



The
UNIVERSITY
of VERMONT

James M. Jeffords Center's
Vermont Legislative Research Service



Criminal Record Disclosure on Employment Applications

State incarceration rates and state correctional budgets have increased dramatically in the last three decades. According to a 2009 report done by the Pew Center on the States, over five million Americans were on parole or probation, a huge increase from the 1.6 million Americans on parole or probation twenty-five years ago.¹ States were estimated to have spent more than \$47 billion on correctional budgets in the year 2008.² Vermont is no exception to the nationwide trend of high incarceration rates and increasing state spending on corrections budgets. The prison population doubled in size between 1996 and 2006.³

In 2010, 2,130 Vermonters were released from prison.⁴ These former prisoners face many challenges upon re-entering the community that affect their ability to positively transition to life outside prison, which has the result of increasing rates of recidivism. One half of all prisoners released in Vermont during the year 2003 had returned to prison by 2006.⁵ "Incarceration is associated with limited future employment opportunities and earnings potential...which themselves are among the strongest predictors of recidivism."⁶ Conversely, increased "legitimate employment opportunities may be as effective, if not more effective, in reducing crime as is in increase in punishment."⁷

Six states and 30 municipalities in the United States have "ban-the-box" laws that make it easier for ex-offenders to enter the job market through inhibiting the ability of employers to

¹ "One in 31: The Long Reach of American Corrections," Pew Center on the States (2009): 1, accessed February 13, 2012, http://www.pewcenteronthestates.org/report_detail.aspx?id=49382

² "One in 31: The Long Reach of American Corrections," Pew Center on the States: 1.

³ "Vermont Sentencing and Corrections Profile," Pew Center on the States (2008): 1, accessed February 13, 2012 http://www.pewcenteronthestates.org/report_detail.aspx?id=35844

⁴ Paul Guerino, Paige M. Harrison, William J. Sabol, "Prisoners in 2010," *Prisoner Series*, Bureau of Justice Statistics, February 13, 2012, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=2230>

⁵ Council of State Governments, Justice Center, "Recent and Projected Growth in the Vermont Prison Population," January 2008, accessed February 13, 2012, http://www.pewcenteronthestates.org/uploadedFiles/VT%20projected%20growth_v9.pdf.

⁶ Devah Pager, "The Mark of a Criminal Record," *American Journal of Sociology* 108 (2003): 939.

⁷ Samuel L. Myers Jr., "Estimating the Economic Model of Crime: Employment Versus Punishment Effects," *The Quarterly Journal of Economics* 98 (1983): 157.

inquire about or discriminate on the basis of a criminal record.⁸ Some states have statutes explicitly banning discrimination in employment due to the applicant's criminal record with the same end in mind.⁹

Employers may oppose legislative limits on the amount of information they may have when making important hiring decisions because "human capital is perceived as a critical asset that helps a firm build its competitive advantage...it is critical for firms to hire both the best candidates and also to avoid bad hires...Background screening is the most commonly cited tool used to avoid poor hiring decisions."¹⁰

In a study of employee performance and employee history, a fast food chain performed background checks on "500 [employees] from low performing stores and 500 from high performing stores. Thirty percent of employees at low performing stores had a criminal record, while 5% of those at high performing stores had a criminal record."¹¹ This study makes no mention of a host of other variables that could affect both poor employee performance and higher rates of criminality. "Employers also face a host of legal issues if they fail to conduct criminal background checks," such as "negligent hiring [which] 'holds employers responsible for the foreseeable acts of even the reckless employee who exceeds the scope of authorized duties.'"¹²

The confluence of uncertain economic times with a prison record "may present an almost insurmountable obstacle for long-term employment."¹³ Without the opportunity to work in a legitimate field, "ex-offenders might feel that they have little choice but to pursue criminal careers. Indeed, while the previously incarcerated may be disadvantaged in the legitimate labor market, their experiences behind bars may actually increase their employability in illegitimate enterprises."¹⁴

⁸ Elizabeth Farid, Michelle Natividad Rodriguez, and Nicole Porter, "State Reforms Promoting Employment of People with Criminal Records: 2010-2011 Legislative Round-Up," National Employment Law Project, accessed February 10, 2012,

www.nelp.org/page/-/SCLP/2011/PromotingEmploymentofPeoplewithCriminalRecords.pdf?nocdn=1

⁹ Jessica S. Henry, "Criminal History on a 'Need to Know' Basis: Employment Policies that Eliminate the Criminal History Box on Employment Applications," *Justice Policy Journal* 5 (2008).

¹⁰ Carole Bonanni, Patrick Doyle, Dean Drysdale and Andrea Hughes, "Employee Background Verification: The Cross-Referencing Effect," *International Business & Economics Research Journal*, 5 (2006): 24.

¹¹ Donna L. Hight and Amy Raphael, "Should Housing Departments Conduct Criminal Background Checks?" *Journal of College & University Student Housing*, 33 (2004): 13.

¹² Hight and Raphael (2004): 10.

¹³ Hight and Raphael (2004): 13.

¹⁴ Robert DeFina and Lance Hannon, "The State of the Economy and the Relationship between Prisoner Reentry and Crime," *Social Problems* 57 (2010): 612.

Description of Existing State Laws:

Connecticut: In 2010 the state legislature overrode Governor Jodi Rell's veto resulting in the passage of "ban-the-box" legislation in Connecticut.¹⁵ The law made it illegal to disqualify a person from state employment solely because of prior conviction of a crime. Exceptions allow employers to use their discretion when crimes have been committed in the past five years or they are crimes that specifically relate to the applicants ability to do the job without complications. If the applicant's criminal record does lead to the rejection of the application, the employer must provide a written rationale for that decision. The state may not discriminate at any step of employment on the basis of crimes a person was arrested for but never convicted.¹⁶

Hawaii: In 1998, Hawaii became the first state to pass "ban the box" legislation.¹⁷ The law prohibits employers from inquiring about and considering the conviction records of applicants unless they have already given the applicant a conditional offer of employment.¹⁸ If the applicant's criminal history is directly related to the duties and responsibilities of the position in question, the employment offer may be retracted. The employer cannot consider a potential employee's criminal history if it is not within the most recent ten years, excluding periods of incarceration.¹⁹

Massachusetts: Passed 2010 "ban the box" legislation as a part of larger CORI (Criminal Offender Record Information) reform.²⁰ The bill keeps employers from inquiring about an applicant's criminal history on an initial written job application. For convictions that specifically impact an applicant's fitness for a particular job, the applicant is subject to disqualification and the employer is allowed to ask the applicant about his/her history in that area.²¹

Minnesota: Passed as part of a public safety omnibus bill, Minnesota became the first state to pass "ban the box" legislation in 2009.²² The law states that applicants may not be disqualified

¹⁵ Christopher Keating, "Legislature Overrides Six Rell Vetoes," *Hartford Courant*, June 22, 2010, accessed February 13, 2012, http://articles.courant.com/2010-06-22/news/hc-veto-session-0622-20100621_1_rell-vetoes-overrides-otb-bill

¹⁶ Conn. Public Act 10-142, <http://www.cga.ct.gov/2010/ACT/PA/2010PA-00142-R00HB-05207-PA.htm>

¹⁷ "New State Initiatives Adopt Model Hiring Policies Reducing Barriers To Employment Of People With Criminal Records," National Employment Law Project, last modified September 21, 2010, <http://www.nelp.org/page/-/SCLP/ModelStateHiringInitiatives.pdf?nocdn=1>

¹⁸ Haw. Rev. Stat. Ann. §378-2.5 http://www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0378/HRS_0378-0002_0005.htm

¹⁹ Haw. Rev. Stat. Ann. §378-2.5 http://www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0378/HRS_0378-0002_0005.htm

²⁰ "Massachusetts CORI Reform Explained." last modified august 9' 2010, http://aclum.org/sites/all/files/legislative/cori_reform_explained.pdf

²¹ Mass. Gen. Laws ch. 151B, § 4-9½ <http://www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B/Section4>

²² Mark Haase, "A Guide for Public Resources Professionals Minn. Stat. 364.021 Public Employment Consideration of Public Records – 'Ban the Box'," Council on Crime and Justice, accessed February 11, 2012, www.crimeandjustice.org/pdfFiles/BanTheBoxHR-Guide.pdf.

from a job with a public employer because of a previous criminal history unless the individual's criminal history relates directly to the job in question.²³ The law prohibits public employers from inquiring about or considering an applicant's criminal history until the public employer has chosen the applicant for an interview.²⁴

New Mexico: Governor Bill Richardson signed Senate Bill 254 into law on March 8, 2010, that amended the Criminal Offender Employment Act, N.M. Stat. § 28-2-3.²⁵ This measure makes it illegal for a previous criminal conviction to automatically bar an applicant from obtaining public employment or license.²⁶ It also prohibits state agencies, departments, boards, or political subdivisions of state agencies from inquiring about an applicant's criminal history records on an initial application.²⁷ The law now states that an applicant's criminal history may only be taken into consideration once he or she is selected as a finalist for the job.²⁸

New York: A 1977 Correction Law prohibits unfair discrimination against persons convicted of one or more criminal offenses.²⁹ This law applies to both public and private employers and makes it illegal to deny an individual employment or licensure solely on the basis of having a criminal record. The employer may disqualify an individual of employment if their conviction directly relates to the type of employment being sought.³⁰

Wisconsin: In 1981 the state legislature passed legislation making discrimination against a job applicant due to previous arrest or conviction record a violation of state law.³¹ There are also a number of special cases and exceptions where this type of discriminatory behavior based on previous arrest or conviction record would not breach state law.³² Like New York's law, Wisconsin law permits an employer to disqualify an applicant if the applicant's criminal history directly relates to the type of employment being sought.³³

²³ Jeff Diebel, Rebecca Pirus, and Ken Backhus, "Bill Summary House Research Department," accessed February 12, 2012 <http://www.house.leg.state.mn.us/hrd/bs/86/HF1301.html>.

²⁴ Minn. Stat. § 364.021 <https://www.revisor.mn.gov/statutes/?id=364.021>.

²⁵ Elizabeth Farid, Michelle Natividad Rodriguez, and Nicole Porter, "State Reforms Promoting Employment of People with Criminal Records: 2010-2011 Legislative Round-Up," National Employment Law Project, accessed February 10, 2012, www.nelp.org/page/-/SCLP/2011/PromotingEmploymentofPeoplewithCriminalRecords.pdf?nocdn=1.

²⁶ New Mexico Senate SB. 254 <http://www.nmlegis.gov/lcs/session.aspx?chamber=S&legtype=B&legno=%20254&year=10>.

²⁷ N.M. Stat. § 28-2-3 <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0>.

²⁸ N.M. Stat. § 28-2-3 <http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0>.

²⁹ N.Y. U.C.C. Law § 752

[http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=\\$\\$COR752\\$\\$@TXCOR0752+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=58930752+&TARGET=VIEW](http://public.leginfo.state.ny.us/LAWSSEAF.cgi?QUERYTYPE=LAWS+&QUERYDATA=$$COR752$$@TXCOR0752+&LIST=LAW+&BROWSER=BROWSER+&TOKEN=58930752+&TARGET=VIEW)

³⁰ Farid, Natividad, and Porter, "State Reforms Promoting Employment of People with Criminal Records: 2010-2011 Legislative Round-Up," National Employment Law Project.

³¹ Wis. Stat. § 111.335 <http://docs.legis.wisconsin.gov/statutes/statutes/111/II/335>

³² Wis. Stat. § 111.335 <http://docs.legis.wisconsin.gov/statutes/statutes/111/II/335>

³³ Wis. Stat. § 111.335 <http://docs.legis.wisconsin.gov/statutes/statutes/111/II/335>

This report was completed on February 20, 2012 by Stephen-George Davis, Lydia Lulkin and Josephine Miller under the supervision of graduate student Kate Fournier and Professor Anthony Gierzynski in response to a request from Representative Mark Woodward.

Contact: Professor Anthony Gierzynski, 513 Old Mill, The University of Vermont, Burlington, VT 05405, phone 802-656-7973, email agierzyn@uvm.edu.

Disclaimer: This report has been compiled by undergraduate students at the University of Vermont under the supervision of Professor Anthony Gierzynski. The material contained in the report does not reflect the official policy of the University of Vermont.