Ex-Offenders and Employment

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This podcast reviews a variety of peer reviewed publications and literary work that have empirically investigated or surveyed employers attitudes and practices in hiring ex-offenders as well as discussing issues such as willingness to hire individuals with felony convictions, employers demand for ex-offenders, enhancing employment opportunities for those with criminal histories, and what types of occupations ex-offenders are performing.

In order to better understand and grasp the many barriers that ex-offenders have when looking for employment it is helpful to understand various laws and federal legislation that can impact an individual’s employability, specifically those who have misdemeanor and felony convictions. While the Civil Rights Act of 1964 nor the Equal Employment Opportunity Commission’s uniform on guidelines on employment selection procedures addressed arrest or conviction records, these provisions provide the foundation for which applicants challenge employer’s consideration of criminal background checks (Harris and Keller, 2005).

The argument becomes that individuals may challenge an employer’s use of criminal background investigations if it has a disparate impact, showing that individuals of a specific, protected class (based on race, religion, sex, national origin, etc.) were excluded by the employment condition at a substantially higher rate than other classes, or that the employer excluded a greater percentage of individuals of one protected class than other classes based on the background investigation (Green versus Missouri, 1975). So as we can see, it is possible that an employer’s hiring practices could potentially discriminate against various individuals based on race or national origin should those individuals have a statistically higher percentage of arrest or conviction.

The employer’s main defense is that an individual with a criminal conviction would violate the business necessity (Dozier versus Chupka, 1975) arguing that an individual who has such an arrest or conviction record that they would be unable to perform specific or essential duties of the job.

As contained in the article of Harris and Keller (2005) a district court in Ohio found that they city’s use of arrest records when hiring fire department trainees were not a business necessity and found that the background checks were too crude for the claimed purposes of determination of applicants. The court found that there was no procedural safeguard to ensure that applicants with non-larcenous convictions were not disqualified (Harris and Keller, 2005). Courts have in general a knowledge that employers who have invested interest in overall safety of the general public are faced with unique situations in such should be afforded more discretion using criminal background investigations when selecting candidates. In the United States versus Chicago (1976) background investigations for police cadet candidates were found to be acceptable in attempting to discover evidence of bad character and moral conduct and dissolute habits. It’s important to note that the court did state that if the investigation revealed a conviction for serious felony the conviction would serve as a valid ground for disqualification regardless of whether the condition represented a disproportionate ratio impact or disparate impact (United States versus Chicago, 1976).

Of importance that EEOC or Equal Employment Opportunity Commission stated that the use of arrest records alone in determining employability violates an individual’s civil rights because it has the foreseeable effect of denying black applicants equal opportunity for employment in that blacks are arrested substantially more than whites (EEOC Decision #72-0386, 1972). In Gregory versus Litton Systems, 1970, the court found that hiring decisions that were based on non-conviction arrest records violated an individual’s civil rights because it disproportionately affected black applicants.

So as we can see in summary, and as pointed out by Harris and Keller (2005) in their review of various federal legislation and court decisions affecting criminal background checks, that in general absolute preclusion of ex-offenders has been helped to violate Title 7 in a variety of similar state legislation. They do however note that either through case law, statutory enactments, or occupational licensing restrictions many exceptions based on the business necessity of the organization have been created to permit employers to exclude applicants with criminal records (Harris and Keller, 2005).

Of particular relevance to this podcast, it is important to understand what kinds of positions that individuals may be capable of performing with a criminal record, as well as those positions for which they will be excluded. Many statutes authorize government agencies to revoke or suspend licenses with a conviction of a felony. In a publication by the Idaho Commerce and Labor titled Enhancing Employment Opportunities for Ex-Offenders, a male survey was distributed to a variety of employers used to gauge what types of occupations employers would consider hiring and ex-offender to perform, the ex-offender’s level of skills and whether a federal bonding program would influence their hiring decision. A total of 922 surveys were sent to employers throughout Idaho and 85 of those were found to be ineligible to participate in the study for various reasons. The response rate was 25% and the findings represented as statistical significance with 95% confidence in a margin of error +/- 6.3.

The highest percentage of employers who would consider hiring ex-offenders fell within the welding, small engine repair, carpentry, plumbing, building and maintenance, commercial driving, framing, electrical wiring and commercial cleaning trade industries. Approximately 60% of those employers surveyed indicated that they would hire ex-offenders for general office clerk and data entry specialist’s positions, and between 66% and 76% of employers within the hospitality occupations (hotel restaurant, food service, and tourism) indicated that they would hire ex-offenders. By industry sector wholesale trade, manufacturing, accommodation and food services, administrative and support, and waste management, and construction were some of the highest industry sectors where it was identified that employers would hire ex-offenders. It should be noted however that the sample size across various industries were quite small, thus limiting the generalized ability of the findings.

A similar study conducted in Virginia by Eric Lichtenberger (2006) investigated the earnings and presumption that most ex-offenders are only able to find employment in low level occupations, low rates of job retention, and limited customer contact. The literature review by Lichtenberger (2006) did not identify any specific research that systematically examined earnings records to examine the industries in which employers have demonstrated patterns of hiring ex-offenders, although he noted that it had generally been presumed that most ex-offenders are only able to find employment in low level occupations (Frye Consulting Group, 1987, Holzer, Raphael, and Stoll, 2003).

While this particular study did not differentiate specifically between those with misdemeanor felony convictions, a variety of statistics were gathered from Virginia employers, specifically noting the percentages of employers within an industry that are currently hiring ex-offenders. The highest industries identified that hire ex-offenders were within the construction and manufacturing, food and accommodation and services, and administrative support services sectors. Industries in which ex-offenders found it difficult to obtain employment and were not significantly represented were within professional scientific and technical services, real estate, finance and insurance, and information related careers. There was also a negligible amount of ex-offenders within public administration and less than 4% within the healthcare industry. The overall results identified that jobs within the construction industry offer the most job stability for the greatest number of ex-offenders (Lichtenberger, 2006).

Some of the most inclusive and scientific investigation into the hiring of ex-offenders has been conducted by Holzer, Raphael, and Stoll. A working paper authored for the Berkley program on Housing and Urban Policy specifically investigated will employers hire ex-offenders addressing specific issues related to employer checks, background checks and their determinates. Holzer, et al. identifies that certain occupations are legally closed to individuals with felony convictions under state and many cases federal law (Hahn, 1991). Examples of these include jobs that require contact with children, various health services occupations where employees are responsible for providing hands-on patient care, and various employments with firms providing security services. It’s also identified that many jobs requiring significant customer contact or the handling of cash or expensive merchandise would also be problematic for ex-offenders to be considered.

Holzer, et al. also addresses a significant concept or theory that many employers exercise as part of the human resources practice call the Theory of Negligent Hiring. On this particular theory, it is assumed that employers are not only responsible for their employees within the organization, but their employees interacting with the public as well. If it is found that an employer has created a risk by exposing employees who are potentially dangerous to the public, they could be held liable for the employee’s criminal or torturous acts (Bushway, 1996). Given that employers could be exposed to possible punitive damages affecting business operations, it is assumed that stringent criminal checks and background investigations would be conducted. There have been several examples where employers were held responsible for the criminal acts of their employees under negligent hiring including judgments against the owner of a taxi company and security services for sexual assaults committed by employees (Craig, 1987; Holzer, et al., 2001). In fact, additional statistics indicate that employers had lost approximately 72% of negligent hiring cases with an average settlement of over 1.6 million dollars.

In 1999, the U.S. Department of Justice concluded that criminal history record information is increasingly becoming more available to noncriminal justice users, implying that employers will be more apt and able to conduct criminal background investigations when screening potential employees. This also brings to light various concerns regarding employer’s ability to interpret these background investigations, including various terminology and judicial dispositions.

Holzer, et al. conducted a survey collected through the multicity study of urban inequality. This survey included over 3,000 establishments and was conducted between 1992 to 1994 in Atlanta, Boston, Detroit and Los Angeles. Telephone surveys were conducted with individuals in charge of hiring and each survey included two questions vital to the current analysis. One question was posed regarding the employers preferences with respect to workers with criminal histories as well as a question of whether or not the employer uses criminal background checks as part of their hiring process.

When assessing employers reluctance to consider ex-offenders, over 60% of employers indicated that they would probably not or definitely not be willing to hire an applicant with a criminal record. Only 38% of employers indicated that they would definitely or probably consider an applicant with a criminal history, with only 12.5% indicating that they would definitely consider hiring and ex-offender. Approximately 92% of employers indicate that they would definitely or probably hire former or current welfare recipients, 96% indicated they were probably and definitely hire workers with a GED in lieu of a high school diploma, 59% indicated they would hire employees with a spotty employment history, while 83% indicated they were likely to consider an applicant from an individual who has been unemployed for a year or more. This is in stark contrast with only 38% of employers stating that they would definitely or probably accept an application from an ex-offender.

The study of Holzer, et al. identified that there were significant differences in the propensity to check criminal backgrounds across areas noting that there was a propensity to check criminal backgrounds among employers in the Atlanta, Detroit, and Los Angeles, however employers in Boston were least likely to use criminal background checks as a screening device. Holzer, et al. offered potential explanations of these differences in that the size of the population of ex-offenders or differences in the ease in which employers can access criminal justice information could be different among various cities.

It is probable that employer attitudes toward applicants with criminal histories will be related to the employers business and the nature of the position that is being filled (Holzer, et al., 2001). These authors noted that employers who cannot monitor their employees or have employees staffed in positions that deal frequently with the public would be more adverse to hiring ex-offenders. One of the strongest associations identified in this study noted a relationship between the employer unwillingness to hire ex-offenders and whether the job involved frequent customer contact. Among employers least willing to hire ex-offenders, 71% of the positions required customer contact. Employers that were the least willing to hire ex-offenders are more likely to require high school degrees, recent and specific work experience, references and some vocational education (Holzer, et al., 2001).

Various tables conducted in the studies of Holzer, Raphael, and Stoll are useful in identifying various differences in the size and industrial distributions between employers that conduct background checks and those who do not. Small employers were found to rarely use criminal background checks whereas nearly 40% of small employers never check backgrounds of applicants. Concerning the industry manufacturing firms are least likely to use criminal background checks while public service such as fire and police are most likely, and in many states mandated. Interestingly, it was identified that the unionized establishments screened criminal history records more than nonunionized establishments (Holzer, et al., 2001).

As is previously stated, many of the studies addressing ex-offenders did not differentiate between misdemeanor and felony convictions. In fact, according to Varghese, et al. (2006) research has yet to investigate if misdemeanors are seen as less serious than a felony with regards to ex-offender employability. In a study conducted by Varghese, Hardin, Bauer, and Morgan (2010) it was identified that applicants with drug possession charges and low qualifications were less likely to be referred for hire than other ex-offenders. It was also identified that severity of charges influences employability but qualifications have no influence for applicants with a felony conviction. This specific study addressed attitudes towards hiring ex-offenders, specifically the rolls of criminal history, job qualifications and race.

The literature reviewed identified that after one year of release from incarceration that nearly 60% of ex-offenders in the United States were unemployed, one specific reason for this unemployment was employer bias. Many authors provided research as contained in this study identifying that employer bias remains one of the strongest barriers to employment of ex-offenders and that those with criminal histories have a lower chance of obtaining and maintaining employment than those with physical impairments and communication deficits (Graffam, et al., 2008).

Although somewhat dated, since 1995 the accessibility of criminal records for employment selection have increased 83% and with this greater accessibility there was an increase in employers who state they always check criminal backgrounds (Holzer, et al., 2006). Also consistent with previous research, the type of crime appeared to be important in making hiring decisions whereas nonviolent victimless crimes were associated with less bias (Graffam, et al., 2008). Holzer, et al., identified that employers appear more likely to hire those with drug related crime or property offenses as compared to those with violent offenses. Interestingly, Varghese points out that no study has examined if employers are more likely to hire those with misdemeanor drug possession charge compared with felony drug possession charges.

While lack of job qualifications was a barrier to employment for both offenders and non-offenders, as a whole offenders have poor work histories (Holzer, Raphael, and Stoll, 2003). There is some evidence however that employment qualifications may mitigate negative effects of having criminal charges although only when the qualifications are especially high (Varghese, et al., 2010).

The study conducted by Varghese, et al., 2010 was to explore the interactive effects of race, criminal history, and job qualifications on the perceived employability of hypothetical applicants who have a criminal history as compared to those who do not. This study consisted of 275 undergraduates from a public university, 162 of whom were women and 112 men. Participants were given a description of a cashier position because it required few skills and employers appear more likely to hire those with criminal histories for jobs that have or require little education and low job skills (Holzer, et al., 2004). A study identified that job qualifications has no effect on the strength of a hiring recommendation for those with a felony charge. The qualifications did however have an effect on whether an applicant with a felony was considered for the job, only 46.9% of unqualified applicants with a felony were considered for the job compared with 75.6% of qualified applicants with a felony change (Varghese, et al., 2010).

The results of the study demonstrated that there was a significant bias in hiring those with criminal charges compared with those with no criminal charges regardless of race. It was also identified that possessing job qualifications appears to mitigate the bias at least for those with a misdemeanor charge. There were also findings that participants were equally unlikely to recommend an applicant for employment who has either a misdemeanor or felony charge (Varghese, et al., 2010). One of the most significant findings from this study is that it appeared a felony charge is more difficult to overlook by employers regardless of an applicant’s qualifications.

Stoll and Bushway (2008) provide a useful framework in assessing employability in ex-offenders. These authors identify both supply and demand factors affecting employability of ex-offenders. They suggest that several factors suggest potentially negative effects of criminal convictions in labor market outcome and on the supply side of the market those who have been incarcerated fail to accumulate work experience, have less ability to social network, and may experience and erosion of skills while incarcerated (pg. 372). On the demand side, Stoll and Bushway noted that employers may be reluctant to hire workers for fear that an ex-convict may harm a customer or be likely to steal, thus reinforcing the theory of negligent hiring. Stoll and Bushway examine the “ban the box” movement which aims to eliminate criminal history questions from standard employment applications. These authors identified that Boston, Chicago, Minneapolis, San Francisco and St. Paul laws had recently been passed to eliminate the question about criminal history records from applications from municipal jobs, with the overall goal to get the individual with the criminal conviction on his record to be considered on the basis of his merits rather than information about their criminal past.

The concern comes when employers are purposefully seeking additional information regarding employees. The intention for these employers are to make better risk assessed hiring decisions and striking the balance between avoiding disparate impact charges and protecting themselves under the theory of negligent hiring.

The literature reviewed conducted by Stoll and Bushway in their study of effective criminal background checks on hiring ex-offenders, noted that evidence showed unsurprisingly that employer aversion to ex-offenders is high and that firms that check backgrounds are larger in size and in industries that have more customer contact such as retail trade and service. Pager in 2003 in using an audit study framework, identified that white and black men with criminal records are much less likely to be called back for job interviews than their counterparts without such records.

The study conducted by Stoll and Bushway specifically analyzed whether employer initiated criminal background checks negatively affect the actual hiring of ex-offenders in Los Angeles in 2001. As was identified, evidence was found that the use of criminal background checks is negatively related to the hiring of ex-offenders and the effect was particularly strong with employers that are legally required to check (Stoll and Bushway, 2008).

Lastly, Devah Pager in 2003 conducted one of the most thorough and scientifically relevant investigations into the mark of a criminal record, specifically issues regarding employability of ex-offenders. Dr. Pager created a model of direct causation implying that in periods of incarceration will directly influence employment outcomes and tested a variety of hypothesis based on an audit survey methodology. Dr. Pager focused on the effect of the criminal record on employment opportunities directing specific attention to the stigma associated with criminal justice intervention and the ways in which employers respond to this stigma in considering applicants (pg. 942).

Dr. Pager was of the opinion that those sent to prison are institutionally branded as in a particular class as individuals, such as college graduates or welfare recipients with implications for the perceived place, and branded this as a negative credential. Prior to Pagers research, the most relevant research pertaining to this course of study was by Schwartz and Skolnick in 1962 where researchers prepared four sets of resumes to be sent to prospective employers containing various types of criminal records. This particular study conducted by Schwartz and Skolnick was limited to only one job type, an unskilled hotel clerk, thus limiting its generalized ability. In each condition however, employers were less likely to consider applicants who had any prior contact with the criminal justice system.

Without becoming to lengthy and specific, Pager’s study involved the use of formula auditors, two black males and two males, paired by race, who collectively applied for over 350 positions, completing applications and proceeding as far as they could during the course of the hiring process. Each audit pair was randomly assigned to 15 job openings per week and rotated among being an ex-offender or being an individual without a criminal background. The most common types of jobs were for restaurant workers, laborers, and production workers. There was also a fair number of customer service, sales, clerical and even some managerial positions that were included in the study. When considering the Caucasian or white test group, a criminal record reduced the likelihood of a callback by 50% across all occupational categories. Among black test subjects without criminal records, only 14% received callbacks relative to 34% of white test subjects with noncriminal records. Of concern, even white test subjects with criminal records received more favorable treatment than blacks without criminal records, although the percentage was +/- 3%.

The study conducted by Pager offered direct evidence of the causal relationship between a criminal record and employment outcomes. Dr. Pager noted that mere contact with the criminal justice system and the absence of any transformed or selective effects severely limits subsequent employment opportunities and the finding that ex-offenders are only one half to one third as likely as non-offenders to be considered by employers who suggest that a criminal record indeed presents a major barrier to employment (pg. 960). The effect of race on employment opportunities is also clear in this particular study where black test subjects were found to be less than half as likely to receive consideration by employers relative to their white test subject counterparts.

In summary, those individual criminal histories are individually much more likely to experience adverse hiring decisions as well as when competing for jobs among similarly qualified individuals. While there also appears to be some mitigating effects for those who have high level skills, further research is needed. It should also be noted that felony convictions also hold more serious negative implications for employment in that charge alone and may negate the person for job consideration (i.e. obtaining security clearance, working in education or healthcare, human service careers, law enforcement, investment licensure, etc.).

Studies have identified that occupations in which ex-offenders are most likely to obtain and maintain employment are among the construction, production, manufacturing, office and administrative support, and installation, maintenance and repair occupations.

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