (Ohio 1991). However, in Ohio, an employer can be sued for negligent hiring of an employee. An employer can be sued for negligent hiring if he or she is negligent or reckless for employing an improper person in work involving risk of harm to others. To obtain relief for "negligent hiring," a plaintiff must show (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employers actual or constructive knowledge of the incompetence, (4) the employee's actions or omissions causing the plaintiff's injuries, and (5) the employers negligent hiring or retaining the employee as the proximate cause of plaintiff's injuries. *Evans v. Ohio State*, 112 Ohio App.3d 724 (10th Dist. 1996). See also, Sections 448 and 449 of the Restatement of Law 2d, Torts (1965); Section 213 of the Restatement of Law 2d, Agency (1958). In order to be deemed negligent, it must have been foreseeable to the employer that the employee would engage in criminal conduct and the risk of giving the employee such a task was unreasonable. *Id.* at 740. In other words, to be held liable, the employer must have known, or should have known, that the employee had criminal or tortuous propensities. *Prewitt v. Alexson Serv.*, 2008 Ohio App. LEXIS 3612, 16 (12th Dist. Ct. App. 2008). "Foreseeability is based upon whether a reasonably prudent person would have anticipated that an injury was likely to result from the performance or nonperformance of the act." *Staten v. Ohio Exterminating Co.*, 123 Ohio App.3d 526, 531 (10th Dist. Ct. App. 1997). "When determining the foreseeability of a criminal act, a court must look at the totality of the circumstances, and only when the circumstances are somewhat overwhelming can an employer be held liable." *Prewitt*, 2008 Ohio App. LEXIS 3612.

The most notable elements are (3) and (5). Element (3) is met if the employer knows about the employees criminal propensity / history. If an employer accepts employees who were recently released

from prison, under a state program, then obviously the employer knows of the incompetence.

Element (5) is a little trickier. The employer's hiring of the employer must be the "proximate cause" of the injuries. Thus the harm must have foreseeable. "It is only where the misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed." *Staten v. Ohio Exterminating Co.*, 123 Ohio App.3d 526, 531 (10th Dist. Ct. App. 1997). Thus, to be liable, the employers failure to anticipate the criminal act must have been unreasonable. Although the wording of many of these opinions emphasize that an employer must be something more than just negligent, the language is broad enough that trial judges can find that the propriety of the employers hiring decision is an issue for the jury to decide. Employers, who hire prisoners, do not want potential liability.

Also, the type of job and the employee's prior criminal acts seems most relevant. Jobs that relate to child care should not be offered to sex offenders. A reasonable employer could have reasonably anticipated potential criminal behavior. On the other hand, an employer can probably hire an employee (with assault conviction) to perform construction work.

Commissioned by Goodwill Industries International, Inc.

September, 2007

STATE BY STATE SURVEY: EMPLOYER LEGAL LIABILITY FOR HIRING EX-OFFENDERS

This memorandum reviews state laws governing an employer's liability in the situation where an ex-offender, hired by and working for the employer, commits a criminal act that causes injury to a third party. Whether the injured party is a customer of the employer or a stranger, the employer may be liable for the employee's criminal acts, or omissions.

I. OVERVIEW

Generally, plaintiffs harmed by the criminal acts of an employee invoke the common law doctrines of vicarious liability, negligent hiring, negligent retention, and/or negligent supervision in suing the employer.

Under a vicarious liability theory, an employer can be held responsible for the criminal acts of its employee only if the employee's actions were committed in furtherance of the employer's business and the acts were within the scope of employment. Imagine, for example, a truck driver who is hired to deliver company goods hits a pedestrian on the way to complete a scheduled delivery. In that instance, the act (hitting a pedestrian) was committed by an employee during an action (driving) in furtherance of his job functions (delivering company goods). Typically, the pedestrian could sue the company under the theory that the company is vicariously liable for the employee's actions.

Goodwill's concerns focus on situations in which an employee's criminal acts are not within the scope of employment. Imagine, for example, a truck driver who is hired to deliver company goods stops en route and physically assaults someone. The act (physical assault) was not committed during an action in furtherance of the employee's job functions. In many states, the employer may nonetheless be held responsible under the theories of negligent hiring, negligent retention, and/or negligent supervision. In most states, liability turns on whether the employer knew or should have known that the employee had dangerous tendencies and posed a risk to others. Simply hiring an individual with a criminal record is not enough to trigger liability.

At common law, there are a few businesses in which the employer may be held to a heightened duty of care. In these contexts an employer can incur liability for even slight negligence, under the

theory that third parties are especially vulnerable and unable to protect themselves against accidents or other harm. *See* Am Jur. 2d Carriers § 866 (2007). For example, some courts have characterized the duty of a common carrier (for example a bus company) to its passengers as a duty to “exercise the highest degree of care, vigilance, and precaution for their safety, consistent with the nature of the conveyance and its proper and normal operation, and are liable for injuries to passengers resulting from the slightest negligence.” *Id.* at § 871. Similarly, an innkeeper owes minor children staying at the hotel a duty of “extraordinary care.” *See* Am. Jur. 2d Hotels § 81 (2007). Moreover, at least one court has held that an innkeeper’s duty of care for adults is similar to the duty owed by a common carrier to its passengers. *See Id.* In these situations, employers should use caution in hiring ex-offenders whose criminal background will increase the employer’s susceptibility to liability for the employee’s tortious conduct.

For those businesses that do not confer a special obligation on the employer, an employer generally has a duty to exercise reasonable care in hiring, retaining and supervising its employees to protect others from harm. “The existence of this duty depends upon whether the risk of harm from an employee to [the plaintiff] was reasonably foreseeable as a result of the employment.” Am Jur. 2d Unemployment § 393 (2007). A negligent hiring, supervision or retention claim does not require the existence of any particular relationship between the plaintiff and the employer. *See Id.* at § 394. Rather, it depends on the nature of the employee’s duties for the employer and the degree to which the exercise of these duties can foreseeably involve risk to a third party. *See Id.*

“When an employer hires an employee who because of the nature of the employment will have a unique opportunity to commit a crime against a third party, there is a duty to exercise reasonable care in the selection, retention and supervision of that employee.” *Id.* Moreover, “where the employee’s job duties will bring him or her into frequent contact with the public or involve close contact with particular persons as a result of a special relationship between such persons and the employer, the employer’s duty expands, requiring it to go beyond the job application form and personal interview and make an independent inquiry into the applicant’s background.” *Id.* at § 393.

The memorandum provides specific findings for individual states below.

II. EMPLOYER LIABILITY UNDER STATE LAWS

[This memo covered many, but not all, of the 50 states. The Ohio portion has been separated out, below]

* * *

A. Ohio

Under Ohio law, a plaintiff bringing a claim for negligent hiring, supervision, or retention must show “(1) the existence of an employment relationship; (2) the employee’s incompetence; (3) the employer’s actual or constructive knowledge of such incompetence; (4) the employee’s act or omission causing the plaintiff’s injuries; and (5) the employer’s negligence in hiring or retaining the employee as a proximate cause of plaintiff’s injuries.” *Steppe v. K-Mart Stores*, 737 N.E.2d 58, 66 (Ohio App. 8th Dist. 2000). “An employer may be negligent if he knew, or should have known, that his employee had a propensity for violence and that the employment might create a situation where the violence would harm a third person.” *Id.* at 66.

The employee must have been on duty when committing the criminal or tortious act. *Saleh v. Marc Glassman, Inc.*, 2005 WL 3081507, at *4 (Ohio App. Ct. 8th Dist. 2005). For example, in *Saleh*, the court dismissed the plaintiff’s claim of negligent hiring against a shopping center, based on an incident in which four employees assaulted the plaintiff in the store’s parking lot. *Id.* The court explained that because employees were not “on the clock” at the time of the assault, the plaintiff had no claim for negligent hiring. *Id.* Indeed, employers are not liable for the criminal acts of former employees, even if the crimes were a foreseeable result of the employment. *Abrams v. Worthington*, 861 N.E.2d 920, 924 (Ohio App. 10th Dist. 2006).

Employers are generally not required to conduct criminal background checks of prospective employees. *Steppe*, 737 N.E.2d at 67. In *Steppe*, a Kmart employee sued the store after a coworker sexually assaulted her. She argued that Kmart was negligent for failing to investigate the co-worker’s criminal background, which included a “juvenile adjudication for assault.” *Id.* The court disagreed, observing that the co-worker “was referred for employment by his mother, a long-term employee and successful Kmart employee; he denied that he had any felony convictions in his job application and he denied that he had been convicted of any offense other than a minor traffic violation in his application for a fidelity bond.” *Id.* Additionally, the court ruled that the co-worker’s prior conviction—for assault—would not have put Kmart on notice that the coworker had a propensity for sexual harassment or sexual assault. *Id.*

The court reached a similar result in *Peters v. Ashtabula Metropolitan Housing Auth.*, 624

N.E.2d 1088 (Ohio App. 11th Dist. 1993). An employee, who was hired to lay floor tiles in vacant apartment units, asked the owner of one of the units if her daughters could help him carry the tiles. *Id.* at 1090. The mother agreed. *Id.* While she was away, the employee raped one of the girls, who was nine years' old. *Id.* The court dismissed the mother's claim for negligent hiring, explaining that the employer's "only duty was to exercise ordinary care" and "[n]o facts were offered which would give rise to a duty to conduct a criminal background check." *Id.* at 1091. The court held that although the employee had a prior conviction twenty years earlier, "it was so remote that it could not reasonably afford a basis of liability against [the employer]." *Id.*

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Prepared for Goodwill Industries International, Inc.

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