

# **EMPLOYEES WITH CRIMINAL HISTORIES**

## **An Overview for Employee Assistance Professionals**

### **Who we are:**

For over three decades, the Legal Action Center (LAC) has worked to combat the stigma and prejudice that keep individuals with histories of addiction, HIV/AIDS, or criminal records out of the mainstream of society. LAC is committed to helping people reclaim their lives, maintain their dignity, and participate fully in society as productive, responsible citizens through a number of strategies and a range of activities.

The National H.I.R.E. (**H**elping **I**ndividuals with criminal records **R**eenter through **E**mployment) Network (HIRE) was created by the LAC to engage in and support innovations to improve the workforce development outcomes of people with criminal records. This overview has been prepared with assistance from a generous grant awarded by the JPMorgan Chase Foundation.

### **How EAPs can help employers who hire individuals with criminal records:**

Because HIRE recognizes that EAPs can serve myriad roles depending on the organizations they work with, this guide is focused on those who assist employers in designing and implementing personnel policies.

According to the Bureau of Justice Statistics, over 700,000 people have been released each year from U.S. federal and state prisons since 2005. Society expects these individuals to rejoin their families, reintegrate into society, avoid any further criminal activity, and find employment to support them. However, these people often leave prison with very few resources and many obstacles, including the stigma of a criminal record and civil penalties that limit their ability to successfully reintegrate and maintain employment.

EAPs can help employers engage this segment of the population by debunking stereotypes and highlighting the advantages these workers can provide. By providing education about the financial and practical advantages and debunking some of the stereotypes that foster concerns, EAPs can help employers decide how to address the employment of individuals with a criminal record.

## What are the advantages to hiring a person with a criminal record?

Helping an employer decide to hire applicants with a criminal background requires some familiarity with the associated benefits, as well as statutory guidelines. Below is a brief overview and links to outside resources:

### **Financial Incentives:**

The incentive programs listed below can be applied for at any point after a qualifying individual with a conviction record is hired. Employers who were unaware of the programs initially can still benefit.

- *Work Opportunity Tax Credit:* An employer who hires a person with a criminal record can save money thanks to the Work Opportunity Tax Credit (WOTC). This federal tax credit provides an incentive for employers to hire, train, and retain job seekers who are among nine groups, including former felons. This credit can reduce an employer's federal income tax liability by as much as \$2,400 per qualified new worker. For more information about WOTC and whom your client may contact in your state, visit <http://www.hirenetwork.org/wotc.html> and <http://www.hirenetwork.org/resource.html>, respectively.
- *Federal Bonding Program:* Many employers do not consider hiring people with conviction records because of the often-incorrect belief that the applicant is not bondable or that the insurance will be too costly to justify hiring them. However, the Federal Bonding Program issues fidelity bonds at no cost to the employee or employer. This protection can assuage an employer's doubts about financial risks.

These bonds are business insurance policies that protect employers in case of theft, forgery, larceny, or embezzlement of money or property by an employee who is covered by the bond. The bond coverage is usually \$5000 with no deductible amount of liability for the employer. Higher amounts of coverage, up to \$25,000, may be allowed if justified. The bond does not cover liability due to poor workmanship, job injuries, or work accidents.

Visit [www.bonds4jobs.com](http://www.bonds4jobs.com) or <http://wtw.doleta.gov/documents/fedbonding.asp>.

- *State Tax Credits:* Six states - California, Illinois, Iowa, Louisiana, Maryland, and Texas - provide state income tax credits to employers that hire people with criminal records. For more information on state tax credits, visit [http://www.hirenetwork.org/state\\_tax\\_credits.htm](http://www.hirenetwork.org/state_tax_credits.htm).

### **Practical Incentives:**

Hiring people with criminal records can also have some practical incentives. For instance, these workers tend to have job experience prior to their conviction and may have skills that would otherwise require costly and time-consuming training. Additionally, there is anecdotal support for the proposition that employees with criminal records may be more appreciative of the opportunity, given the initial difficulty of re-entering the work force, and may be more dedicated workers.

*QUOTE: “Of all the groups we targeted, ex-offenders turned out to be the best employees, in part because they usually have a desire to create a better life for themselves . . . . They are often highly motivated and many have usable job skills that are desirable for an employer. They come to work every day and do not engage in the type of behaviors that will land them back in the penal system.”*

-Terri Jackson, founder of Empowercom.

### **EAPs can help address employers’ concerns regarding employees with criminal records**

Because most states have no standards governing private employers’ consideration of applicants’ records, many employers address these safety concerns by simply maintaining a blanket policy of not hiring people with conviction records. The societal impact of this unfair policy is an overall increase in recidivism and a loss of opportunity for employers who bypass a valuable source of skilled, willing and often trained labor.

### **Stereotypical Risks Perceived by Employers**

Employers’ reluctance to consider applicants with criminal histories typically centers on the unsubstantiated belief that this group of jobseekers are mostly violent and that hiring them would leave a business susceptible to negligent hiring liability. While HIRE advocates for the removal of employment barriers that are counterproductive to a successful reintegration to society, we also recognize that employers and their employees have legitimate workplace safety concerns.

#### *Violence in the Work Place:*

Contrary to popular belief, most released prisoners were incarcerated for non-violent offenses. Furthermore, there is no evidence that violence in the workplace can be directly attributed to employees with criminal records. In fact, 71% of state prisoners were convicted of non-violent offenses. While “termination, suspension *and referral to an EAP* are the top three methods organizations use to respond to threats of violence,” according to a study conducted by the Society for Human Resource Management (SHRM), the study drew no correlation between violence in the workplace and employees with criminal records. To obtain this study, visit <http://shrmstore.shrm.org>.

#### *Negligent Hiring:*

Employers also cite their concern that they will incur liability for negligent hiring if he or she hires an employee with a criminal record who then commits another crime. While the standards for this vary from state to state, the employers are generally shielded from liability if they are diligent in their evaluation of employees on case-by-case basis.

While state standards differ, the key to determining liability is usually whether the employer could have foreseen the crime: specifically, whether the employee had a history or propensity for harmful behavior and, most importantly, whether the employer knew or should have known of the employee's propensities. Ordinarily, an employer's reasonable efforts to check and consider a prospective employee's background will generally satisfy the legal requirements and eliminate the risk of liability on the employer's part. For more information on negligent hiring concerns, please visit [http://www.hirenetwork.org/negligent\\_hiring.html](http://www.hirenetwork.org/negligent_hiring.html).

*When may employers choose not to hire an applicant because of a criminal record?*

The law varies from state-to-state and even city-to-city, so employers should check with counsel. Generally, however, an employer must demonstrate a "business necessity" for using an applicant's conviction record as a basis for employment decisions. To show "business necessity," employers are typically required to consider:

- The type of offense and its severity;
- The amount of time that's passed since the offense occurred; and
- How the offense relates to the job.

For example, attorney David Gevertz says that a larceny conviction may be relevant to a position as a restaurant cashier, but is less likely to be relevant to a position as a cook. As always, however, employers should discuss local standards with a legal representative.

*Example: New York Correction Law Art. 23-A*

While there is no standardized procedure for how to evaluate these factors, it is prudent to look up any state-specific guidelines and to record the process. For example, New York Correction Article 23-A encourages employers to take into account any unreasonable risk attached to hiring the applicant, as well as the relationship between the conviction and the sought after position. It recommends considering the following 8 factors when deciding whether or not to deny employment based on an individuals criminal record:

- New York's public policy of this state to encourage the licensure and employment of persons previously convicted of one or more offenses.
- The specific duties and responsibilities related to a license or employment.
- The bearing, if any, of the criminal offense(s) on the applicant's fitness or ability to perform one or more such duties or responsibilities.
- The time which has elapsed since the criminal offense(s) occurred.

- The age of the person at the time of the criminal offense(s).
- The seriousness of the offense or offenses.
- Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

As with any potential liability, if an employer conducts a thorough evaluation and documents the process, future exposure for negligent hiring can be limited.

### **EAPs can offer people with criminal histories and their supervisors support for their unique situation**

EAPs will have direct interaction with the employees themselves, whether of their own volition or through referral. By being aware of the challenges that these employees face in their daily lives, EAPs can help the employees to identify potential problems and provide counseling or referral, as necessary. Some of the issues faced by workers with a prior conviction are listed below:

- *Financial Management of Child Support Obligations:* Working at a job that pays low wages can be difficult for anyone, but when an employee’s paycheck is garnished at rates of up to 60% after taxes, it can be increasingly stressful. While people with criminal records in the workplace face most of the same issues with balancing work and family matters as a person without a record, the conviction and subsequent incarceration time may exacerbate some of these problems.

Because of the court’s increasing use of default orders, a person with a criminal record who has served a length of time often finds him or herself owing thousands of dollars in arrears in addition to on-going child support obligations. EAP providers can offer financial management and assistance by linking these clients with resources that can inform them on how to modify their child support orders so they are manageable. For more on best practices concerning parents with criminal records and child support, see [http://www.cffpp.org/publications/Effect\\_of\\_Child\\_Support.pdf](http://www.cffpp.org/publications/Effect_of_Child_Support.pdf). This website also contains technical assistance for providers and valuable resources for clients who are having a difficult time retaining employment due to the payment of child support arrearages.

*QUOTE: In a number of states “incarceration is considered ‘voluntary unemployment,’ meaning prisoners can’t have their child support payments suspended while they’re behind bars. As a result, they emerge from prison with enormous debts, severely hampering their chances for successful re-entry into society by making employment—*

*already difficult with a conviction history—counterproductive to their economic success: States can take as much as 65 percent out of their paychecks to recoup the support.”*  
-Steve Yoder, *The Prisoner’s Dilemma*, *The American Prospect* (Mar. 14, 2011).

- *Advising Clients on How to Review their Criminal Record:* A Record of Arrest and Prosecution is most commonly known as a RAP Sheet. It is a report of the history of arrests attributed to one person based on his or her fingerprints. When a person is fingerprinted by a law enforcement agency, a record is generated and sent to the state central repository. Each state has its own central repository that maintains the arrest and disposition (or outcome) information for cases handled in that state. For a list of all state agencies, visit <http://www.hirenetwork.org/resource.html>.
- *Conflict Resolution and Stress Reduction:* Employees with criminal records, like everyone else, have some degree of stress and anger that needs to be constructively managed. Oftentimes, prison-based programs lack the resources to address these problems before the individual is released, leaving them to look for other resources. In addition, people who leave prison may be reluctant to add the stigma of seeing a mental health specialist to the stigma of being incarcerated.
- *Advising Clients on Legal, Employment, Educational, Training and Social Service Resources Available in your State:* Both employers and employees may benefit from the use of state-specific governmental agencies and community-based organizations that assist people with criminal records and their employers. These agencies and organizations may be of assistance in providing job-related and legal services, answering questions arising from having a criminal record, or offering referrals to other useful organizations. For state-specific resource information, visit <http://www.hirenetwork.org/resource.html>.

## Conclusion

EAPs that assist employers in developing work place policies and initiatives can provide a valuable service to their clients and the growing population of potential workers with a criminal record. By being familiar with the basic opportunities and legal guidelines surrounding engaging this group in the workforce, EAPs can help employers to make responsible decisions.