

**THE PRACTICE OF REGULATING CORI:  
EXAMINING REGULATORY, PROCEDURAL, AND PERCEPTION-BASED  
BARRIERS TO STATE EMPLOYMENT FOR EX-OFFENDERS**

Client: Stanley Jones Clean Slate Project

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## EXECUTIVE SUMMARY

### Statement of Problem

Employment of ex-offenders has become a debate between, on the one hand, removing the debilitating lifetime stigma of ex-offenders as hardened criminals in order to further rehabilitation and, on the other hand, protecting public safety. Massachusetts is at the crossroads of these competing public policy goals and, consequently, there are numerous opportunities to increase meaningful employment opportunities for ex-offenders.

The Stanley Jones Clean Slate Project (SJCSP), a Boston-based advocacy group for ex-offenders, is concerned with the process by which the Executive Office of Health and Human Services (EOHHS) is systematically preventing ex-offenders from working for EOHHS-funded human service providers. Research suggests that EOHHS regulations effectively bar ex-offenders from nearly 60,000 jobs, depriving them of the opportunity to assist other ex-offenders in the challenging task of reintegrating into the community. Ex-offenders working for EOHHS is a win-win situation for all parties involved – ex-offenders themselves become invested in their communities through gainful employment, which has been proven to reduce recidivism, and other ex-offenders, or those at-risk of offending, may receive services from ex-offenders who have walked in their shoes and are committed to breaking the cycle of recidivism.

The Massachusetts Superior Court stated in *Cronin v. O’Leary* that ex-offenders have a constitutionally protected liberty interest in seeking employment.<sup>1</sup> The court mandated that EOHHS protect ex-offenders’ due process rights by creating a procedure by which all ex-offenders can rebut the presumption of dangerousness.<sup>2</sup> In an effort to comply with the court mandate, EOHHS revised their employment regulations to incorporate two means by which Table A<sup>3</sup> ex-offenders may rebut the presumption of dangerousness.<sup>4</sup> The applicant must either

- obtain good-faith approval from his or her parole officer showing that the applicant does not pose an unacceptable risk to program clients, or
- undergo a mental health assessment, conducted by a professional with at least 1000 hours of experience doing dangerous behavior assessments, showing that the applicant does not pose an unacceptable risk to program clients.

SJCSP is concerned that procedures which appear adequate as written may actually be more of a hurdle and disadvantage than a meaningful opportunity upon evaluation of the implementation.

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<sup>1</sup> *Cronin v. O’Leary*, 2001 WL 919969 (Mass. Super. Ct. Middlesex Dist. Aug. 9, 2001).

<sup>2</sup> *Id.*

<sup>3</sup> The crimes the state has categorized as most severe.

<sup>4</sup> 101 Code Mass. Regs. 15.00 to 15.16 (2003).

## Project Goals

This project focused on the opportunities made available in August 2002 to ex-offenders seeking employment in EOHHS positions and the means by which they may overcome the presumption that they are not suitable for employment. However, this barrier is but one of the challenges faced by ex-offenders seeking employment. To focus the research, the law office established the following goals:

- To assess the effectiveness of allowing ex-offenders to obtain approval from a parole officer or qualified mental health professional in order to rebut the presumption of dangerousness and assess whether these two procedures create meaningful opportunities for ex-offenders to become employed at EOHHS.
- To fashion creative and feasible solutions to address the challenges uncovered by the research and analysis.
- To create two brochures, one for ex-offenders and one for human services employers, that provide an overview of the EOHHS regulations, possible difficulties faced by employers and applicants, and potential solutions to these problems.

## Methodology

In order to achieve the project goals, field research was conducted to clarify the current implementation in Massachusetts, and a nation-wide audit was done to assess promising practices from other states.

- **Field:** The field research was conducted to understand and assess the interaction of existing social, political and economic constructs that effect the implementation of the law by those with decision-making authority. The field research process began with an attempt to understand the broad scope of ex-offenders' experiences. Next, the field research team sought a diverse group of stakeholders involved and/or impacted by the EOHHS regulations to understand how these regulations are affecting employment opportunities for ex-offenders. Interviews were conducted with ex-offenders, advocacy organizations, human services agencies/employers, parole officers, and legislators. The findings of the field research is limited by the tight economy that has slowed all hiring, particularly in Massachusetts, and the short period of time between implementation of the current regulations and the interviews.
- **National Audit:** In order to place the impact of the EOHHS regulations in a national perspective, it is instructive to explore how other states' regulatory and statutory schemes have dealt with the need for effective and fair public policy surrounding criminal background checks for ex-offenders, particularly for those interested in working for human services providers. What a state has chosen not to regulate can be as important as the issues or employment fields it has. The scope of the nation-wide audit of state statutory, regulatory, and administrative codes is limited to those laws found to be most analogous to the EOHHS regulations and is not an exhaustive list of all relevant laws. In an effort to provide a more detailed view of a representative cross-section of the laws, the research team chose five states that were supportive of the employment of ex-offenders in which to conduct more detailed research.

## Conclusions

In the end, it is inconclusive whether the current regulations are in full compliance with the court mandates in *Cronin v. O'Leary*. However, field research suggested that the EOHHS regulations constitute a constructive bar to employment for Table A ex-offenders. The field research demonstrated that the current EOHHS regulations pose a profound and daunting challenge for an ex-offender trying to gain employment in the health and human services field and the regulations make it difficult, if not impossible, for service providers to hire a Table A ex-offender, even if he or she is the best person for the job.

There are a number of policy options that could both increase the opportunities for employment and increase compliance with *Cronin v. O'Leary*. The broadest reform would eradicate the classification of crimes and the underlying assumption that some ex-offenders are more dangerous than others. EOHHS could grant full discretion to the hiring service provider to assess the risk and qualifications of each applicant by considering the circumstantial factors surrounding the crime, as they currently do when considering Table B and C offenders for employment. If the state is unwilling to leave all discretion to the hiring service provider, it could retain its reporting requirements and ultimate veto power over the hire of any ex-offenders. Alternatively, the state could itself conduct discretionary decision-making by reviewing any Table A ex-offender whom an agency wants to hire, but has been unable to obtain either the parole officer or mental health evaluation. This decision could be left either to an individual at EOHHS or to a panel of stakeholders. Finally, other options for reform are possible within the existing regulatory framework. A standardized process for service providers and parole officers could make the parole office assessment a more meaningful opportunity. Increased opportunities for ex-offenders could be created by limiting the scope of the regulations, possibly by removing crimes that do not involve violence against a person and those crimes which are associated with addiction. Employment opportunities could also be broadened by limiting the application of the regulation to those jobs which involve a close relationship with vulnerable populations where the job duties are substantially related to the crime committed.

## INTRODUCTION

Forgiveness should not be reserved for a select few. Our criminal justice system releases 1,600 ex-offenders per day, 600,000 per year, back into the communities from which they came.<sup>5</sup> A disproportionate number of ex-offenders will return to America's poorest neighborhoods, predominantly those of color, who bear the burden of the cycle of arrest, incarceration, and reentry.<sup>6</sup> The prison system has become the proverbial "revolving door" through which a disproportionate number of minority ex-offenders continue to walk.

Creating employment opportunities for ex-offenders in appropriate, higher paying jobs is more likely to have a positive impact on their integration back into the community than minimum wage jobs, in addition to improving ex-offenders' ability to make meaningful and unique contributions to the economic community.<sup>7</sup> Years of empirical evidence suggests not only that employment itself reduces recidivism among released ex-offenders, but that the perception of the status and importance of the job in the community has an even greater positive effect on the recidivism rate.<sup>8</sup> In essence, menial labor jobs have less preventative effect on recidivism rates among ex-offenders than higher paying jobs that require more education and skills.

Employment of ex-offenders has become a debate between, on the one hand, removing the debilitating lifetime stigma of ex-offenders as hardened criminals in order to further rehabilitation and, on the other hand, protecting public safety. Our collective perceptions and stigmas regarding ex-offenders reinforce the notions of deviance that are created when society places a label on an offender, thereby creating a self-fulfilling prophecy.<sup>9</sup> Expressions such as "ex-con" have become glamorized, stereotyped, and stigmatized by the media and popular entertainment in the same way that welfare recipients are consistently portrayed as the "welfare

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<sup>5</sup> Jennifer Leavitt, *Walking A Tightrope: Balancing Competing Public Interests In The Employment Of Criminal Offenders*, 34 Conn. L. Rev. 1281 (2002).

<sup>6</sup> *Id.*

<sup>7</sup> Christopher Uggen, *Ex-Offenders and the conformist alternative: a job quality model of work and crime*, 46 Social Problems 127, 137 (Feb. 1999).

<sup>8</sup> *Id.* at 130.

<sup>9</sup> Leavitt, 34 Conn. L. Rev. at 1282.

queen.”<sup>10</sup> While these stereotypes are sometimes based upon a kernel of truth, they are an insufficient basis on which to make effective policy decisions. As a result of the stigma of deviance, ex-offenders find closed doors and barriers to opportunity that perpetuates a cycle of deviance as they fulfill the expectations of others by re-offending.

The other side of the debate emphasizes the public safety concerns of having employees who are ex-offenders enter homes and businesses to interact with citizens, their families, and their livelihoods.<sup>11</sup> Sensational and high profile incidents, such as the murder of Alexandra Zapp by Paul Leahy, an ex-offender, at the Bridgewater Burger King on Route 24 in Massachusetts, enhance the public perception of the potential danger posed by ex-offenders employed in their communities, and thus add to the pressure to hold companies liable for their employment decisions.<sup>12</sup> As an increasing number of public officials are elected with campaign promises to be “tough on crime,” it becomes clear that they face strong public pressure to demonstrate that they are ensuring public safety through stringent crime policies. This political pressure is a driving force in employment laws, especially those in the area of public employment.

Leading the charge as advocates for ex-offenders in Boston is the Stanley Jones Clean Slate Project (SJCSP), with the goal of facilitating the integration of ex-offenders back into the community by empowering them to make a difference in the lives of other ex-offenders. SJCSP’s principle activities are to advocate for opportunities for ex-offenders and to counsel them about appropriate steps to become productive citizens. SJCSP has recently focused on the impact and use of Criminal Offender Record Information (CORI) and transitional services for ex-offenders who are released into the community. Haywood Fennell, Sr., the founder and president of SJCSP, has recently been honored with the Boston Neighborhood Fellows Award for his creativity, leadership, and commitment to the Boston community.<sup>13</sup>

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<sup>10</sup> Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 *Fordham Urb. L.J.* 1159 (1995).

<sup>11</sup> Leavitt, 34 *Conn. L. Rev.* at 1282.

<sup>12</sup> Michele Kurtz, *Who is to Blame if Employees Kill*, *Boston Globe* B1 (August 4, 2002).

<sup>13</sup> Mark Leccese, *Unexpected Rewards in a City Where Brilliance Often Outshines Industry, Six Workers Break Through Anonymity and are Set to Collect \$30,000 Surprises*, *Boston Globe City Weekly* 1 (Jan. 12, 2003).

Massachusetts is at the crossroads of competing public policy goals regarding the employment of ex-offenders. During this time of transition, there is an unprecedented opportunity to remove the stigma of deviance associated with ex-offenders, to give them equal access to employment, and to provide new opportunities for human service providers to gain employees who have valuable experience, compassion, and knowledge from the unique and powerful perspective of the personal challenges overcome by ex-offenders.

SJCSP is concerned with the process by which the Executive Office of Health and Human Services (EOHHS) is systematically preventing ex-offenders from working for EOHHS human service providers, therefore barring ex-offenders from assisting other ex-offenders through many community-based human services agencies that receive funding from EOHHS. EOHHS is a cabinet level agency that oversees fifteen state agencies that make up the Secretariat.<sup>14</sup> The Secretary of EOHHS is appointed by the Governor, serves as Chief Executive Officer at EOHHS, and is the Governor's chief policy advisor on all health and human services issues.<sup>15</sup> Collectively, the agencies under EOHHS supply roughly 60,000 to 70,000 human service positions in Massachusetts.<sup>16</sup>

EOHHS and its agencies are an important source of employment for ex-offenders, who have life experiences that cannot be replicated or replaced and, as a result of those experiences, can provide a unique type of support for others who come from similar situations and have similar experiences. While not all ex-offenders may be qualified for some of the higher paying positions, EOHHS is also a source of entry-level positions that can provide stable employment opportunities for a broad range of ex-offenders. In short, ex-offenders working for EOHHS in a human service capacity can be a win-win situation for all parties involved – ex-offenders become invested in their community, which has been proven to reduce recidivism, and other ex-offenders, or those at risk who are receiving services through these agencies, receive the

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<sup>14</sup> *Mass.gov, Executive Office of Health and Human Services* <<http://www.masscares.org/main.asp?page=aboutus>> (accessed Nov. 25, 2002).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

perspective of those who have walked in their shoes and are committed to breaking the cycle. EOHHS funds a large proportion of human service providers across the state, putting EOHHS in the position to control the employment practices of those agencies. By barring ex-offenders from employment in those agencies, EOHHS may be restricting ex-offenders from many of the jobs that they have an irreplaceable skill-set for and can become more invested in than menial labor.

The Massachusetts Superior Court stated in *Cronin v. O'Leary* that ex-offenders have a liberty interest in seeking employment and mandated that EOHHS create a due process procedure through which ex-offenders can rebut a presumption of dangerousness.<sup>17</sup> As a broad tenet of law, once a court has ruled that a person has a property interest in either tangible property or a proxy for property, such as a government entitlement, liberty, or life, the person has due process rights that are protected by the 5<sup>th</sup> and the 14<sup>th</sup> Amendments.<sup>18</sup>

Welfare advocates have attempted to use due process protections to empower the disadvantaged, in the same way that SJCSP is advocating for EOHHS to implement an effective and feasible procedure through which ex-offenders can obtain employment. Just as is the case with due process regarding termination of welfare benefits, procedures that appear adequate on paper may reveal to be more of a hurdle and disadvantage than a beneficial opportunity upon evaluation of the implementation. "Removing formal barriers to participation is not enough in our stratified society to achieve procedural justice, even in the modest sense of enabling all persons to participate in the rituals of their self-government on an equal basis."<sup>19</sup> Though appearing to be just and adequate on its face, the EOHHS regulations may not be so in practice.

There are numerous stakeholders in the employment decisions of EOHHS funded agencies, each with their own interests, concerns, and goals. Therefore, we must operate as problem-solvers in order to assess the implementation of the EOHHS regulations and come up with feasible solutions, while recognizing that the courtroom is not the only means of resolving

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<sup>17</sup> *Cronin v. O'Leary*, 2001 WL 919969 (Mass. Super. Ct. Middlesex Dist. Aug. 9, 2001).

<sup>18</sup> *Goldberg v. Kelly*, 397 U.S. 294 (1970).

<sup>19</sup> Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 Buff. L. Rev. 1 (1990).

this debate. Any complex problem that involves community values, prejudices, and barriers aimed at ex-offenders requires a more comprehensive approach than litigation alone to provide a complete solution.<sup>20</sup> However, there may be times when a more adversarial, litigation-based approach is necessary to protect the constitutional rights of ex-offenders.<sup>21</sup>

### **PROJECT GOALS**

- ❖ *To understand the implementation of the EOHHS regulations on the ground level, particularly whether ex-offenders are able to obtain approval from a parole officer or qualified mental health professional in order to rebut the presumption of dangerousness.*
- ❖ *To understand the pragmatic changes that the EOHHS regulations have undergone.*
- ❖ *To identify any attitudinal changes toward ex-offenders on the part of EOHHS and its service providers.*
- ❖ *To provide creative and feasible solutions to address the challenges uncovered by the research and analysis.*
- ❖ *To create two brochures, one for ex-offenders and one for human services employers, that provide an overview of the EOHHS regulations, possible difficulties faced by employers and applicants, and potential solutions to those challenges.*

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<sup>20</sup> Susan P. Strum, *From Gladiators to Problem-Solvers: Connecting Conversations About Women, the Academy, and the Legal Profession*, 4 Duke J. Gender L. & Policy 119 (1997).

<sup>21</sup> *Id.*

## **EOHHS REGULATORY HISTORY: MASSACHUSETTS LEGISLATIVE, REGULATORY, & JUDICIAL ACTIONS**

In 1992, EOHHS became aware of several instances where employees with criminal records had abused or assaulted mentally retarded program clients and appointed staff to investigate the problem.<sup>22</sup> At that time, EOHHS did not require hiring agencies to check applicants' criminal records.<sup>23</sup> During the review process several other incidents of abuse occurred and EOHHS determined that a standardized policy was needed to ensure uniformity among its contractors in how this matter was handled.<sup>24</sup> An affidavit written by Kevin McHugh, EOHHS Director of Investigations at the time these incidents occurred, cited only cases of abuse that concerned mentally retarded program clients, a particularly vulnerable client population.<sup>25</sup>

In the spring of 1996, at the same time the standardized EOHHS policy was being finalized and adopted, the Boston Globe ran several articles regarding the state's approval of foster parents and child care providers who have criminal records.<sup>26</sup> The initial stories reported over 100 approved foster parents who had criminal records or whose households included adults with criminal records.<sup>27</sup> The criminal records of the foster parents referenced in the article included charges and convictions for offenses including assault and battery, drunk driving, and the sale and possession of drugs.<sup>28</sup> Less than one month later, the Globe reported that day-care providers had also been approved by the state in spite of the fact that the providers themselves, or another adult in their household (in instances of in-home day care), had a criminal record.<sup>29</sup>

Thus, today's broad policy which presumes that ex-offenders are ineligible for all state human services jobs seemingly was born of an important, but narrow, concern that children and mentally retarded individuals not be endangered by those who care for them. All applicants to

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<sup>22</sup> Aff. Kevin McHugh ¶¶ 3-4 (Aug. 1, 2000)

<sup>23</sup> *Id.* at ¶ 4.

<sup>24</sup> *Id.* at ¶¶ 6-8.

<sup>25</sup> *Id.* at ¶¶ 3, 6.

<sup>26</sup> See David Armstrong, *DSS Lets Criminals Give Care*, Boston Globe B1 (April 28, 1996); David Armstrong, *12 Day-Care Sites with Criminals Got State OK*, Boston Globe B1 (May 23, 1996).

<sup>27</sup> Armstrong, Boston Globe B1 (April 28, 1996).

<sup>28</sup> *Id.*

<sup>29</sup> Armstrong, Boston Globe B1 (May 23, 1996).

EOHHS funded or subcontracted positions – from child care providers to adult drug recovery counselors to maintenance workers – are subject to the CORI background check and a presumptive or discretionary disqualification from employment should a criminal record be confirmed. Many jobs posted on the EOHHS website, like Registered Nurses and Social Workers, require advanced skills and education.<sup>30</sup> However, there are many entry-level vacancies for full-time Nursing Assistants and level I Mental Health Workers, which require a high school diploma or G.E.D. and provide a starting salary in the mid-\$20,000 range.<sup>31</sup> Furthermore, as the plaintiffs in *Cronin v. O’Leary*<sup>32</sup> demonstrate, some ex-offenders have education and skills that would otherwise qualify them for upper-level positions available with EOHHS.

The state’s initial regulation that restricted employment of ex-offenders in EOHHS-funded agencies is known as Procedure 001. It required all EOHHS job applicants to disclose whether they had a criminal record, which would then be verified through a CORI check with the Criminal History Systems Board.<sup>33</sup> Procedure 001 also required lifetime employment disqualification for people convicted of violent crimes, sexual assault, or drug trafficking, while people convicted of less serious crimes faced mandatory disqualification for 10 years, and those convicted of still lesser crimes could be hired only upon written authorization of the program.<sup>34</sup> While EOHHS did consult several contracting service providers before issuing Procedure 001,<sup>35</sup> a participating association of substance abuse service providers reported that none of its specific recommendations were incorporated into Procedure 001 as issued.<sup>36</sup> The Alcohol and Drug Abuse Association specifically recommended the following: to exclude crimes like drug

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<sup>30</sup> Human Resources Division, Commonwealth of Massachusetts, *Commonwealth Employment Opportunities*, <[http://ceo.hrd.state.ma.us/ceo.nsf/\\$\\$ViewTemplate+for+by+Agency?OpenForm&Start=1&Count=30&Seq=1](http://ceo.hrd.state.ma.us/ceo.nsf/$$ViewTemplate+for+by+Agency?OpenForm&Start=1&Count=30&Seq=1)> (accessed Mar. 17, 2003).

<sup>31</sup> *Id.*

<sup>32</sup> 2001 WL 919969 (the lawsuit which challenged the constitutionality of this broad exclusion from employment).

<sup>33</sup> *Id.* at \*1.

<sup>34</sup> *Id.* at \*2.

<sup>35</sup> Aff. McHugh at ¶ 8.

<sup>36</sup> Letter from Anne Taft, Exec. Dir., Alcohol and Drug Abuse Assn., Inc., to Gerald Whitburn, Sec., Exec. Off. of Health and Human Servs., *Standardized Policy on Criminal Background Checks* (June 4, 1996) (copy on file with Stanley Jones Clean Slate Project).

possession that are associated with addictive behaviors, to differentiate between types of employment with extensive direct client contact and those without, to differentiate between providers' client populations in recognition of the special need to employ former addicts in treatment programs, and to retain the discretion to hire in the provider agencies in all cases.<sup>37</sup>

Notwithstanding the arguable wisdom of its content, Procedure 001 was not implemented in accordance with the Massachusetts Administrative Procedures Act (APA)<sup>38</sup> and was, therefore, not legal. The APA requires that the public must be given at least 21 days notice and an opportunity to comment on any proposed regulations, either through public hearing or by accepting written comments, before they become effective.<sup>39</sup> Additionally, the APA requires the agency to file the regulation with the State Secretary and publish it in the Massachusetts Register before it becomes effective, unless it is an emergency regulation.<sup>40</sup> An agency may adopt emergency regulations without immediate public notice and comment if necessary for the "preservation of public health, safety, or general welfare," but emergency regulations can be in place for no longer than 3 months, during which time an opportunity for public comment must be provided.<sup>41</sup> Nothing appeared in the Massachusetts Register regarding the employability of ex-offenders when Procedure 001 took effect, nor was Procedure 001 adopted as an emergency regulation, which would have permitted its immediate adoption followed by a formal administrative review and adoption process. Though it governed the hiring practices of all EOHHS agencies, Procedure 001 was not implemented legally. All of the subsequent versions of the regulations, however, were implemented in accordance with the APA and were thus legally

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<sup>37</sup> *Id.*

<sup>38</sup> Mass. Gen. Laws Ann. ch. 30A, § 1, 3, 5, 6 (West 2003).

<sup>39</sup> Mass. Gen. Laws Ann. ch. 30A, § 3.

<sup>40</sup> Mass. Gen. Laws Ann. ch. 30A, §§ 5-6.

<sup>41</sup> Mass. Gen. Laws Ann. ch. 30A, § 3.

promulgated.<sup>42</sup>

*Cronin v. O'Leary* was filed in April 2000, challenging Procedure 001's compliance with the APA as well as its constitutionality.<sup>43</sup> The plaintiffs were 4 individuals who had been denied employment under then-applicable Procedure 001 -- 2 plaintiffs were subject to the 10 year mandatory disqualification, while the other 2 were subject to the lifetime mandatory disqualification.<sup>44</sup>

After *Cronin* was filed with the court, but before its ruling in August 2001, EOHHS issued emergency regulations in December 2000.<sup>45</sup> EOHHS followed the requisite procedure by filing the emergency regulations with the State Secretary and publishing the regulations with an open comment period in the Massachusetts Register on December 22, 2000.<sup>46</sup> Several service providers who contracted with the Department of Public Health (DPH) for funding provided public comment regarding the regulations and expressed concern that the regulations would exclude many people whose life experience in dealing with addiction and HIV/AIDS make them particularly effective messengers in both treatment and outreach efforts.<sup>47</sup> Directors from these EOHHS-funded substance abuse and HIV+ treatment programs testified that they were in the best position to exercise the discretion necessary to run a successful program and that the regulations were over-inclusive and would diminish the quality of their services.<sup>48</sup>

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<sup>42</sup> Massachusetts courts have upheld the strict procedural requirements of publication in the Register and struck down regulations that were not enacted in compliance with the APA. *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Commission*, 345 Mass. 228 (1962) (state minimum price for liquor was not legally established as the regulations were invalidly enacted and so Commission's decision to suspend claimant's liquor license for selling below this state minimum was reversed as the state minimum price was not legally promulgated.)

<sup>43</sup> *Cronin*, 2001 WL 919969 at \*1.

<sup>44</sup> *Id.* at \*2.

<sup>45</sup> 101 Code Mass. Regs. 15.00 to 15.16 (2000).

<sup>46</sup> 911 Mass. Register 65 (Dec. 22, 2000).

<sup>47</sup> Letter from Charles Faris, Pres., Spectrum Health Sys., Inc., to LouAnn Stanton, General Counsel, Dept. of Public Health, *Emergency Regulations Regarding CORI Checks* (Jan. 8, 2001) (copy on file with Stanley Jones Clean Slate Project); Letter from Dianne Luby, Pres., Planned Parenthood League of Mass., to Howard Koh, Commr., Dept. of Public Health, *Emergency Regulations Entitles Criminal Offender Record Checks* (Jan. 26, 2001) (copy on file with Stanley Jones Clean Slate Project); Memo from Friends of the Shattuck Shelter, to Howard Koh, Commr., Dept. of Public Health, *Public Hearings Before the Commr. of the Mass. Dept. of Public Health* (Jan. 2001) (copy on file with Stanley Jones Clean Slate Project).

<sup>48</sup> *Id.*

The December 2000 regulations limited the scope of coverage to positions in which the employee would have the potential for unsupervised client contact, as opposed to all EOHHS-funded positions, as was required under Procedure 001.<sup>49</sup> Unsupervised client contact did not include contact in commonly used areas, like waiting rooms, but did include bathrooms and other isolated areas.<sup>50</sup> The December 2000 emergency regulations also established four slightly different categories of crimes with corresponding limitations on employment options: the most serious crimes triggered a mandatory lifetime disqualification, less serious crimes triggered a presumptive five- or ten-year disqualification, and hiring programs were granted discretion to hire people who committed the least serious crimes.<sup>51</sup> The presumptively disqualified applicants could be hired only upon showing that either their criminal justice supervisor or a qualified mental health professional concluded that the applicant “does not pose an unacceptable risk to the persons served by the program.”<sup>52</sup> Under the presumptive and discretionary categories, the program must also consider several factors when exercising discretion: time passed since conviction, age at time of offense, seriousness and circumstances of offense, nature of work performed, number of offenses, evidence regarding rehabilitation, and any other relevant information.<sup>53</sup>

Procedure 001 was replaced by the December 2000 emergency regulations and, as a result, the focus of *Cronin* shifted, with the court considering only the constitutionality of the mandatory lifetime disqualification under the December 2000 emergency regulations as the issuance of emergency regulations in compliance with the APA rendered the APA claim moot.<sup>54</sup> The plaintiffs stipulated that the court need not rule on that claim.<sup>55</sup>

Meanwhile, in June 2001, advocates in the Massachusetts legislature successfully added language to the FY 2002 state budget which prohibited EOHHS from discriminating against an

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<sup>49</sup> 101 Code Mass. Regs. 15.03 (2000).

<sup>50</sup> 101 Code Mass. Regs. 15.04 (2000).

<sup>51</sup> 101 Code Mass. Regs. 15.10 (2000).

<sup>52</sup> 101 Code Mass. Regs. 15.10 (2000).

<sup>53</sup> 101 Code Mass. Regs. 15.11 (2000).

<sup>54</sup> *Cronin*, 2001 WL 919969 at \*1.

<sup>55</sup> *Id.*

employer who hired an ex-offender after documenting to EOHHS why the candidate is appropriate and providing all ex-offenders the opportunity to rebut the presumption of disqualification.<sup>56</sup> While the budget language expired in August 2002, *Cronin* effectively required EOHHS to permanently provide the reform embodied in the FY 2002 budget language.

In addition to working to change the regulations to ensure a meaningful opportunity for ex-offenders to rebut the presumptive or discretionary disqualification for employment, some effort has been made to seal criminal records. Sealed criminal records legally enable ex-offenders to state on job applications that they have no criminal record.<sup>57</sup> Currently, upon petition, adult criminal records shall be sealed in Massachusetts when 15 years have passed since felony conviction without an intervening conviction of anything more serious than a \$50 motor vehicle conviction.<sup>58</sup> Juvenile criminal records shall be sealed upon petition after 3 years have passed without an intervening conviction of anything more serious than a \$50 motor vehicle conviction.<sup>59</sup> Model “Second Chance” legislation has been developed by Rev. Al Sharpton and Professor Charles Ogletree which would extend the opportunity for ex-offenders to seal their criminal records.<sup>60</sup> Ex-offenders with two or fewer non-violent drug crimes would be eligible for this “second chance” and would be required to complete a treatment program, perform public service (e.g., speaking in high schools about the importance of staying drug-free), and obtain a high school diploma or G.E.D., if they did not already have one.<sup>61</sup> House Speaker Thomas Finneran floated the proposal in the Massachusetts House of Representatives, but did not introduce legislation to this effect after criticism from Republicans and small business owners.<sup>62</sup>

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<sup>56</sup> Enacted Line Item Budget Language, Mass. Conf. Rpt. *Fiscal Year 2002 State Budget* <<http://www.state.ma.us/legis/02budget/conference.pdf>> (accessed Dec. 2, 2002).

<sup>57</sup> *Commonwealth v. Vickey*, 381 Mass. 762 (1980).

<sup>58</sup> Mass. Gen. Laws. Ann. ch.276 § 100A (West 2003).

<sup>59</sup> Mass. Gen. Laws. Ann. ch. 276 § 100B (West 2003).

<sup>60</sup> Student Author, *Winning the War on Drugs: A “Second Chance” For Non-Violent Drug Offenders*, 113 Harv. L. Rev. 1485 (2000).

<sup>61</sup> *Id.* at 1494-95.

<sup>62</sup> Ellen Silberman, *Finneran: Employers Needn't Know About All Crimes*, Boston Herald 3 (Mar. 16, 2000).

In August 2001, the court held that ex-offenders have a constitutionally protected liberty interest in the opportunity to seek employment with EOHHS.<sup>63</sup> The court recognized ex-offenders' constitutionally protected liberty interest in employment with EOHHS-funded agencies, likening it to the constitutionally protected liberty interest of a corporation that had previously been found to have acted with a lack of integrity in governmental contracts in seeking and being awarded future federal contracts.<sup>64</sup> The court found a liberty interest because:

1. the deprivation was of a tangible interest, here, employment and
2. the stigma resulting from the denial of employment is based on the applicant's purported dishonesty, immorality, or propensity for future criminality, and
3. the applicant is barred from a significant number of employment opportunities in the field, here, thousands of jobs in social services.<sup>65</sup>

After recognizing the liberty interest in employment at stake, the court discussed what process is due to protect this interest. Citing the MA Supreme Judicial Court in *Doe v. Attorney General*, which held that all sex offenders are due an opportunity to rebut the presumption that they are a continuing threat to the public before being required to register with the local police department, the court held that the plaintiffs' right to due process was violated because they did not have an opportunity to rebut the presumption of continuing risk and disqualification from employment opportunities with EOHHS.<sup>66</sup> All potential applicants are entitled to a fair opportunity to challenge a mandatory lifetime disqualification, as the opportunity for employment with EOHHS is a constitutionally protected liberty interest.<sup>67</sup> The court did not prescribe a procedural method to be instituted; rather, it permitted EOHHS to determine, by October 12, 2001, how to provide a fair opportunity for plaintiffs to rebut their presumptive disqualification from employment.<sup>68</sup> The court recognized that plaintiffs had the right to challenge the procedure instituted by EOHHS if the procedure implemented did not comport with procedural due process.<sup>69</sup>

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<sup>63</sup> *Cronin*, 2001 WL 919969 at \*4.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at \*9.

<sup>66</sup> *Id.* at \*\*6-7.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at \*7.

<sup>69</sup> *Id.*

Following the *Cronin* decision, EOHHS issued a second set of emergency regulations.<sup>70</sup> Though this second set of emergency regulations took effect in October 2001 to comply with the court order, they were not finalized and published until February 2002, after providing the public comment period required by the APA. The February 2002 emergency regulations allowed all disqualified applicants, including those convicted of the most serious crimes, the opportunity to rebut the presumption of a disqualification.<sup>71</sup> Those with a presumptive lifetime disqualification were given the opportunity to rebut in the same manner established for those with a time-limited presumptive disqualification – a criminal justice or mental health assessment revealing an acceptable level of risk to program clients.<sup>72</sup> The February 2002 emergency regulations answered the court’s order that all applicants must have the opportunity to challenge a presumptive employment disqualification. The February 2002 emergency regulations retained similar categories of crimes: lifetime presumptive disqualification, 10-year presumptive disqualification, 5-year presumptive disqualification, and discretionary disqualification.<sup>73</sup>

EOHHS promulgated its current non-emergency regulations in August 2002 after providing an opportunity for public comment, as required in the APA.<sup>74</sup> There are now three categories of crimes. Table A contains the most serious violent crimes and retained a lifetime presumptive disqualification that can be challenged only with a determination made by a criminal justice official or through a mental health assessment.<sup>75</sup> Table A crimes include murder, rape, other sexual offenses, and trafficking in cocaine, heroin, or marijuana.<sup>76</sup> Table B and C crimes are considered discretionary disqualifications.<sup>77</sup> Table B crimes include assault with a dangerous weapon, armed and unarmed robbery, and manufacture or possession of drugs.<sup>78</sup> Table C crimes include assault and battery, operation of motor vehicle while under the influence,

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<sup>70</sup> 101 Code Mass. Regs. 15.00 to 15.16 (2002).

<sup>71</sup> 101 Code Mass. Regs. 15.10 (2002).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 101 Code Mass. Regs. 15.00 to 15.16 (2003).

<sup>75</sup> 101 Code Mass. Regs. 15.10(1)(a) (2003).

<sup>76</sup> 101 Code Mass. Regs. 15.16 (2003).

<sup>77</sup> 101 Code Mass. Regs. 15.10 (2003).

<sup>78</sup> 101 Code Mass Regs. 15.16 (2003).

prostitution, and violation of a support order.<sup>79</sup> An applicant whose criminal record includes either a Table B or C crime need not submit either criminal justice or mental health verification showing a lack of a threat to program clients; the program need only weigh the following factors when exercising their hiring discretion: time passed since conviction, age at time of offense, seriousness/circumstances of offense, nature of work performed, number of offenses, evidence regarding rehabilitation, and any other relevant information.<sup>80</sup> All hiring decisions regarding applicants with CORI records must be sent in writing, prior to the employment start date, to the Department of EOHHS which provides funding.<sup>81</sup> The Department can override the decision to hire candidates convicted of crimes in Tables A or B within 5 days.<sup>82</sup> There is no 5-day waiting period for hiring approval for those convicted of Table C crimes.<sup>83</sup> Finally, a program can obtain a waiver of the 5-day waiting period provision from EOHHS for the hires of those convicted of Table B or C crimes.<sup>84</sup>

While the original regulations issued in 1996 were illegal and thus not effective, EOHHS has complied with APA requirements regarding notice and publication in subsequent amendments, making the current regulations limiting employment of people with criminal backgrounds legally-enacted and valid. Two outstanding questions remain:

- Do the current regulations preserve the constitutionally protected liberty interest of ex-offenders in seeking employment with EOHHS by providing a meaningful opportunity for ex-offenders to rebut their presumptive disqualification?
- Have other states chosen different means to balance the need to keep human services clients safe with the interest in providing employment opportunities for ex-offenders to facilitate re-integration into the community through employment?

The paper will address each of these questions in turn.

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<sup>79</sup> 101 Code Mass. Regs. 15.16 (2003).

<sup>80</sup> 101 Code Mass. Regs. 15.11 (2003).

<sup>81</sup> 101 Code Mass. Regs. 15.11(3) (2003).

<sup>82</sup> 101 Code Mass. Regs. 15.11(4) (2003).

<sup>83</sup> 101 Code Mass. Regs. 15.11(4) (2003).

<sup>84</sup> 101 Code Mass. Regs. 15.12 (2003).

## **FIELD RESEARCH: PERCEPTION AND IMPLEMENTATION OF THE EOHHS REGULATIONS**

In order to understand the impact and implementation outcomes of the EOHHS regulations since their final permutation in August 2002, it was imperative to conduct field research to assess our project goals. Laws are not implemented in a vacuum – the process inevitably involves interaction with the existing social, political, and economic constructs that will effect the interpretation of the law by those with the implementation and decision-making authority. Given the discretionary power embedded in the employment process, the implementation is crucial to understanding the impact of these regulations on ex-offenders. More specifically, the essential question is whether the two opportunities to rebut the 10-year prohibition on employment included in the August 2002 EOHHS regulations are effective.

The field research process began with an attempt to understand the broad scope of ex-offenders' experiences in the employment process, namely, what general process is involved with trying to get a job. Where do ex-offenders go for assistance? What barriers are there? How do they perceive their rights, abilities, and prospects? Next, the field research team sought out a diverse group of stakeholders involved and/or impacted by the EOHHS regulations to understand how these regulations are affecting employment opportunities for ex-offenders. By bringing a diverse group of stakeholders to the table our law office has obtained a broad perspective on this complex issue.

In assessing the effect of the latest EOHHS regulations, interviews were conducted with health service agencies/employers, legislators, parole officers, and ex-offenders. The field research team sought to answer the following questions through interviews:

- Are service providers and ex-offenders aware of the new EOHHS regulations?
- Are ex-offenders using the new EOHHS-defined process to establish non-dangerousness in order to gain employment at health service employers?
- If so, are such efforts allowing ex-offenders to gain employment, or do the regulations constitute a constructive bar to employment, contrary to the *Cronin v. O’Leary*<sup>85</sup> decision.

The field research team encountered three significant challenges in their research. First, the poor economy has had a profound impact on all hiring, especially given the impending state budget shortfalls, which has affected the hiring practices for all state agencies, particularly EOHHS. Second, the short time frame between the passage of the final EOHHS regulations and the field research interviews has impacted reports on the implementation outcomes of the regulations. Some of the interviews suggest that there is a general unawareness of the changes in the regulations, which is telling unto itself, but also suggests that the regulations have not yet been completely integrated. Lastly, all of the parties involved in the process, most notably the ex-offenders and legislators, are burdened and may be motivated by public pressures. The ex-offenders face the perception that they will likely resort once again to commit crimes and the legislators face the public pressure to be “tough on crime.”

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<sup>85</sup> *Cronin*, 2001 WL 919969.

## RESEARCH METHODOLOGY

The primary goals of the field research were to explore the following questions:

1. Is it realistic to expect that an ex-offender can overcome the assumptions made based upon a criminal history by having a prison superintendent, probation officer, or parole officer vouch for the future trustworthiness of the ex-offender based upon his/her past behavior?
2. Is a mental health certification a viable option for ex-offenders given the availability and cost to the employer?
3. Overall, do the EOHHS regulations provide a fair opportunity for ex-offenders to rebut “the inference that because of their prior convictions, they pose an unacceptable risk to EOHHS clients?”<sup>86</sup>
4. Additionally, how is the use of discretion being applied in these situations? Can discretion be used to support an ex-offender’s integration into the community? Or is it being used to create further hurdles and obstacles to his/her employment at EOHHS?

The field research team conducted sixteen interviews with various stakeholders, who could be categorized into four groups.

Ex-Offenders: The interviews with ex-offenders provide first hand accounts of their efforts at employment. While not all of the ex-offenders have attempted to gain employment under the EOHHS regulations, their experiences, attitudes, and perceptions are essential to understanding the challenges they face upon release from incarceration. If the broad goal is complete integration into the community, it is impossible to understand how to accomplish this goal without understanding the needs of ex-offenders.

Service Providers: Service providers are essential stakeholders and experience the conflict between the needs of their agency, the general public, and clients. They can provide insight into the challenges faced by ex-offenders, concerns over employing ex-offenders, and most importantly, their utilization of discretion to balance their needs and that of their agencies.

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<sup>86</sup> *Id.* at \*1-2.

Parole Officers: Parole officers are essential to understanding how this new regulation is being implemented for two reasons. First, they have the discretionary power to certify a Table A ex-offender. Second, they can provide a broad and integrated perspective on the experiences of ex-offenders as they are re-introduced into the community after incarceration.

Legislators: Legislators are vital stakeholders in this system given that their perceptions and actual understanding of the challenges and needs of EOHHS will shape any future employment regulations and will affect the ability of the SJCS to lobby for any changes in the regulation to promote the interests of ex-offenders. While changes to the EOHHS regulations can be made administratively by EOHHS, advocates within the legislature can help jar any bureaucratic roadblocks. There is a natural disconnect between those who create and implement regulations and understanding this gap in knowledge can help assess where the system is failing and how to solve the problems.

#### **SUMMARY OF INTERVIEW FINDINGS**

Generally, employers are aware of the change in the regulations, although some are unclear about the mechanics of the process.<sup>87</sup> The legislators who were interviewed (by and large those who are sympathetic to the concerns of ex-offenders) feel that the current regulations do, in fact, constitute a constructive bar to employment, contrary to the legislature's intent and the mandate set forth by the court in *Cronin v. O'Leary*.<sup>88</sup> Parole officers indicated significant concerns regarding their liability should they ever "sign-off" on the non-dangerousness of an ex-offender; yet, of the nine officers and two supervisors interviewed, none had received a single request for a letter.<sup>89</sup> Of the ex-offenders the research team interviewed, most understood the purpose of CORI record checks was to protect the public and they were sympathetic to that

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<sup>87</sup> Telephone Interview with Court Cline, Volunteer Coordinator, AIDS Care of Hampshire County (February 11, 2003); Telephone Interview with Edith White, Executive Director, South Shore AIDS Project (February 20, 2003).

<sup>88</sup> Interview with Dianne Wilkerson, State Senator in Boston, Mass. (Feb. 27, 2003).

<sup>89</sup> Interview with Jim O'Neal, Supervisor, Region One Parole Office, Mike Joyce, Parole Officer, and Dan Joyce, Parole Officer, Quincy, Mass. (Feb. 13, 2003); Interview with Debbie Wornham, Mattapan Parole Office Supervisor, Arthur Isberg, Parole Officer, and 4 other Parole Officers who wished to remain anonymous, Mattapan, Mass. (Feb. 20, 2003).

concern, but felt that modifications had to be made to the system in order to facilitate the employment of ex-offenders.<sup>90</sup>

Although the stakeholders see relevance and utility behind the EOHHS regulations, there is a universal feeling that the system must be modified in order for it to be truly effective in balancing the competing public interests of providing employment opportunities for ex-offenders and ensuring public safety. As the EOHHS employment regulations have been implemented, not only are there concerns about the inability to hire ex-offenders for jobs they're qualified for, but there is a greater concern that the relative inability of ex-offenders to find gainful employment only perpetuates a cycle of crime, encourages recidivism, and thus increases the burden that society must bear for both the crime and the cost to incarcerate and care for the recidivist offender.<sup>91</sup>

### **STAKEHOLDER GROUP ANALYSIS**

#### Ex-offenders

The quite limited field research interviews with ex-offenders suggest that perhaps the EOHHS regulations are not a barrier for ex-offenders finding employment in EOHHS jobs given the demographics of the population. Despite concerted effort, the field research team was only able to interview three ex-offenders, and found that many were unwilling to speak on the record.

Echoing a point raised by the parole officers, none of the three ex-offenders who were interviewed would qualify for a majority of EOHHS positions, given their education levels. Similarly, all said that they generally understood the reasoning behind the CORI laws; however, they were less certain of its efficacy.

One especially insightful narrative was that of Robert Cameron, an ex-offender himself and a placement specialist at STRIVE, a job training center geared towards Boston area ex-offenders.<sup>92</sup> Though Cameron has long-term employment, his experience working with ex-

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<sup>90</sup> Interview with "B.G.", an ex-offender in Boston, Mass. (Jan. 23, 2003); Interview with Tony, an ex-offender in Boston, Mass. (Feb. 10, 2003).

<sup>91</sup> Interview with Dianne Wilkerson.

<sup>92</sup> Interview with Robert Cameron, Placement Specialist at STRIVE in Boston, Mass. (January 14, 2003).

offenders has made him believe the problem with CORI is that it allows employers discretionary power to discriminate against those with a CORI, regardless of the severity of their offense.<sup>93</sup> Cameron believes that the minds of employers are corrupt in the sense that they believe once a person is a criminal, they will always be a criminal.<sup>94</sup>

The ex-offenders interviewed expressed a strong desire for the opportunity to present their case to a state official in person – a face-to-face opportunity to rebut a presumptive disqualification, rather than a process that is strictly on paper and impersonal.<sup>95</sup> Such a process would help put a human face and story behind a crime and would allow the ex-offender to personally explain why he committed the offense, why he’s qualified for the job, and why he does not pose a danger to the public.

“B.G.,” an ex-offender incarcerated for acts related to his drug addiction, noted that the fields of employment should be limited to those relevant to the acts for which the ex-offender was incarcerated.<sup>96</sup> For example, according to “B.G.,” if an ex-offender was convicted of a drug offense, but is now fully recovered, it may be appropriate for the offender to be a drug counselor and help those with whom he has a common background.<sup>97</sup> Tony, an ex-offender convicted of breaking and entering, robbery, and drug-related offenses, also noted that the CORI laws are misguided, insofar as they may prevent ex-offenders from pursuing employment opportunities.<sup>98</sup>

Perhaps most compelling are some of the experiences of the ex-offenders in employment interviews. For example, when “B.G.,” recently clean of drugs, began working as a temp at a mutual funds company, he showed such promise that he was offered a permanent position.<sup>99</sup> He was told that a background check was a part of the hiring process. Two days later, when the company discovered “B.G.” had a criminal record, he was immediately fired.<sup>100</sup> “B.G.”

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Interview with “B.G.”

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Interview with Tony.

<sup>99</sup> Interview with “B.G.”

<sup>100</sup> Interview with “B.G.”

described the situation as one where “as soon as they had let me into the house, they turned me away.”<sup>101</sup>

Tony has also expressed disheartenment. Although he was released from prison in 1989 and the time period from which he has been barred from EOHHS jobs has passed, he still expressed the belief that CORI will limit him professionally.<sup>102</sup> Although his offenses were unrelated to his position, he stated, “It is a handicap. I am never going to be the head of an agency.”<sup>103</sup>

Overall, all of the interviewed ex-offenders believed that CORI, though purposeful, serves neither the employers (insofar as it deprives them of potential competent employees) nor the ex-offenders. In the words of “B.G.,” “There are a lot of intelligent people out there who happen to have a CORI and who became successful once they were given a chance.”<sup>104</sup>

#### Service Providers

Six service providers in agencies funded by EOHHS were interviewed to determine how the implementation of the current EOHHS regulations affects their ability to hire ex-offenders. Two of the organizations interviewed provide substance abuse treatment to former addicts, two provide services to AIDS patients and two aim to reintegrate ex-offenders or formerly homeless persons back into society.

The general consensus among the service providers is that the regulations constitute an undue burden upon the provider’s ability to offer sufficient and valuable services to clients. This view is especially prevalent for the two providers specifically serving ex-offenders or the incarcerated who feel that the best way to reach these communities is by having another ex-offender speak with them, providing a common ground on which they can discuss their problems.<sup>105</sup> As one interviewee said, “An ex-offender may be the best individual to work with

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<sup>101</sup> *Id.*

<sup>102</sup> Interview with Tony.

<sup>103</sup> *Id.*

<sup>104</sup> Interview with “B.G.”

<sup>105</sup> Telephone Interview with Edith White.

those who are trying to get their lives together.”<sup>106</sup> Service providers also recognized that ex-offenders’ applications need to be reviewed carefully since an ex-offender/applicant could potentially be in a position of power over clients who are at-risk.<sup>107</sup>

Among the service providers interviewed who have filled positions since the new regulations were implemented, each had only hired one or two ex-offenders whose offenses fell into either Table B or C. The reason for the dearth of hiring is uncertain and beyond the scope of this study, but may be due to financial constraints related to the economic recession or the fact that not many ex-offenders are applying for those positions.<sup>108</sup> The ex-offenders who were hired filled various positions, such as shelter relief coordinator, counselor aid for a women’s residential program, and orderly at a detoxification and addictions program. Friends of Shattuck Shelter, whose mission is to successfully integrate homeless men and women back into the community, was the only organization among the six interviewed that has been able to hire a Table A offender.<sup>109</sup> With a positive assessment from the candidate’s parole officer, the Shelter hired the ex-offender to run the Street Outreach Program.<sup>110</sup> However, the consensus among the service providers remained that a Table A offender is rarely hired.

Some of the service providers were unaware that the regulations provide Table A offenders the ability to rebut the presumption of dangerousness.<sup>111</sup> Service providers working in larger organizations were generally more aware of the changes to the EOHHS regulations that were implemented in August 2002. The four service providers who were aware of the rebuttal process found it unrealistic and nearly impossible to hire a Table A offender because of time and money constraints.<sup>112</sup> These providers also presumed that there are underlying liability issues

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<sup>106</sup> E-mail Interview Maria Alexson, Training Manager, Community Resources for Justice (February 19, 2003).

<sup>107</sup> Telephone Interview with Jeanne O’Connell, Director of Human Resources, Friends of Shattuck Shelter (February 13, 2003).

<sup>108</sup> Interview with Tony Winsor, Attorney, Mass Law Reform Institute (January 23, 2003).

<sup>109</sup> Telephone Interview with Jeanne O’Connell.

<sup>110</sup> *Id.*

<sup>111</sup> E-mail Interview with Maria Alexson; Telephone Interview with Court Cline.

<sup>112</sup> Telephone Interview with Jeanne O’Connell; Telephone Interview with Edith White; Interview with “C.J.,” Director of Human Resources, an anonymous residential drug treatment facility (February 14, 2003); Telephone Interview with Judith Whitmarsh, Director of Social Policy, Catholic Charities (March 3, 2003).

that would prevent a parole officer from signing such a letter.<sup>113</sup> Two human resources directors expressed their belief that it is highly unlikely that someone would “stick their neck out” or “put their name on the line” by attesting to the non-dangerousness of an ex-offender with whom they are not familiar, the primary reason being that no one can predict human behavior, including whether an ex-offender will re-offend.<sup>114</sup>

In addition, one human resources representative candidly stated she would not go through the timely and costly process of seeking approval from a parole officer or mental health professional for a Table A offender unless the candidate was exceptional.<sup>115</sup> While the apparent reluctance to hire Table A offenders may be a result of the stigma that is attached to an ex-offender, it is also likely, and understandable, that human resources departments simply do not want to create additional work for themselves than is absolutely necessary.

Given the current economy and the tight job market, providers/employers feel that it is impractical to hire an ex-offender if they can hire someone of roughly equal competence who does not have a criminal record. Small substance abuse service providers do not have sufficient manpower or financial resources to get assessments from mental health professionals or parole officers, as most of these smaller service agencies have only one or two persons who are responsible for hiring.<sup>116</sup> If an organization needs to hire someone on short notice to fill a counselor, volunteer, or coordinator position, it will be more likely to take the person without a CORI over the person with a CORI, thereby avoiding the need to jump through any additional “hoops.”<sup>117</sup> Also, most of these organizations do not have an in-house mental health professional, so they would need to hire someone from outside to do the assessment. This takes time and money – the two most precious and scare resources for many providers.

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<sup>113</sup> *Id.*

<sup>114</sup> Interview with “C.J.”; E-mail Interview with Maria Alexson.

<sup>115</sup> Interview with “C.J.”

<sup>116</sup> Telephone Interview with Jeanne O’Connell.

<sup>117</sup> Interview with Tony Winsor.

One provider interviewed believed the 2002 regulations were an improvement for persons whose offenses once fell in the lifetime bar category.<sup>118</sup> Such offenders are now at least being given a chance to rebut the presumption that they pose a threat to their clients. However, as mentioned above, it is the general consensus that the requirement of getting an assessment from a parole officer or mental health professional makes the hiring process extremely difficult, if not impossible.

Even if providers were more willing or able to hire ex-offenders under the current EOHHS regulations, there are many other obstacles to an employer's ability to conduct his/her business. For example, one of the interviewees, who employed ex-offenders in programs involving incarcerated populations, explained that many prison administrators refuse to permit ex-offenders access to the facility, thereby rendering the issue of ex-offenders eligibility for employment under the regulations moot.<sup>119</sup>

#### Parole Officers

After interviewing nine Boston area parole officers, it is apparent that there are no uniform procedures in place to process a request for a letter of suitability from an ex-offender. Additionally, parole officers have concerns regarding legal liability should they sign a letter for an ex-offender. The general procedure in the Quincy parole office is that, if an individual parole officer receives a request, he would pass that request up to his supervisor.<sup>120</sup> Once the supervisor receives the request, he would then pass the request on to his supervisor.<sup>121</sup> Once the request is passed up the chain of command beyond the regional supervisor, it is unclear what would happen to the request.<sup>122</sup> The individual parole officers, as well as the supervisor, assume that a risk assessment request would most likely be denied due to the concern of liability should the ex-offender re-offend.<sup>123</sup> None of the parole officers interviewed from the Quincy office would feel

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<sup>118</sup> Telephone Interview with Jeanne O'Connell.

<sup>119</sup> Telephone Interview with Edith White.

<sup>120</sup> Interview with Jim O'Neal, Mike Joyce, and Dan Joyce.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

comfortable providing a detailed assessment of a parolee because of these liability concerns.<sup>124</sup> From our interview, it seemed that the regional supervisor has not been trained regarding the presence or lack of legal liability issues involved with providing a risk assessment. The risk-assessment decisions would be sent up the chain of command, further and further away from the parole officer who has actual contact with the individual being assessed. The Quincy parole office has not yet received a single request for a risk assessment.<sup>125</sup> Thus, this procedural system has yet to be tested.

As in Quincy, the Mattapan parole office instructed its parole officers to pass risk assessment requests to their supervisor.<sup>126</sup> However, no one in the Mattapan district has requested an assessment under the current EOHHS regulations.<sup>127</sup> Earlier, the Mattapan office came under scrutiny for providing a positive assessment of a parolee for a non-EOHHS job who later re-offended in the workplace.<sup>128</sup> One of the parole officers said that they have been trained not to provide detailed information on a parolee if a potential employer asks for a reference.<sup>129</sup> They have been trained to provide objective facts, such as that the parolee has reported regularly or has passed drug tests.<sup>130</sup>

From speaking with supervisors in both Quincy and Mattapan and individual parole officers, it seems that there is not really a set procedural system in place to handle potential requests from ex-offenders. The individual officers who know the parolees the best are required to pass a risk assessment request to their supervisors, who in turn must pass the request on to their supervisors. The regional supervisors are not really sure what happens to the request once they pass it up the chain of command. This “passing the buck” from one person to the next, and the lack of clarity of what actually would become of a request, suggests that there really is not an effective procedure in place to process a risk assessment request. Thus, the realities of an ex-

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Interview with Debbie Wornham, Arthur Isberg, and 4 anonymous Parole Officers.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

offender obtaining an assessment from his or her criminal justice official are not very strong. Because there is not a solid procedural system in place within the parole system, the procedural step developed by EOHHS in the 2002 regulations is not an effective way for an ex-offender to rebut the presumption of dangerousness.

### Legislators

As part of the field research, interviews were conducted with some leading state and local legislative leaders on the general effects of the CORI laws on employment opportunities for ex-offenders. For the most part, the discussions with legislators regarded CORI in general, not EOHHS regulations, but some key themes were uncovered throughout the course of these interviews.

When asked about the EOHHS provisions requiring a parole officer or mental health professional to verify the non-dangerousness of an ex-offender, all of the legislators interviewed cited this criterion as impractical and illusory. They were quick to point out that a parole officer would not be likely to jeopardize his or her credibility and open him or herself to potential liability. Furthermore, legislators recognized the prohibitive cost to service providers of an assessment performed by a mental health specialist who is certified to perform high-risk evaluations.

Senator Wilkerson recognized that employers are not given the appropriate discretion in these matters and suggested that the administration caved in to public perception about crime. Furthermore, Senator Wilkerson indicated that these regulations exacerbate the difficulties in re-integration of ex-offenders. From the local perspective, Boston City Councilor Chuck Turner was much more blunt, stating that “most people who are interested in getting jobs in public agencies have probably heard that [they have an opportunity to rebut], but they understand the attitudes of parole officers and people in the district attorneys’ offices and they’re not going to help [ex-offenders].”<sup>131</sup> Overall, Councilor Turner was highly critical of the regulation’s options

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<sup>131</sup> Interview with Chuck Turner, Boston City Councilor in Boston, Mass. (March 14, 2003).

for rebuttal: “It may be in the regulations, but people don’t take it seriously. It’s just a way for the administration to save face around the question of due process.”<sup>132</sup>

All of the legislators agreed that persons convicted of certain crimes are not suitable for certain human services positions. For instance, no one would want a pedophile serving as a school bus driver. Opinions differ, however, when it comes to how broadly CORI records should be used by employers. City Councilor Maureen Feeney indicated that CORI checks are necessary in every instance, as they provide an employer with a complete history of the employee.<sup>133</sup>

Councilor Turner, on the other hand, recommended a much more restricted use of CORI checks. Unfettered access to a person’s entire criminal record actually perverts the original intent of CORI law. Created in 1972, the CORI Act was intended to be a potent implement to protect the privacy of ex-offenders and to facilitate their pursuit in obtaining employment.<sup>134</sup> In particular, it was designed so that employers could use a CORI report to begin a conversation with a job applicant about his or her past and determine how the employer could help work around required probation appointments and other logistical problems created by other commitments required of ex-offenders, particularly the recently incarcerated.<sup>135</sup>

To uphold this intent, Councilor Turner recommended a much more narrow application of CORI checks, where, for instance, a person applying for a position in a youth services agency would be required to answer a question such as, “Have you ever been convicted of a crime which harmed or caused detriment to a child?” The employer would submit a CORI request to the state, which would conduct a background check for crimes specifically related to the service provider’s field of practice and the question asked of the applicant. The state would then notify the employer if relevant offenses were listed on the CORI with necessary instructions.<sup>136</sup> While there was unanimity among the legislators that the state needs to fund support programs for

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<sup>132</sup> *Id.*

<sup>133</sup> Interview with Maureen Feeney, Boston City Councilor in Boston, Mass. (March 7, 2003).

<sup>134</sup> Taken from *The Practice of Regulating CORI: Examining Regulatory, Procedural, and Perception-Based Barriers to Employment of Ex-Offenders*, Donald Donnaldson, Fall 2002.

<sup>135</sup> *Id.*

<sup>136</sup> Interview with Chuck Turner.

prison inmates and ex-offenders, none could suggest a feasible means to fund such programs given the state's current budget crisis. Councilor Feeney cited her strong support for such funding.<sup>137</sup> She feels that the City of Boston must do more to provide ex-offenders opportunities to rehabilitate themselves, in an attempt to prevent further crimes.<sup>138</sup> She advocated direct, proactive support to ex-offenders, potentially through an Office of Re-Integration, that would provide employment assistance and other services.<sup>139</sup> She suggested that if one completes the rehabilitation process, some form of due consideration should be allowed, and proposed differentiating first-time offenders from multiple offenders.<sup>140</sup> Councilor Turner observed, "We have a moral responsibility to each other, but we also need to look at the fiscal costs of this system that creates little more than a cycle."<sup>141</sup> He pointed out that an investment in support programs for prisoners and ex-offenders would lead to a reduction in prison costs due to the reduction in recidivism.<sup>142</sup> "Even in the conservative atmosphere we're in, as our financial situation becomes difficult, there has to be attention paid to where resources are being put. I hope that even conservatives can look at the compilation of information and see the exorbitant costs of incarceration and the benefit of public education programs."<sup>143</sup>

Senator Wilkerson mentioned that former Governor Jane Swift had been paranoid about compromising her "get tough on crime" image.<sup>144</sup> "The entire affair really has little to do with getting tough on crime; it has more to do with the government caving in to public perceptions about crime. This is something that we need to address, to show people that such approaches only exacerbate the problem. [Massachusetts Governor Mitt] Romney didn't even know what CORI was one week prior to the elections."<sup>145</sup> She relayed a story when candidate Romney was at an African-American church in a debate, and he was questioned about the impact of CORI

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<sup>137</sup> Interview with Maureen Feeney.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> Interview with Chuck Turner.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Interview with Dianne Wilkerson.

<sup>145</sup> *Id.*

regulations. According to Senator Wilkerson, he didn't know what CORI was, but he tried to cover it up by talking about sex offenders.<sup>146</sup> She also mentioned that, given Lieutenant Governor Healey's background in criminal justice (she was a consultant in the fields of law and public safety for ABT Associates, Inc. in Cambridge), she is the point-person for the administration on CORI and other criminal justice issues.<sup>147</sup>

All the legislators, particularly Councilor Turner and Senator Wilkerson, noted the significant relationship between race and CORI. Senator Wilkerson noted that "we have nearly a third of African-American males who are essentially unemployable because of these regulations and their criminal histories. This is not just a Black and Latino issue, it's also a white issue. Whites are ex-offenders as well. We need to build coalitions to educate the public about these issues."<sup>148</sup> Councilor Turner noted that "there's a situation where more and more people of color are being disproportionately put into jail. You have to say that it's a part of our racism and classism."<sup>149</sup>

Senator Wilkerson and Councilor Turner, however, felt that progress is being made. Senator Wilkerson pointed out that evolution in sentiment, most notably in former Health & Human Services Secretary Jajuga's co-sponsoring a budget amendment with Senator Wilkerson.<sup>150</sup> Councilor Turner observed that there is at least recognition of the problem. A few years ago, it wasn't even seen. "But, to create a public sentiment that feels we're better off fiscally and morally by having a system that helps people move forward with their life development despite past mistakes, that's going to take a long time. I don't know when we'll be able to do it, whether that's in the next decade or the next couple of decades. It makes it hard for us to really appreciate that society has a responsibility to think through and create ways that help people move forward."<sup>151</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> Interview with Chuck Turner.

<sup>150</sup> Interview with Dianne Wilkerson.

<sup>151</sup> Interview with Chuck Turner.

## AUDIT OF STATE REGULATIONS

In order to understand the Massachusetts EOHHS regulations, it is instructive to survey how other states' regulatory and statutory schemes have dealt with the need for effective public policy surrounding criminal background checks. Exploring how other states have addressed this difficult public policy issue and creatively balanced the interests of numerous stakeholders is helpful in identifying promising practices. Additionally, some states have chosen to define its policy regarding criminal background checks more narrowly, suggesting that the scope of the public safety concern is overstated in Massachusetts.

One response to the growing political mantra of "tough on crime" policies is to understand and articulate how employment policies both in Massachusetts and across the country are affecting employment opportunities for ex-offenders. New and promising practices can provide information and alternatives to what is a growing, one-sided debate. Overall, employment is essential, since it is in the best interest of society to integrate ex-offenders into the community to reduce recidivism.

Overall, states have chosen to balance these interests with a wide range of public policies – from complete absence of regulations to creative policies, such as good cause waivers and certificates of rehabilitation, which introduce discretion and consider ex-offenders as individuals. One of the only universal conclusions that can be drawn from this analysis is that ex-offenders have greater opportunities to gain human services positions in many of the other states. There appears to be no standard policy or obvious solution to the challenges faced here in Massachusetts, although there are common themes that run through the policy choices of some states.

All states have witnessed the tension created by limiting the rights of some, in this case ex-offenders, while giving the right to discriminate against that group to another authority, either through the use of discretion or strict procedures. Most states have chosen to require that employers conduct criminal background checks, analogous to CORI, when the state employee has or would have interaction with vulnerable populations, such as children or the elderly, presumably in an effort to protect those populations from criminal activity. However, the states have chosen different methods to evaluate whether ex-offenders are eligible for employment in human services agencies.

### **RESEARCH METHODOLOGY**

The scope of the nationwide audit of state statutory, regulatory, and administrative codes is limited to those laws found to be most relevant and/or analogous to the Massachusetts EOHHS regulations. The research was conducted to explore all laws regarding criminal background checks that either applied to an agency analogous to EOHHS or applied a creative or distinct criminal background check procedure to a state agency.

The audit of state regulations, codes, and statutes primarily involved using Westlaw and Lexis-Nexis to research practices in all fifty states. In an attempt to provide a complete picture of how other states are protecting the rights of ex-offenders to employment, and specifically the public policy surrounding human services positions, state agency regulations, state statutes, judicial case law, and legislative history were included in the review, although not all sources were available or applicable for each state. Each state was systematically analyzed using the

same research questions.<sup>152</sup>

Given the limited time and resources available to the research team, the following summaries include only the laws available through accessible sources. Furthermore, the summaries included cannot be said to be an exhaustive list of all relevant laws, but simply those that are most analogous and pertinent, as determined by the research team.

In an effort to provide a more detailed view of a representative cross-section of the relevant laws, the research team chose five states for which to conduct a more in-depth inquiry. These five states were chosen because they exemplified creative policy choices that were supportive of the employment of ex-offenders. The research team then chose a representative state from each category that would be an instructive comparison to the Massachusetts EOHHS regulations. However, this level of research is again constrained by the inability of the research team to conduct field research in these five states to determine implementation outcomes of and qualitative attitudes toward each state's laws.

In an effort to highlight the differences in outcome between the different policies of the focus states, three hypothetical employment candidates have been created and will be used in the analysis. Each one has been convicted of a different crime – murder, simple assault, or drug possession.

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<sup>152</sup> 1. Coverage: What types of jobs and crimes are addressed by the regulation, code, or statute? Does the state govern the same type of employment as EOHHS and in the same manner?  
2. Time of Restriction: Are any restrictions on employment time-limited or do they last a lifetime?  
3. Possibility of Rebuttal: Is there a process by which an ex-offender can challenge a disqualification from a job based upon his/her criminal history? If so, what is it?  
4. Fitness Exam: Is there a psychological exam or an equivalent means for an ex-offender to demonstrate that they are fit for employment?  
5. Employer Discretion/Veto: What room is there for employers to exercise discretion over the hiring decisions or are there mandatory restrictions?  
6. Types of Crimes Involved: What is the extensiveness of the list of disqualifying crimes? What crimes trigger a restriction on employment and how related are they to the nature of the employment responsibilities?

## FOCUS STATES

The policy of five states that have legislation that prohibits or limits discrimination against ex-offenders is presented below. The strongest statute, from Wisconsin, forbids considering all types of criminal histories in both public and private situations. Illinois and Rhode Island prohibit consideration of arrest records only. Colorado prohibits discrimination in state employment, with some exceptions. New York lays out circumstances under which an employer can consider conviction records in employment decisions.

### COLORADO

In Colorado, the fact that a person has been convicted of a felony or other offense involving moral turpitude<sup>153</sup> does not, in and of itself, prevent her from applying for and obtaining public employment nor prevent her from applying for and receiving a license, certification, permit, or registration required by the state in order to partake in any business, occupation, or profession.<sup>154</sup> The intent of this statute, as explicitly stated, is to expand employment opportunities for persons who, notwithstanding a conviction, have been rehabilitated and are ready to accept responsibilities.<sup>155</sup>

However, Colorado statutory law provides an exception for positions involving direct contact with vulnerable persons.<sup>156</sup> Under this statute, ex-offenders are disqualified from employment under the auspices of the Department of Health and Human Services if the position involves direct contact with or face-to-face care of people.<sup>157</sup> An applicant may be disqualified from employment if they have been convicted of certain serious crimes,<sup>158</sup> regardless of the

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<sup>153</sup> Although the courts do not appear to have defined 'moral turpitude,' they have found that, for example, driving while intoxicated is not an offense of moral turpitude. *Hartman v. Wadlow*, 545 P.2d 735 (Colo. App. 1990).

<sup>154</sup> Colo. Rev. Stat. § 24-5-101 (2002); Colo. Rev. Stat. § 24-4-101 (2002).

<sup>155</sup> Colo. Rev. Stat. § 24-5-101.

<sup>156</sup> Colo. Rev. Stat. § 27-1-110 (2002).

<sup>157</sup> Colo. Rev. Stat. 27-1-100(1) (2002).

<sup>158</sup> Serious crimes include crimes of violence, felony offenses involving unlawful sexual behavior, and felony offenses that involve domestic violence. Colo. Rev. Stat. § 27-1-100(7)(a)-(b).

length of time that has passed, or if they have been convicted of certain misdemeanors<sup>159</sup> within the last ten years.<sup>160</sup>

An applicant who has been convicted of a qualifying misdemeanor within the last ten years may submit a written request to the Executive Director of the Department of Health and Human Services for reconsideration of the disqualification.<sup>161</sup> The reconsideration is essentially a review of whether the person poses a risk of harm to vulnerable persons.<sup>162</sup> In reviewing the disqualification, the Executive Director of the Department of Health and Human Services gives predominant weight to six factors: seriousness of the disqualifying offense, whether the applicant has more than one conviction, vulnerability of the victim of the offense, time elapsed without repeat of offense, documentation of successful completion of training or rehabilitation, and any other relevant information submitted by the applicant.<sup>163</sup> The factors considered in reconsideration of an employment bar do not require an expensive outside assessment by a psychologist or other professional. The decision of the Executive Director is final.<sup>164</sup>

The Colorado statute does permit reconsideration for some applicants who have been convicted of a serious crime that carries an apparent lifetime employment prohibition. However, a hiring reconsideration for a criminal offense qualifying as a lifetime bar may only be based on a mistake of fact such as an error in the identity of person.<sup>165</sup>

There are apparently no cases that deal directly with this statutory exception to Colorado's policy of encouraging re-entry of ex-offenders into society. The few cases in the state that address the statute deal only with the interpretation of 'moral turpitude'.<sup>166</sup>

The statute that provides for the licensure of certified nurses presents a notable departure from the Department of Health and Humans Services hiring scheme outlined above. The

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<sup>159</sup> Misdemeanors include third degree assault or violation of a restraining order.

Colo. Rev. Stat. § 27-1-100(7)(a)-(b).

<sup>160</sup> Colo. Rev. Stat. § 27-1-100(7)(a)-(b).

<sup>161</sup> Colo. Rev. Stat. § 27-1-100(11).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> Colo. Rev. Stat. § 27-1-100(11)(b).

<sup>165</sup> Colo. Rev. Stat. § 27-1-100(10).

<sup>166</sup> *Hartman*, 545 P.2d 735.

licensing board of the state may revoke the license of a certified nurse if that person has been convicted of a felony, without recourse.<sup>167</sup>

To give a better idea of how the criminal background check system might work in Colorado, we look to our three hypothetical ex-offenders, one convicted of murder, one convicted of assault, and one convicted of possession of a controlled substance. The ex-offenders with the murder and the assault conviction would face a lifetime bar to employment at a Department of Health and Humans Services agency. Regardless of elapsed time since the conviction or circumstances surrounding the conviction, health care employers would be prohibited from hiring or retaining those ex-offenders.

The ex-offender with the conviction for possession of a controlled substance would qualify for a position at a Department of Health and Humans Services agency. The Colorado statute focuses on conviction for crimes of violence against people, not felony or misdemeanor convictions in general.

## **ILLINOIS**

In Illinois, public and private organizations are not prohibited from utilizing conviction information in evaluating the qualifications and character of current and prospective employees.<sup>168</sup> Protection is given only to those whose records have been expunged,<sup>169</sup> sealed, or impounded, either because they were youthful offenders or because they were acquitted or released without being convicted. It is a civil rights violation for any employer to inquire into or to use an applicant's expunged, sealed, or impounded record as a basis for refusal to hire.<sup>170</sup> Otherwise, it appears that there is no restriction on the use of criminal record information in the employment setting. There are statutes that require certain employers to consider the criminal records of their current and prospective employees.

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<sup>167</sup> Colo. Rev. Stat. § 12-38.1-111.

<sup>168</sup> 20 Ill. Comp. Stat. Ann § 2630/5 (West 2002).

<sup>169</sup> At trial, a defendant may request that the trial judge order the record of arrest erased from the official records of that arresting authority and also order that the records of the clerk be sealed until further order from the court upon a showing of good cause. *Id.*

<sup>170</sup> 775 Ill. Comp. Stat. Ann § 5/2-103 (West 2002).

The Illinois statute that is most relevant to our discussion of the Massachusetts EOHHS regulations is the Illinois Health Care Worker Background Check Act.<sup>171</sup> This Act requires health care employers<sup>172</sup> to conduct UCIA (Uniform Conviction Information Act<sup>173</sup>) criminal record checks on current and prospective employees<sup>174</sup> who are or will be involved in the direct care<sup>175</sup> of patients. If the background check reveals any prior criminal convictions, classified under an extensive list ranging from petty theft to first-degree murder,<sup>176</sup> the conviction shall serve as an absolute bar to employment unless the employee obtains a waiver of employment prohibition.<sup>177</sup>

Current and prospective employees may request a waiver of employment prohibition from the entity responsible for inspecting, licensing, certifying, or registering the health care employer (“the licensing entity”) within five working days after the receipt of the criminal report.<sup>178</sup> The licensing entity may grant a waiver based upon mitigating circumstances, including, but not limited to: age at which the crime was committed, circumstances surrounding the crime, length of time since conviction, criminal history since conviction, work history, current employment references, character references, nurse aid registry records, and other evidence demonstrating the ability to competently perform employment responsibilities without posing a threat to the health or safety of residents, patients, or clients.<sup>179</sup> The licensing entity must act upon the waiver request within thirty days of receipt of the information.<sup>180</sup>

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<sup>171</sup> 225 Ill. Comp. Stat. Ann. § 46/25 (West 2002).

<sup>172</sup> “Health care employer” is defined as “a community living facility, life care facility, long-term facility, home health agency, hospital, community residential alternative, nurse agency or respite care provider.” 225 Ill. Comp. Stat. Ann. § 46/15 (West 2002).

<sup>173</sup> 225 Ill. Comp. Stat. Ann. § 46/30, 35 (West 2002).

<sup>174</sup> The background check applies to health care and nurse aides, personal care assistants, and day training personnel, but not licensed health care professionals. 225 Ill. Comp. Stat. Ann. § 46/15.

<sup>175</sup> “Direct care” is defined as the “nursing care or assistance with meals, dressing movement, bathing or other personal needs or maintenance, or general supervision and oversight of the physical and mental well-being of an individual who is incapable of managing his or her person.” *Id.*

<sup>176</sup> See 225 Ill. Comp. Stat. Ann. § 46/25.

<sup>177</sup> 225 Ill. Comp. Stat. Ann. § 46/40 (West 2002).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

Although the waiver request presents the current or prospective employee with an opportunity to rebut a presumption of dangerousness, the health care employer is not obligated to offer permanent employment to or retain an employee who is granted a waiver.<sup>181</sup> In fact, the employer, unlike the licensing entity, is not immune from liability in the event that the current or prospective employee subsequently harms a patient or resident during the course of employment. Therefore, in spite of a grant of a waiver, the employer must still evaluate each current or prospective employee, on a case-by-case basis, to determine if they represent a risk of harm to residents, patients, or clients.<sup>182</sup> If an employer perceives a current or prospective employee to be a risk and/or liability, employment opportunities will most likely not be extended to ex-offenders.

There have been no cases in Illinois that have challenged the constitutional validity of using the UCIA criminal record check as an absolute bar to employment. In *Newborne v. University of Chicago Hospitals and Clinics*,<sup>183</sup> an employee brought an action for wrongful discharge, claiming that the Act was a pretext for age discrimination. The court granted summary judgment for the employer, never addressing the validity of the Act.<sup>184</sup> “If the Healthcare Worker Background Check Act survives a constitutional challenge, it may be expanded in the future to include additional healthcare workers and/or additional prohibited crimes.”<sup>185</sup> However, the Act has yet to be challenged on constitutional grounds.

This statute seems to be a liberal one in that it gives the applicant an opportunity to obtain employment in the human services sector even though a criminal record exists. The waiver of employment prohibition could be utilized in Massachusetts to alleviate some of the barriers that currently exist in the EOHHS regulations. Although the statute appears to contain a flaw in its assignment of liability to the employer rather than the entity that grants the waiver of prohibition, it does show a significant legislative initiative to remove barriers to employment for ex-offenders.

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<sup>181</sup> *Id.*

<sup>182</sup> Judith R. Amsel et al., *Survey of Illinois Law: Health Care*, 20 S. Ill. U. L.J. 839, 870 (1996).

<sup>183</sup> 1999 WL 1129604 (N.D. Ill. Dec. 3, 1999).

<sup>184</sup> *Id.*

<sup>185</sup> Amsel, 20 S. Ill. U. L.J. at 871.

Again, we gain a better understanding of how the criminal background check system might work in Illinois, when we look to our three hypothetical ex-offenders, one convicted of murder, one convicted of assault, and one convicted of possession of a controlled substance. The ex-offenders with the murder and the assault conviction would face a lifetime bar to employment. Regardless of elapsed time since the conviction or circumstances surrounding the conviction, health care employers would be prohibited from hiring or retaining those ex-offenders unless a waiver of employment prohibition was obtained.

Interestingly, possession of a controlled substance is not one of the crimes identified in the statute. Therefore, being convicted of drug possession does not serve as an absolute bar for obtaining employment. However, the statute does list multiple drug charges, such as criminal drug conspiracy, drug trafficking, and drug manufacture or delivery, as crimes for which a conviction would function as a lifetime bar to employment, unless a waiver of employment prohibition were obtained.

The waiver of employment prohibition serves as an opportunity for an ex-offender to obtain employment with a health care employer despite an existing prior conviction for any one of the crimes enumerated in the statute.

## **NEW YORK**

New York public policy encourages “the licensure and employment of persons previously convicted of one or more criminal offenses.”<sup>186</sup> New York statutory law furthers this policy by directly addressing the issue of employment discrimination against ex-offenders. New York has codified its policies on discrimination in three separate fair employment statutes: N.Y. Executive Law § 296,<sup>187</sup> N.Y. Correction Law §§ 752-54,<sup>188</sup> and N.Y. Criminal Procedure Law § 160.60<sup>189</sup>. These statutes address all aspects of employment for ex-offenders, including overarching policy objectives as well as specific guidelines that govern this area of employment discrimination.<sup>190</sup>

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<sup>186</sup> N.Y. Correction Law §§ 753(1)(a) (McKinney 2003).

<sup>187</sup> N.Y. Exec. Law §§ 296(15) to 296(16) (McKinney 2001).

<sup>188</sup> N.Y. Correct. Law §§ 752 to 754 (McKinney 2003).

<sup>189</sup> N.Y. Crim. Proc. Law § 160.60 (McKinney 2003).

<sup>190</sup> Leavitt, 34 Conn. L. Rev. at 1294.

In N.Y. Executive Law § 296, the New York legislature has included criminal history as one of the prohibited bases of discrimination in its general Human Rights Law, along with “race, religion, creed, sex, and the like.” Section 296 specifically forbids private and public employers from denying licenses or employment “to any individual by reason of his or her having been convicted of one or more criminal offenses.”<sup>191</sup> In addition, all employers are barred from inquiring about, or acting adversely upon, information regarding arrests that terminated in favor of the accused.<sup>192</sup> While § 296 limits the ability of employers and state licensing agencies to use criminal records of applicants, its purpose is not to give ex-offenders preferential treatment in the hiring process, but to reduce employer prejudice.<sup>193</sup>

However, N.Y. Correction Law § 752 provides two exceptions to N.Y. Executive Law § 296, specifying situations in which employers can or should consider an applicant’s criminal record when making employment decisions.<sup>194</sup> The first exception permits employers to deny an application for employment or licensure if “there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought.”<sup>195</sup> A direct relationship is defined as one in which the “nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.”<sup>196</sup>

The statute provides eight factors to assist employers in determining whether a “direct relationship” exists between a particular applicant’s prior criminal record and the employment position sought: (1) the state’s public policy of encouraging the licensure and employment of previously convicted individuals, (2) “the specific duties and responsibilities necessarily related to the license or employment,” (3) the bearing of any criminal offenses on the fitness or ability to perform employment duties and responsibilities, (4) the time which has elapsed since the

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<sup>191</sup> N.Y. Exec. Law § 296(15).

<sup>192</sup> *Id.*

<sup>193</sup> Dermot Sullivan, *Employee Violence, Negligent Hiring, and Criminal Records Checks: New York’s need to reevaluate its priorities to promote public safety*, 72 St. John’s L. Rev. 581 (1998).

<sup>194</sup> Leavitt, 34 Conn. L. Rev. at 1294.

<sup>195</sup> *Id.*

<sup>196</sup> N.Y. Correct. Law § 750(3) (McKinney 2003).

occurrence, (5) the age of the person at the time of occurrence, (6) the seriousness of the offense, (7) “any information produced by the person ... in regard to his rehabilitation and good conduct,” and (8) the legitimate interest of the agency or employer in protecting property and the safety and welfare of other persons.<sup>197</sup> In addition, an agency or employer should give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant.<sup>198</sup> Such a certificate creates a presumption of rehabilitation in regard to the offense or offenses addressed.<sup>199</sup> However, the New York Court of Appeals has established that the certificate does not establish a prima facie entitlement to a license or employment, but only establishes that the applicant has been rehabilitated, constituting only one of the eight factors that the employer or licensing body must consider in determining whether an exception under N.Y. Correct. Law § 753 applies.<sup>200</sup>

The second exception to N.Y. Executive Law § 296 permits employers and public agencies to deny employment or licensure if “the granting ... would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”<sup>201</sup> However, unlike the “direct relation” exception, “unreasonable risk” is not defined, but instead must be determined on a case-by-case basis.<sup>202</sup> Some courts have noted that the eight factors used in determining a direct relation are also useful in finding an “unreasonable risk.”<sup>203</sup>

Case law interpreting New York’s fair employment statutes has overwhelmingly “emphasized the judiciary’s commitment to protecting and rehabilitating ex-offenders.”<sup>204</sup> In *Rogers v. N.Y. City Human Res. Admin.*,<sup>205</sup> the Appellate Division held that the discharge of a state caseworker from the City Department of Social Services for two sealed misdemeanors was

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<sup>197</sup> N.Y. Correct. Law § 753(1); Sullivan, 72 St. John’s L. Rev. at 597.

<sup>198</sup> N.Y. Correct. Law § 753(2).

<sup>199</sup> *Id.*

<sup>200</sup> *Arrocha v. Bd. of Educ. of City of N.Y.*, 712 N.E.2d 669 (N.Y. 1999).

<sup>201</sup> N.Y. Correct. Law § 752.

<sup>202</sup> *See Bonacorsa v. Van Lindt*, 523 N.E.2d 806 (N.Y. 1988).

<sup>203</sup> *See id.*; Sullivan, 72 St. John’s L. Rev. at 597.

<sup>204</sup> Leavitt, 34 Conn. L. Rev. at 1295.

<sup>205</sup> 154 A.D.2d 233 (N.Y. App. Div. 1989).

in violation of N.Y. Executive Law § 296<sup>206</sup>. *Ford v. Gildin*,<sup>207</sup> one of the most notable cases concerning an employer’s liability for the act of an employed ex-offender, also speaks to New York’s strong public policy in favor of hiring rehabilitated offenders.<sup>208</sup> In *Ford*, the employer had hired a man who had been convicted of manslaughter to fill the position of a porter.<sup>209</sup> The Appellate Division refused to hold the employer liable for the negligent hiring of an employee when he molested a child twenty-seven years after his original manslaughter conviction.<sup>210</sup> The Appellate Division stated that “it was not foreseeable ... that a person who had committed manslaughter ... would molest a child years later.”<sup>211</sup> Importantly, the court noted that the imposition of liability in this case would have “an unacceptably chilling effect on society’s efforts to reintegrate ex-offenders into mainstream society, contrary to precedent and the explicitly stated public policy of [New York] State.”<sup>212</sup>

Similarly, in *Soto-Lopez v. New York City Civil Service Commission*,<sup>213</sup> a veteran applicant for a civil service position challenged the New York Civil Service Law.<sup>214</sup> The United States District Court for the Southern District of New York held that the city could not deny the job of housing caretaker to a person who had been convicted of manslaughter and drug offenses because of the express public policy of the state to encourage employment of ex-offenders.<sup>215</sup> Moreover, the duties of a caretaker were deemed to be unrelated to the circumstances of the crime committed.<sup>216</sup> Typical tasks of a caretaker, such as “washing windows, changing light bulbs, [and] gardening,” were found not to be “‘directly related’ to a manslaughter conviction [nor to] present an unreasonable risk to persons or property.”<sup>217</sup> The court did not consider

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<sup>206</sup> N.Y. Exec. Law § 296(16).

<sup>207</sup> 200 A.D.2d 224 (N.Y. App. Div. 1994).

<sup>208</sup> Leavitt, 34 Conn. L. Rev. at 1295.

<sup>209</sup> *Ford*, 200 A.D.2d at 225.

<sup>210</sup> *Id.* at 227.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 229-230.

<sup>213</sup> 713 F. Supp. 677 (S.D.N.Y. 1989).

<sup>214</sup> N.Y. Civ. Serv. Law § 50(4) (McKinney 1983).

<sup>215</sup> *Soto-Lopez*, 713 F. Supp. at 678.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

whether the applicant would have access to the homes and property of apartment dwellers, and only noted that the position “would not as such involve plaintiff in violent confrontations and obviously [did] not require plaintiff to carry arms.”<sup>218</sup> The decision in *Soto-Lopez* is seen as an exceedingly narrow interpretation of the statute, arguably restricting an employer’s “power to fully evaluate the compatibility of an ex-offender’s record with the responsibilities of the available position.”<sup>219</sup>

Even a decision that appears to “punish” an employer for hiring an employee with a lengthy criminal record can be read to offer full support for New York’s strong public policy towards rehabilitating ex-offenders.<sup>220</sup> In *Haddock v. City of New York*, a nine-year-old girl was brutally raped and assaulted by a Parks Department employee who had been hired by the City’s Welfare Department under a mandatory employment program.<sup>221</sup> The employee, who had told his welfare caseworker that he had no criminal convictions, in fact had a lengthy criminal history, including attempted rape and assault, as well as various parole violations.<sup>222</sup> Contrary to the Department’s written policy, the employee’s criminal history report had not been obtained, and no one in the Department considered his criminal record in determining his employment placement.<sup>223</sup> In upholding a \$2.5 million verdict against the City, the Court of Appeals made a concerted effort to explain that their holding should not be interpreted as violating New York’s “strong public policy favoring rehabilitation of ex-convicts.”<sup>224</sup> The court commented that, “the importance of employing former inmates, and reintegrating them into society, without risk of absolute liability for those who open doors to them, cannot be overstated.”<sup>225</sup> The court nonetheless held that “even that worthy objective cannot excuse a municipal employer from compliance with its own procedures requiring informed discretion in the placement of

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<sup>218</sup> *Id.* at 679.

<sup>219</sup> Leavitt, 34 Conn. L. Rev. at 1296.

<sup>220</sup> *Id.*

<sup>221</sup> 553 N.E.2d 987, 988-89 (N.Y. 1990).

<sup>222</sup> *Id.* at 990.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 990, 992.

<sup>225</sup> *Id.* at 992.

individuals with criminal records.”<sup>226</sup> The court’s narrow holding confirms and amplifies New York’s commitment to rehabilitating ex-offenders.<sup>227</sup>

New York has established a prevailing model that could serve as a template for other states in creating legislation to prohibit employment discrimination based on criminal history.<sup>228</sup> New York’s statutory scheme goes beyond merely encouraging employers to hire ex-offenders and combines several different statutory elements to “create the best state model for addressing employment discrimination among ex-offenders.”<sup>229</sup> The New York State Legislature has both explicitly addressed the important public policy of employing ex-offenders and created a balancing scheme to help guide employers as to what specific factors they should evaluate and in what order competing interests should be considered.<sup>230</sup> Although there is room for improvement, New York leads the way in the establishment of a statutory scheme that reduces many of the common barriers to employment for ex-offenders.<sup>231</sup>

Applying this to our three hypothetical ex-offenders, each of these individuals, when applying for employment, would be subject to the two-prong test laid out in N.Y. Correct. Law § 752. First, an employer or licensing body would be required to determine whether the conviction had a direct bearing on the individual’s ability to perform the duties or responsibilities related to the position sought. Second, the employer would be permitted to deny employment if the granting would pose an “unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”<sup>232</sup> The definition of “unreasonable risk” would be decided on a case-by-case basis.

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<sup>226</sup> *Id.*

<sup>227</sup> Leavitt, 34 Conn. L. Rev. at 1297.

<sup>228</sup> *Id.* at 1310.

<sup>229</sup> *Id.*; N.Y. Correct. Law §§ 752 to 753.

<sup>230</sup> Leavitt, 34 Conn. L. Rev. at 1310.

<sup>231</sup> *Id.*

<sup>232</sup> N.Y. Correct. Law § 752.

## RHODE ISLAND

The State of Rhode Island takes a moderate approach to its criminal background check policy. The approach attempts to balance the policy goal of re-integrating ex-offenders into mainstream society with the desire to safeguard its citizens from any undue risk. Unlike some states that bar any inquiry into one's criminal history, Rhode Island only prohibits employers from asking applicants whether they have "ever been arrested or charged with any crime."<sup>233</sup> Employers in Rhode Island may ask "whether the applicant has ever been convicted of any crime."<sup>234</sup> This, along with the fact that the employers are not told of the specific reasons for an applicant's employment disqualification, aids in the protection of the privacy of the applicant.<sup>235</sup> In many instances criminal background records are kept on file long after the employee has vacated their position.

The ban on asking about one's arrest record prevents employers from discriminating against those who have been arrested or charged with crimes without being convicted.<sup>236</sup> Nationally, those who are arrested and charged with crimes are disproportionately African-American or members of other minorities and any disqualification on this basis would penalize a greater percentage of this group.<sup>237</sup> It also punishes those who are innocent of the crimes for which they were arrested.<sup>238</sup> "No individual should suffer adverse consequences merely on the basis of an accusation."<sup>239</sup>

Rhode Island's policies are demonstrated in the hiring practices of the Department of Health.<sup>240</sup> In any facility licensed or registered under the Department of Health, all applicants for positions which involve routine contact with patients or residents without the presence of other employees must undergo a criminal background check.<sup>241</sup> This check must be initiated prior to

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<sup>233</sup> R.I. Gen. Laws § 28-5-7(7) (2002).

<sup>234</sup> *Id.*

<sup>235</sup> Leavitt, 34 Conn. L. Rev. 1281.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> R.I. Gen. Laws § 5-34.1-7 (2002).

<sup>241</sup> *Id.*

or within one week of employment.<sup>242</sup> Fingerprints are only required if the applicant is seeking employment in child care or as a Youth Services worker.<sup>243</sup> The state or local police department is responsible for the completion and the payment of the background check.<sup>244</sup> This alleviates the fiscal burden on the employee or the employer, in contrast to other states where the applicant or the hiring institution must fund the background check. The police department then notifies the department in writing if the applicant is eligible for consideration.<sup>245</sup>

Unlike some states that have outright bars to the employment of ex-offenders, Rhode Island allows for some employer discretion.<sup>246</sup> The director of the Department of Health identifies the positions for which criminal background checks will be required.<sup>247</sup> The director also decides which crimes will disqualify persons for different positions.<sup>248</sup> These disqualifications are not listed in the statute, but are left to the discretion of the director and vary depending on the requirements of the position.<sup>249</sup> After the employer is notified of the disqualification, the applicant may request that the specific disqualifying information be sent to the employer so that the employer can decide the relevance of the information described.<sup>250</sup> Such discretion illustrates Rhode Island's tempered attitude toward ex-offenders, allowing for a balance between the public policy goals of re-integrating ex-offenders through employment opportunities and of protecting the welfare of its citizens.

Rhode Island also demonstrates its concern with the re-integration of ex-offenders into mainstream society by providing the opportunity for an ex-offender to have her record expunged. An ex-offender who has been convicted of a felony<sup>251</sup> that is a first time offense and is not a crime of violence is permitted to petition for expungement of their record 10 years after the

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<sup>242</sup> *Id.*

<sup>243</sup> R.I. Gen. Laws § 40-13.2-4.1 (2002).

<sup>244</sup> R.I. Gen. Laws § 5-34.1-7.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> A felony is any criminal offense which may be punished by imprisonment for a term of more than one year, or by a fine of more than \$1000. R.I. Gen. Laws § 11-1-2 (2002).

termination of the sentence.<sup>252</sup> An ex-offender who has been committed of a first time misdemeanor offense that is not a crime of violence may petition after 5 years.<sup>253</sup> The petition should be filed in the court where the conviction took place and the petitioner must notify the attorney general and the police department which originally brought the charge of the hearing date set by the court at least ten days prior to the hearing.<sup>254</sup> After considering all relevant information, it is within the discretion of the court to expunge the ex-offender's record if it is found that, in the time period since the termination of the sentence, the individual has not been arrested or convicted of any felonies or misdemeanors, there are no criminal procedures pending against the individual, and the individual has displayed good moral character.<sup>255</sup>

Again, we look to our three hypothetical ex-offenders, one convicted of murder, one convicted of assault, and one convicted of possession of a controlled substance. Within the Department of Health, each of these ex-offenders might be eligible for employment, depending upon the requirements of the position as set out by the director.<sup>256</sup> The Director of the Department of Health has the discretion to decide which crimes will disqualify ex-offenders from specific positions.<sup>257</sup> Even if the Director determines that the ex-offender should be disqualified, the applicant can then present the employer with the criminal record and the employer has the discretion to decide that the convictions are not applicable to the position sought and the ex-offender should be hired.<sup>258</sup> The ex-offender who was convicted of drug possession could, 10 years after completion of his sentence, request that his record be expunged, unlike the ex-offenders who having committed violent crimes, who would be unable to apply for expungement.<sup>259</sup>

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<sup>252</sup> *State v. Alejo*, 723 A.2d 762 (R.I. 1999).

<sup>253</sup> R.I. Gen. Laws 1956 § 12-1.3-2 (2002).

<sup>254</sup> R.I. Gen. Laws 1956 § 12-1.3-3 (2002).

<sup>255</sup> *Id.*

<sup>256</sup> R.I. Gen. Laws § 5-34.1-7.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

## WISCONSIN

The State of Wisconsin has significant legislation regarding the gainful employment of ex-offenders as a means to reintegrate them into society. The Wisconsin legislature has chosen to prohibit discrimination in employment based on arrest or conviction records by including such records, much like race, creed, and religion, within the definition of a protected class under the Wisconsin Fair Employment Act.<sup>260</sup> The state's philosophy is to re-immense ex-offenders into society by not allowing employers in either the private or public sectors to discriminate against them solely because of a criminal record.<sup>261</sup> However, the Fair Employment Act does contain several specific exceptions, one of which is relevant to our discussion of the Massachusetts EOHHS regulations.<sup>262</sup> This exception provides that it is not employment discrimination to refuse to employ a person who has a pending charge or prior conviction if the circumstances of the conviction "substantially relate" to the circumstances of the position sought.<sup>263</sup>

In *County of Milwaukee v. Labor & Industry Review Commission (LIRC)*, the Wisconsin Supreme Court held that a person who had been convicted of multiple misdemeanors and one felony as the result of patient neglect while in a prior position as an administrator of a nursing home was not being discriminated against when he was discharged from his present employment as a crisis intervention specialist.<sup>264</sup> Although his performance in his present job had been excellent, the circumstances surrounding his prior offenses, having been convicted of twelve counts of neglect and having been responsible for one patient wandering out into the cold and dying, substantially related to the care he was presently giving.<sup>265</sup> Thus the discharge was considered exempt from the discrimination statute.<sup>266</sup>

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<sup>260</sup> Wis. Stat. § 111.335 (2003); Leavitt, 34 Conn. L. Rev. at 1288.

<sup>261</sup> Jeffrey D. Myers, *County of Milwaukee v. LIRC: Levels of Abstraction and Employment Discrimination Because of Arrest or Conviction Record*, 1988 Wis. L. Rev. 891, 893-94 (1988).

<sup>262</sup> Wis. Stat. § 111.335(1)(c)(1).

<sup>263</sup> *Id.*

<sup>264</sup> 407 N.W.2d 908 (Wis. 1987).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

In *Wal-Mart v. LIRC*,<sup>267</sup> the court affirmed a LIRC finding that Wal-Mart had discriminated against an employee in their distribution center when it learned that she had been convicted of a drug offense and fired her as a result. The court held that an arrest or conviction for past drug use or distribution cannot be the basis for terminating an employee unless the substantial relationship test is met, which it was not in this case.<sup>268</sup>

The Department of Health and Family Services (DHFS) has promulgated regulations consistent with the Fair Employment Act's rules against discrimination.<sup>269</sup> The regulations create one overarching hiring procedure for agencies seeking to hire ex-offenders as caregivers in the health and human services field. Employers are required to conduct a background check on any applicant for a position that entails direct contact with people receiving services from DHFS. There are a number of parallels between the Wisconsin regulations and the Massachusetts EOHHS regulations, including the determination of a relationship between the offense and the position sought, the required supervision pending receipt of a background check, the rehabilitation process for persons who have committed certain offenses, and the list of offenses that affect caregiver eligibility.<sup>270</sup>

DHFS incorporated a test into its regulations to ensure compliance with the Fair Employment Act's exception that permits discrimination against ex-offenders only if there is a substantial relationship between the applicant's criminal history and the position sought.<sup>271</sup> An agency or entity may look to many factors, relating to the job, the offense, and the applicant, when determining whether a crime is "substantially related to the care of a client,"<sup>272</sup> such as the nature and scope of client contact, the opportunity the position presents for committing similar offenses, any pattern of offenses in the applicant's criminal history, whether the elements or circumstances of the offense are substantially related to the employment duties, and the number

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<sup>267</sup> 1998 WL 286332 (Wis. App. June 4, 1998).

<sup>268</sup> *Id.* at \*3.

<sup>269</sup> Wis. Admin. Code, Health & Fam. Svcs. § 12.05 to 12 App. A (2002).

<sup>270</sup> *Id.*

<sup>271</sup> Wis. Admin. Code, Health & Fam. Svcs. § 12.06 (2002).

<sup>272</sup> *Id.*

and type of offenses for which the person has been convicted.<sup>273</sup> While these are not all of the considerations set out in the regulation, it is clear that the state of Wisconsin is interested in equal access to employment for ex-offenders and that there must be heightened cause to deny that equal access. Because the regulations are so new, there is not yet any case law interpreting them.

The Wisconsin Law Enforcement Board has promulgated regulations that are similar to those promulgated by DHFS in relation to the hiring of ex-offenders. In particular, the regulation prohibits the employment of a convicted felon at a detention facility unless she has received a pardon.<sup>274</sup> In *Collins v. LIRC*,<sup>275</sup> the court held that an applicant for the position of juvenile correction worker could be denied employment under the Law Enforcement Board regulation because his conviction for armed robbery was substantially related to the position he sought. Collin's suitability for employment was subjected to heightened scrutiny because his position would involve substantial contact with children, a standard that is applicable to both the DHFS and the Law Enforcement Boards regulations.

The DFHS regulations provide an extensive list of crimes for which conviction affects an ex-offender's eligibility for employment in positions involving contact with persons under the age of 18.<sup>276</sup> The list is subdivided such that certain crimes only pertain to positions in programs serving only those under 18 years of age, other pertain to positions in programs serving any clients under 18 years of age, and a longer list of crimes that pertain to those employed in foster care.<sup>277</sup> The list of exclusions is acceptable because the crimes listed are those that are substantially related to the positions sought. In the first two categories, the listed crimes carry a bar to employment until rehabilitation is approved.<sup>278</sup> However, for those seeking a position in foster care, there are different levels of employment prohibitions, including permanent bars, based on the severity of the crime.<sup>279</sup> In order to comply with the Fair Employment Act, the list

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<sup>273</sup> *Id.*

<sup>274</sup> Wis. Admin. Code, L. Enforcement Stands. Bd. 2.01 (2003).

<sup>275</sup> 1992 WL 459628 (Wis. App. Dec. 15, 1992).

<sup>276</sup> Wis. Admin. Code, Health & Fam. Svcs. § 12 App. A.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

of exclusionary crimes applies only to positions that involve direct client contact. DHFS cannot set out an absolute bar to employment in positions that do not involve close contact. Those applications must be assessed on a case-by-case basis to establish whether the applicant's criminal history is sufficiently related to the position desired.

As stated above, those who have been convicted of crimes listed under the non-foster case categories are barred from employment only until rehabilitation is proven.<sup>280</sup> This rehabilitation process is explicitly described in the regulation.<sup>281</sup> All DHFS agencies must appoint a committee, consisting of at least two people, that will conduct rehabilitation reviews, as necessary and appropriate. The committee must certify that the ex-offender no longer poses a risk to those receiving services under the position sought. The applicant must convince the committee that they have been rehabilitated by presenting clear and convincing evidence of rehabilitation. The committee will consider many factors, including, but not limited to, employment history, evidence of rehabilitation, nature and scope of client contact, and the opportunity presented for the applicant to commit similar offenses. After the consideration has been made, the committee may immediately make a decision or it may defer its decision for a period of not more than 6 months. If the committee decides to defer, it will give the reasons for the deferral and revisit the issue within the established time and at that point render a final decision. If the decision is negative, the applicant may reapply once a year. If the decision is affirmative, then the applicant is eligible for employment that has direct contact with clients receiving services. Even then, employment depends on the discretion of the hiring body based on the merits of the applicant.

Finally, for Wisconsin, we look to our three hypothetical ex-offenders, one convicted of murder, one convicted of assault, and one convicted of possession of a controlled substance. In any industry other than foster care, a murder conviction would carry a bar from employment up until such time as the ex-offender was given rehabilitation approval. Given the crime that this

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<sup>280</sup> *Id.*

<sup>281</sup> Wis. Admin. Code, Health & Fam. Svcs. § 12.12 (2002).

person was convicted of, rehabilitation might not be approved for a long period of time, but he has the right under the procedures to seek rehabilitated status every year. Once rehabilitation approval is granted, he is eligible to work with people receiving services unless they are foster children. People convicted of murder are permanently barred from having contact with foster children.

In any industry other than foster care, the situation is the same for the ex-offender who has been convicted of assault. The ex-offender must be given rehabilitation approval, but it seems likely that the rehabilitation would be approved in a shorter period of time for the ex-offender convicted of assault than the one convicted of murder. If the person convicted of assault wished to be involved in foster care, he would be barred for a minimum of five years, and then he could seek rehabilitation approval. However, if the victim of the assault was the ex-offender's spouse, the bar from foster care is permanent.

In any industry other than foster care, drug possession is not an exclusionary offense, suggesting that drug possession would not be considered to be substantially related to those DHFS positions and discrimination based on that conviction would be illegal. However, a conviction for felonious drug possession does carry a minimum five-year bar from employment in foster care, after which time rehabilitation must be approved.

## **SUMMARIES FOR THE OTHER STATES**

### **ALABAMA**

*Criminal History Background Information Checks as Required by the Social Services Division of the Department of Human Resources*<sup>282</sup>

Alabama law provides that any current or prospective employee of a public or private adult care facility, licensed by the Department of Human Resources, is subject to a background check. A conviction for any one of the crimes listed in this provision,<sup>283</sup> including murder, sex crimes, and robbery, makes an individual unsuitable for employment or volunteer work. This

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<sup>282</sup> Ala. Admin. Code r. 660-5-46 (2002).

<sup>283</sup> Ala. Admin. Code r. 660-5-46(29)-(30).

appears to be a lifetime bar to employment with no opportunity to rebut the presumption of unsuitability.

## **ALASKA**

### *Consumer-Directed and Agency-Based Personal Care Services*<sup>284</sup>

Alaska law requires that each employee of a personal care agency must be subject to a criminal justice information check. The Code further provides<sup>285</sup> that any current or prospective employee is barred from employment if she has been convicted of a crime that involves contributing to the delinquency of a minor or any sex offense. This Code does not appear to provide any opportunity for rebuttal.

## **ARIZONA**

### *Good Cause Exception for Provider Employment or Use of Ex-Offenders*<sup>286</sup>

Arizona law prohibits providers of care and treatment to minors for the abuse of alcohol, drugs, and other substances, from employing any person with a criminal conviction.<sup>287</sup> Any prospective employee whose background check includes a criminal conviction is barred from employment.<sup>288</sup> However, the Code does provide a good cause exception from the employment bar for some ex-offenders. To qualify, an applicant for an exception for good cause must provide supporting documentation to the employer, including documents pertaining to their arrest, parole documents, and a personal statement explaining why the applicant believes that they are rehabilitated. If an employer wants to hire an applicant who has a criminal record, the employer must file a statement with the Department of Youth Treatment and Rehabilitation. The Director of that Department will review the application and statement and issue a written decision within 15 days. The Code does provide for a rebuttal process by way of an appeal.

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<sup>284</sup> Alaska Admin. Code tit. 7, § 43.787 (2002); Alaska Admin. Code tit. 7, § 43.950 (2002).

<sup>285</sup> Alaska Admin. Code tit. 7, § 43.950.

<sup>286</sup> Ariz. Admin. Code § R6-1-301 to R6-1-308 (2002).

<sup>287</sup> Ariz. Rev. Stat. § 46-141 (2002).

<sup>288</sup> *Id.*

## **ARKANSAS**

### *Criminal Records Checks for Persons Caring for the Elderly*<sup>289</sup>

Arkansas law requires that prospective employees who will work in the area of elder care be subject to a criminal record check. An applicant is disqualified if he has been convicted of any of the qualifying felonies within the last ten years. There is a lifetime bar to employment for persons who have been conviction of certain more serious offenses.<sup>290</sup> An applicant may not request a waiver of either the ten-year or lifetime bar to employment.

## **CALIFORNIA**

### *Licensing Provisions for Intermediate Care Facilities: Staff Conviction of Crime*<sup>291</sup>

The California Health and Safety Code requires intermediate care facilities to obtain a criminal record for any prospective direct care staff who provides nursing or program care. A prospective employee may be denied employment if he has been convicted of one of the included crimes,<sup>292</sup> unless the conviction has been dismissed or, if convicted of a felony, the prospective employee has obtained a certificate of rehabilitation, as provided in the California Penal Code.<sup>293</sup>

Regardless of the aforementioned exceptions, the facility may consider other factors indicating that it is unlikely the prospective employee will re-offend when deciding whether or not to hire an ex-offender, including the nature of the offense and its relationship to the prospective employee's duties and responsibilities, the amount of time since the commission of the offense, the number of offenses, the extent to which the person has complied with any terms of sentencing, parole, and/or probation, and any evidence of rehabilitation, including any character references and any employment or participation in therapy or education since conviction.

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<sup>289</sup> Ark. Code Ann. § 20-33-205 (2002).

<sup>290</sup> For example, murder, rape, and kidnapping.

<sup>291</sup> Cal. Health & Safety Code Ann. § 1265.5 (West 2002).

<sup>292</sup> Certain felonies and misdemeanors. Cal. Health & Safety Code Ann. § 1265.5(b)(1).

<sup>293</sup> An ex-offender will be granted a certificate of rehabilitation if she has fulfilled the conditions of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, or in any other case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted a certificate of rehabilitation. Cal. Penal Code Ann. § 1203.4 (West 2002).

## CONNECTICUT

*State Policy Regarding Employment of Criminal Offenders*<sup>294</sup>  
*Denial of Employment Based on Prior Conviction of Crime*<sup>295</sup>

Connecticut law encourages all employers to give favorable consideration to providing jobs to qualified individuals, including those who may have criminal conviction records.<sup>296</sup> However, an ex-offender may be denied employment by the state or any of its agencies if, after considering the nature of the crime, the relationship of the crime to the position, the degree of rehabilitation, and the time elapsed since the conviction, the employer determines that the applicant is not suitable for the position sought.<sup>297</sup> Neither of the applicable statutes addresses a process by which an ex-offender can rebut a determination of unsuitability.

## DELAWARE

*Criminal Background Checks and Nursing Home Compliance with the Social Security Act*<sup>298</sup>

Delaware law requires nursing home facilities to conduct criminal history checks on all current and prospective employees. An employer must immediately terminate a conditionally hired employee upon notification of the employee's conviction of a disqualifying crime.<sup>299</sup>

## FLORIDA

*Screening of Home Health Agency Personnel*<sup>300</sup>

Florida law requires that any person applying for a position at a home health agency be screened, which includes conducting a criminal record check.<sup>301</sup> An applicant may be disqualified if the screening reveals a criminal conviction.<sup>302</sup> However, the appropriate licensing agency may grant to any disqualified ex-offender an exemption from disqualification for certain crimes, including felonies committed more than 3 years prior to the date of disqualification and

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<sup>294</sup> Conn. Gen. Stat. Ann. § 46a-79 (2002).

<sup>295</sup> Conn. Gen. Stat. Ann. § 46a-80 (2002).

<sup>296</sup> Conn. Gen. Stat. Ann. § 46a-79.

<sup>297</sup> Conn. Gen. Stat. Ann. § 46a-80.

<sup>298</sup> Del. Code Ann. tit. 16, § 1141 (2002).

<sup>299</sup> Disqualifying crimes are defined by the Department of Health and Humans Services and not listed within this statute.

<sup>300</sup> Fla. Stat. Ann. § 435.07 (West 2002).

<sup>301</sup> Fla. Stat. Ann. § 400.512 (West 2002).

<sup>302</sup> *Id.*

commissions of acts of domestic violence. In order for a licensing department to grant an exemption, the applicant must demonstrate, by clear and convincing evidence, that she should not be disqualified from employment. Applicants also have the burden of setting forth sufficient evidence of rehabilitation, including the circumstances surrounding the criminal incident for which an exemption is sought, the time period that has elapsed since the incident, the nature of the harm caused to the victim, and the history of the employee since the incident. The decision of the licensing department regarding an exemption may be contested through a hearing process.

## **GEORGIA**

### *Criminal Records Checks for Employees of Hospitals and Other Health Care Facilities*<sup>303</sup>

Georgia law prohibits health care facilities from employing a person with a criminal record in a position that entails personal contact with residents unless the facility determines that there are mitigating circumstances surrounding the crime and that there was no physical harm to the victim. If the facility would like to hire the applicant and it finds that mitigating circumstances exist, the facility may submit an application to the Department of Public Health and an administrative law judge must determine that the applicant is authorized to work in the health care facility.

## **HAWAII**

### *Unlawful Discriminatory Practices*<sup>304</sup> *Services for Persons with Developmental Disabilities or Mental Retardation*<sup>305</sup>

Hawaii law states that no employer, public or private, shall discriminate based on an applicant's court record.<sup>306</sup> However, an exception to this statute provides that employees at adult foster homes must not have been convicted of any crime, other than a minor traffic violation.<sup>307</sup> The Department of Health may revoke the facility's license if it finds that an employee, based on his criminal history record,<sup>308</sup> may pose a risk to the health or safety of

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<sup>303</sup> Ga. Code Ann. § 31-7-259 (West 2002).

<sup>304</sup> Haw. Rev. Stat. Ann. § 378-2 (LEXIS L. Publg. 2002).

<sup>305</sup> Haw. Rev. Stat. Ann. § 333F-22 (LEXIS L. Publg. 2002).

<sup>306</sup> Haw. Rev. Stat. Ann. § 378-2.

<sup>307</sup> Haw. Rev. Stat. Ann. § 333F-22.

<sup>308</sup> A criminal history record includes arrest records as well as convictions.

people living in the home.<sup>309</sup> The statute does not appear to give guidelines on how to determine whether an employee’s criminal history record may evidence a risk to residents, suggesting that the determination is within the discretion of the Department of Health. The statute does not address a process through which an ex-offender can rebut a determination of ineligibility for employment.

## **IDAHO**

### *Health and Background Checks for Personal Care Service Providers*<sup>310</sup>

Idaho law requires providers of personal care services to conduct criminal background checks on current and prospective employees and deny or revoke employment when an employee is found to “endanger the health, person or property of the participant.”<sup>311</sup> The statute does not specify what type of evaluation process is necessary in order to make that determination. The language of the statute is ambiguous and open to broad interpretation, leaving it within the discretion and authority of an employer to construct his own definition of when a criminal record should constitute grounds for denial or revocation of employment.

## **INDIANA**

### *Adoption of Criminal History Information Policy for Public Schools*<sup>312</sup>

Although Indiana does not have a relevant law applicable to the human services sector, the Indiana Code requires that public schools adopt a policy concerning criminal history information for individuals who seek employment if those individuals are likely to have a direct, ongoing contact with children within the scope of the individual’s employment. Each public school has the discretion of establishing its own policy.

### *Indiana Sex and Violent Offender Directory*<sup>313</sup>

One source of criminal history information in Indiana is the Sex and Violent Offender Directory. The Indiana Criminal Justice Institute is required to publish the directory on the

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<sup>309</sup> Haw. Rev. Stat. Ann. § 333F-22.

<sup>310</sup> Idaho Code § 39-5604 (2002).

<sup>311</sup> *Id.*

<sup>312</sup> Ind. Code Ann. § 20-5-2-7 (West 2002).

<sup>313</sup> Ind. Code Ann. § 5-2-6-3.5 (West 2002).

Internet as well as make the directory available, and send a copy at least once every six months, to the state personnel department, all public and non-public schools, all state agencies that license individuals who work with children, all child care facilities licensed by or registered by the state, and any other children's services provider that requests a copy of the directory. The statute does not identify how recipients may use this information; therefore, those institutions maintain the ultimate discretion in deciding how to apply this information during the hiring process.

## **IOWA**

### *Personnel of Residential Care Facilities for Persons with Mental Illnesses*<sup>314</sup>

The Iowa Administrative Code governs residential care for persons with mental illnesses. The Code states that every health care facility must submit and receive the results of a criminal history check before any person is employed. Any person who has a criminal record cannot be employed unless the Department of Human Services has evaluated the crime and concluded that the crime does not merit prohibition from employment. There is nothing in the regulation describing the evaluation process, suggesting that it may be largely discretionary. The regulation does not include any language to indicate the existence of an appeals process.

## **KANSAS**

### *Operation of Home Health Agencies*<sup>315</sup>

Kansas law prohibits the operation of a home health agency that knowingly employs any person convicted of certain crimes unless five or more years have elapsed since the prospective employee satisfied the sentence imposed or was discharged from probation or parole. The list of crimes that require a five-year prohibition includes, but is not limited to, murder, voluntary manslaughter, assisting suicide, mistreatment of a dependent adult, rape, and indecent liberties with a child.

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<sup>314</sup> Iowa Admin. Code r. 481-62.9(135C) (2002).

<sup>315</sup> Kan. Stat. Ann. § 65-5117 (2001).

## KENTUCKY

### *Criminal Background Check on Certified Employees and Student Teachers in Private, Parochial, and Church Schools*<sup>316</sup>

Although Kentucky does not have a relevant law applicable to the human services sector, Kentucky law permits private, parochial, and church schools that are certified by the Kentucky Board of Education to require national and state background checks for all new certified hires in the school district. The language of the statute does not prohibit employment, but gives the school district the authority to choose not to employ persons who have been convicted of a violent crime or a felony sex crime. The statute expressly permits non-public schools to employ persons who have been convicted of sex crimes that are classified as misdemeanors. In short, the school has the ultimate discretion in deciding whether or not to employ ex-offenders.

## LOUISIANA

### *Criminal Background Investigation in Order to Protect Vital Records*<sup>317</sup>

Louisiana law prohibits the hiring of applicants or promotion of employees into the Division of Records and Statistics, the Office of Public Health, the Department of Health and Hospitals, or the Division of Public Health and Safety until a determination has been made regarding whether the applicant has been convicted of a crime.<sup>318</sup> Any person seeking employment may be denied if the person has been convicted of or pled *nolo contendere* (no contest) to any crime.<sup>319</sup> The language of the statute provides that an applicant “*may be denied*”<sup>320</sup> employment, suggesting that a criminal history check does not serve as an automatic employment prohibition.

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<sup>316</sup> Ky. Rev. Stat. Ann. § 160.151 (2002).

<sup>317</sup> La. Stat. Ann. § 40:61.1 (2003).

<sup>318</sup> As defined in La. Stat. Ann. § 14:7 (2003).

<sup>319</sup> As defined in *id.*

<sup>320</sup> La. Stat. Ann. § 40:61.1 (Emphasis added).

## **MAINE**

### *Licensing of Hospitals and Institutions*<sup>321</sup>

Maine law requires the registration of nursing assistants and provides for a state registration listing. The registration listing includes a notation of each registrant's criminal convictions. All criminal convictions are noted, with the exception Class D<sup>322</sup> and Class E<sup>323</sup> convictions that are over 10 years old that did not involve as patient, client, or resident of a health care facility as a victim. A health care facility, before hiring a nursing assistant, must verify the applicant's registration listing. There does not appear to be an opportunity to challenge the notation of a criminal conviction.

## **MARYLAND**

### *Background Investigation for Employment in the Department of Transportation*<sup>324</sup>

Although Maryland does not have a relevant law applicable to the human services sector, Maryland regulatory law, promulgated by the Department of Transportation, allows the employer to conduct criminal background checks as needed. The regulation states that the employer shall make a determination regarding the necessity of investigating the background of a prospective employee for purposes of verifying suitability for employment. The regulation provides no process for evaluating the necessity if an investigation, implying that the employer maintains a tremendous amount of discretion in making such a determination. Although the regulation does not state whether it is mandatory for an ex-offender to disclose a criminal history, the employer reserves the right to investigate and terminate or deny employment for a fraudulent representation during the application process.

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<sup>321</sup> 22 Me. Rev. Stat. § 1812-G (2000).

<sup>322</sup> Including assault and reckless conduct

<sup>323</sup> E.g., theft.

<sup>324</sup> Code Md. Regs. tit. 11, § 02.02.08 (2003).

## **MICHIGAN**

### *Personnel Management for Substance Abuse Service Programs*<sup>325</sup>

Michigan law prohibits Mental Health and Substance Abuse Services programs from refusing to employ individuals solely on the grounds of prior substance abuse or prior criminal history.

### *Staff Qualifications for Child Placing Agencies*<sup>326</sup>

Michigan law requires that child placing agencies must have a written assessment of all criminal convictions of prospective staff before hiring or assigning positions. The assessment takes into account the nature of the convictions, when the convictions occurred, and any evidence of rehabilitation. Any staff member who has ongoing contact with children or parents must be of good character, emotionally stable, and able to perform the duties assigned.

### *Licensing of Child Care Centers*<sup>327</sup>

Michigan law requires child care centers to have a screening process in place for all staff and volunteers, including parents, who have contact with children.

## **MINNESOTA**

### *Application for Human Services Licensure*<sup>328</sup>

Minnesota law outlines specific hiring practices for licensed human services agencies. Such agencies are required to conduct background studies on applicants for any public welfare related activity. The commissioner of the particular administrative department that is doing the hiring has the sole discretion in deciding whether an individual poses a sufficient danger to service recipients and is not suitable for a position that entails direct contact with persons served by the program. The considerations may include, but are not limited to, the amount of time since the disqualifying conviction, the amount of time that has elapsed since the individual's discharge from probation, the number of offenses, the level of violence involved in the offense, and the

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<sup>325</sup> Mich. Admin. Code r. 325.14112 (2001).

<sup>326</sup> Mich. Admin. Code r. 400.12206 (2002).

<sup>327</sup> Mich. Admin. Code r. 400.5102 (2001).

<sup>328</sup> Minn. Stat. Ann. § 245A.04 (West 2002).

similarity between the victim of the crime and the persons that are served by the program where the applicant seeks employment.

An individual can have a disqualification removed if he can prove that he does not pose a risk to service recipients or that the evidence used was incorrect. A request for appeal must be filed within 30 days (unless more time is actively requested) of the applicant's initial receipt of the notice of disqualification. In specific situations involving work with children, an ex-offender may be precluded from having the disqualification lifted until the statutory minimum amount of time has passed since the conviction. The amount of time is outlined in the statute and depends on the severity of the crime.<sup>329</sup> If reconsideration is denied, the applicant can request a hearing for the "contested case" before the commissioner. There, the commissioner, weighing all the evidence, will make a final decision.

Short of approving the applicant, the commissioner may decide to grant a limited time variance that can allow a disqualified person to work directly with people receiving services for a limited amount of time. This variance is only available to ex-offenders who are normally only required by the statute to reveal that they have a criminal record, but are not required to disclose the specifics. However, in order to receive the variance, the applicant must make public the details of his criminal record. The commissioner may revoke this variance at any time.

## **MISSISSIPPI**

Research has yielded no statutes or regulations regarding the hiring of ex-offenders in the health services industry in Mississippi.<sup>330</sup>

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<sup>329</sup> Minn. Stat. Ann. § 245A.04 Subd. 3d.

<sup>330</sup> Mississippi has not made their administrative regulations or statutory provisions available on the online research tools, LexisNexis, or Westlaw. Given this roadblock, the research group exhausted its other limited resources to find any applicable regulations. Since hard copies of the Mississippi code are not available in Northeastern University's Law School Library, we attempted to look several places on the web, including the Mississippi state homepage, the University of Mississippi Law School homepage, a general Mississippi law homepage that was linked to the Law School page, and a page that was titled Mississippi Administrative Regulations. These pages are not cited because they did not yield any useful information. We tried to call several of the numbers from several of the departments listed in the Administrative Code page, but received no answer. Because Mississippi is geographically and politically removed from Massachusetts, and given the regulations from the states surrounding Mississippi, we decided that it is unlikely that any Mississippi regulation would be persuasive in effecting change in Massachusetts law. We therefore did not consider regulations from Mississippi to be a vital part of our study.

## MISSOURI

### *Protective Services for Adults – Employee Disqualification List*<sup>331</sup>

Missouri law prohibits any person appearing on the social services disqualification list from employment in any Department of Social Service (DSS) position. This statute regards the social services disqualification list. Prior to placing an individual on the list, the director of the department from which they are being disqualified conducts an investigation. Once the director makes the determination of disqualification, the individual is notified in writing of how long they will be disqualified and of the procedure to dispute the disqualification. The length of the disqualification period is determined by many factors, including the state of mind of the applicant during the commission of the crime, the degree to which the applicant has harmed or is a danger to harm a resident or in-home services client, whether the person has been on any disqualification list before, and any relevant mitigating circumstances. To appeal a placement on the disqualification list, the individual must make a written request to the director to have their name removed. The director will make a decision based on information submitted by the disqualified individual. This decision cannot be appealed any further, but a new appeal request may be made every year.

### *Hiring Restrictions – Good Cause Waiver*<sup>332</sup>

Missouri law requires that a background check be conducted on any current or prospective DSS employee within two days of hiring.<sup>333</sup> The check is performed to make sure that no one with patient contact is on the social services disqualification list.<sup>334</sup> DSS, however, can promulgate rules for good cause waivers, showing that DSS has made a determination that the employee does not present a risk to the health or safety of residents.<sup>335</sup>

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<sup>331</sup> Mo. Rev. Stat. Ann § 660.315 (2002).

<sup>332</sup> Mo. Code Reg. Ann. tit.19, 30-82.060 (2002).

<sup>333</sup> Mo. Rev. Stat. Ann. § 660.317 (2002).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

The Division of Health and Senior Services has promulgated one such regulation regarding good cause waivers.<sup>336</sup> A good cause waiver is an exception that may be granted to certify that an applicant who would normally be excluded from a position, given special circumstances, is eligible for the job. Waivers are granted to allow ex-offenders to be employed in an arena where they could have direct contact with those receiving services. In deciding whether to grant a good cause waiver, the Division of Health and Senior Services may consider, among other things, the circumstances surrounding the applicant's crime, age of the applicant when the crime was committed, length of time since the conviction and the completion of the sentence, the applicant's entire criminal history, and the applicant's risk to potential patients.

*Criminal Record Review for Certain Staff in Programs Operated or Funded by the Department of Mental Health*<sup>337</sup>

Missouri law requires criminal record reviews to be conducted on all applicants or employees whose position involved direct contact with anyone associated with mental health facilities, including the staff. The regulation provides the specific levels of offenses that disqualify applicants from all positions in agencies governed by the Department of Mental Health, or only in those positions that have contact with patients. These disqualifications may be appealed to an exception committee (the make-up of which is not clear) where the final decision regarding disqualification is made. Certain more serious crimes may not receive an exception. If the applicant has received an exception or has committed a crime that does not require disqualification, the employer retains discretion regarding the hiring of the employee.

**MONTANA**

*Private Correctional Facilities – Background/Criminal Record Check*<sup>338</sup>

Montana law requires that criminal background checks be conducted on all new employees of private correctional facilities. The facility is prohibited from hiring any person with a prior felony conviction without the approval of the Department of Corrections and Human

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<sup>336</sup> Mo. Code Reg. Ann. tit.19, 30-82.060.

<sup>337</sup> Mo. Code Reg. Ann. tit.9, 10-5.190 (2002).

<sup>338</sup> Admin. R. Mont. 20.27.219 (2002).

Services. The regulation does not set out any automatic bars to employment, allowing Department approval in any case.

## **NEBRASKA**

### *Certification and Accreditation Requirements for Developmental Disabilities Services*<sup>339</sup>

Nebraska law requires that any entity interested in contracting with the state to provide specialized services to people with developmental disabilities must conduct criminal background checks on all current and prospective employees whose positions involve direct contact with clients. Violation of this regulation could prevent the entity from receiving accreditation and certification to provide such services as state contractors. However, the regulation does not elucidate how the criminal background check will affect an applicant's eligibility for employment.

## **NEVADA**

### *Certificates of Good Conduct*<sup>340</sup>

Nevada law provides ex-offenders with the opportunity to obtain a certificate of good conduct. This certificate, issued by the State Board of Pardons Commissioners, essentially indicates that a person is not a risky hire and relieves the ex-offender of the responsibility of registering as a convicted person on applications or when entering the state. An ex-offender must wait at least five years from the time that he is released from custody before he can apply for a certificate. If the ex-offender was not a resident at the time the offense was committed, he must have been a resident of Nevada for five years before he can apply for a certificate. The application process is not clear from the regulation.

Although the regulation does not specifically address the barriers to employment that a criminal record may present, it is apparent that, without a certificate of good conduct, ex-offenders do face significant barriers. For those seeking professional licensure, the licensing body retains the discretion to make licensing decisions, regardless of whether the applicant has a

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<sup>339</sup> Neb. Rev. Stat. Ann. § 83-1217 (LEXIS L. Publg. 2002).

<sup>340</sup> Nev. Admin. Code 213.130 to 213.180 (2002).

certificate, as long as the decision is made in accordance with the law. Generally speaking, though, a certificate of good conduct will lower significant barriers to employment for many ex-offenders.

## **NEW HAMPSHIRE**

### *Criminal Records Check for Certain Applicants to Health and Human Services Positions*<sup>341</sup>

New Hampshire law requires the Department of Health and Human Service (DHHS) to conduct criminal records checks on current and prospective employees in positions that involve direct contact with children. A prospective employee can be conditionally hired prior to completion of a criminal records check, but the prospective employee's release authorization form must be submitted to the New Hampshire central repository within 15 days of applying for the job. If the prospective employee does have a criminal history, a committee will conduct an investigation as to whether the applicant poses a risk to anyone receiving services. Many factors are considered, including (but are not limited to) the evidence of child abuse or neglect in the criminal record, the nature of the position and the level of contact with children, the possibility of altering the position to remove contact with children, and whether an alternative position is available.

At a minimum, a prospective employee must be provided with an opportunity to present evidence in front of the committee to demonstrate that he does not pose a threat to children. If the prospective employee is deemed to be a risk by a preponderance of the evidence, then employment may be denied. If a person is already employed when the inquiry is made, then termination, demotion, or even corrective action may be taken. A corrective action plan can be submitted by the employee to show what steps the employee has taken to address the criminal behavior such that the employee should be able to retain his position. The regulation does not list a corrective action plan as an option for an applicant.

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<sup>341</sup> NH Code Admin. R. Ann., Dept. of Health & Human Svcs. 505.04 to 505.06 (2003).

## **NEW JERSEY**

### *Requirements for Child Care Centers – Criminal History Record Information Background Check Procedures*<sup>342</sup>

New Jersey law requires, as a condition of securing a license, that financial sponsors of child care centers ensure that a Criminal History Record Information (CHRI) fingerprint background check is completed for the sponsor and for all employees at least 18 years of age who are or will be working at the center on a regularly scheduled basis. If an employee refuses to consent to a CHRI background check, the sponsor must immediately terminate his employment at the center. For newly hired employees, the center must ensure that a current employee is present whenever the new staff member is caring for children at the center until the CHRI background check is received.

When the Division receives the results of the CHRI background check from the Division of State Police and the Federal Bureau of Investigation, it informs the sponsor and the employee in writing as to whether any record of conviction by the sponsor or staff member has been found. If the CHRI background check reveals a record of conviction, the Division must inform the sponsor or employee of the opportunity to challenge the accuracy of the CHRI.

An individual is permanently disqualified from employment at, or ownership or sponsorship of, a child care center if the CHRI background check reveals a conviction for certain crimes and offenses, including a crime against a child, abuse, abandonment or neglect of a child, endangering the welfare of an incompetent person, sexual assault, murder or manslaughter, kidnapping, or arson. In such a case, the sponsor must immediately terminate the employee. However, a sponsor or employee who has been convicted of a crime other than those specified above may be eligible for employment at, or sponsorship of, a child care center if the Division determines that the individual has affirmatively demonstrated clear and convincing evidence of rehabilitation.

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<sup>342</sup> N.J. Admin. Code 10:122-4.10 (2002).

In determining whether a person has affirmatively demonstrated rehabilitation, the Division shall consider factors that include the nature and responsibility of the applicable position at the child care center, the nature and seriousness of the offense, the circumstances under which the offense occurred, whether the offense was an isolated or repeated incident, and any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of those who have had the person under their supervision. The Division makes the final determination regarding the employment of a sponsor or employee who has a criminal conviction.

## **NEW MEXICO**

### *Caregivers Criminal History Screening Requirements*<sup>343</sup>

New Mexico law requires all prospective employees for positions as caregivers at a state-owned, operated, or funded health and human services program be subjected to a nationwide criminal history record check. A prospective employee is ineligible for employment if her criminal record reveals any of the disqualifying convictions specified in the regulation. A disqualified individual may request an informal administrative reconsideration from the Department of Health. The request must be submitted in writing and include a signed statement that identifies any criminal felony convictions along with a statement of any circumstances that the individual would like the Department of Health to consider, including evidence of the actual disposition of any arrest for which the nationwide criminal history record was incomplete, the person's age at the time of each disqualifying conviction, any mitigating circumstances when the offense was committed, rehabilitation since the offense, and the person's full employment history since the disqualifying conviction.

The reconsideration proceeding is intended to be an informal review of written documentation. It is non-adversarial, administrative, and conducted by a reconsideration committee designated for that purpose by the Department of Health. The reconsideration

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<sup>343</sup> N.M. Admin. Code tit. 7, § 1.9.10 (2002).

committee may issue an employment clearance determination based upon the completed request for reconsideration and all supporting documents that are submitted. In cases where the reconsideration committee finds the need for additional or clarifying information, it may request that the applicant supply additional information.

In determining whether the disqualified individual may be employed, the reconsideration committee will take into account the requirements of the Criminal Offender Employment Act<sup>344</sup>. However, that act is not conclusive in the committee's determination. Other factors may also be considered, including the total number of disqualifying convictions, time elapsed since last disqualifying conviction or since discharge of sentence, circumstances of crime (including whether violence was involved), activities evidencing rehabilitation (including but not limited to substance abuse or other rehabilitation programs), and evidence that applicant poses no risk of harm to the health and safety of care recipients.

A disqualified individual will be issued a reconsideration employment clearance by the Department of Health when all of the evidence before the review committee demonstrates that the criminal history record was inaccurate, or that the services provided by the disqualified individual would present no risk of harm to clients, or that the disqualifying conviction does not directly bear upon the individual's fitness for employment.

## **NORTH CAROLINA**

### *Criminal Record Check Requirements for Child Day Care Providers*<sup>345</sup>

North Carolina law requires that a criminal history check be conducted on all persons who provide childcare in licensed childcare facilities or in non-licensed childcare homes that receive state or federal funds.<sup>346</sup> The Department of Health and Human Services (DHHS) is required to ensure that the criminal history of all child care providers is checked and a

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<sup>344</sup> N.M. Stat. Ann. § 28-2-1 to 28-2-6 (1978).

<sup>345</sup> 10 N.C. Admin. Code 3U. 2702 (1997).

<sup>346</sup> N.C. Gen Stat. § 110-90.2 (1997).

determination is made of the child care provider's fitness to have responsibility for the safety and well-being of children based on the criminal history.<sup>347</sup>

To fulfill this duty, the DHHS has promulgated regulations that require child day care providers to submit to their employer a certified criminal history check from the Clerk of Superior Court's office in the county where the provider resides. The criminal history must include a signed statement declaring under penalty of perjury whether the childcare provider has been convicted of a crime<sup>348</sup> other than a minor traffic violation.

If a provider has been convicted of a crime, he may submit to the Division of Child Development additional information concerning the conviction that could be used to make the determination of the provider's qualification for employment. The Division may consider the length of time since conviction, nature of the crime, circumstances surrounding the commission of the offense or offenses, evidence of rehabilitation, number of prior offenses, and age of the individual at the time of occurrence. The child day care provider retains a probationary status pending the determination of qualification or disqualification by the Division.

The Division will notify the child day care provider in writing of its determination with respect to the individual's fitness to have responsibility for the safety and well being of children based on that individual's criminal history. However, the employer will not be told the specific information used in making the determination. Child day care providers who are disqualified from employment based on their criminal history must be terminated from their position by the facility or small day care home immediately after receiving notification of the qualification. A disqualified individual has the opportunity to challenge the determination by filing a civil lawsuit within 60 days after receipt of the written notification of disqualification.

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<sup>347</sup> *Id.*

<sup>348</sup> Such crimes include, but are not limited to: homicide, rape and offenses against family member, assaults, kidnapping and abduction, malicious injury or damage by use of explosive or incendiary device or material, offenses against public morality and decency, prostitution, public intoxication, possession or sale of drugs, and alcohol-related offenses such as sale to underage persons or driving while impaired.

## **NORTH DAKOTA**

### *Licensing of Programs and Services for Individuals with Developmental Disabilities – Disclosure of Criminal Record*<sup>349</sup>

North Dakota law requires chief executive officers and employees or agents of programs that provide services for individuals with developmental disabilities to disclose to the Department of Human Services (DHS) any conviction of a criminal offense if the employee or agent receives and disburses funds or provides any direct service to clients. A program is required to conduct criminal background checks on all persons who work with clients and disclose to DHS the names, type of offenses, dates of conviction, and position and duties of employees with a criminal record. This disclosure does not disqualify a program from licensure unless the conviction is for a crime having direct bearing on the capacity of the employee or agent to provide services for individuals with developmental disabilities and the employee is not sufficiently rehabilitated. An employee may be deemed sufficiently rehabilitated once five years has passed, without subsequent conviction, since the employee's final discharge or release from any term of imprisonment, probation, parole, or other form of community corrections.<sup>350</sup>

## **OHIO**

### *Child Care Agency Personnel and Prohibited Convictions for Employment*<sup>351</sup>

Ohio law prohibits a child care agency from hiring an individual for a position as administrator, child care staff, or caseworker, or for any other position responsible for a child's care in out-of-home-care, if the individual has been convicted of or pled guilty to certain offenses, including homicide, assault, kidnapping, extortion, sex offenses, robbery, burglary, trespass and safecracking, offenses against the family; and drug offenses. A conviction of, or a plea of guilty to, any of the included offenses will not prevent an individual from being hired if the individual has been granted an unconditional pardon for the offense or the conviction or

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<sup>349</sup> N.D. Admin. Code 75-04-01-06 (2003).

<sup>350</sup> N.D. Cent. Code § 12.1-33-02.1 (2001).

<sup>351</sup> Ohio Admin. Code 5101:2-5-09 (2002).

guilty plea has been set aside under state or federal law. An “unconditional pardon” includes a conditional pardon where all the conditions have been performed or have transpired.

An individual who has been convicted of or who has pled guilty to any of the included offenses may be hired by an agency if the specified amount of time (three years for a misdemeanor and ten years for a felony) has passed since the date when the individual was fully discharged from any imprisonment or probation as a result of the conviction and the victim of the offense was not a person under the age of eighteen, a functionally impaired person, a mentally retarded person, a developmentally disabled person, a person with a mental illness, or a person sixty years of age or older. When determining whether to hire a prospective employee, the agency is also permitted to consider the individual’s age at the time of the offense, nature and seriousness of the offense, circumstances under which the offense was committed, degree to which the individual participated in the offense, whether the individual is a repeat offender, the individual’s employment record, and the individual’s efforts at rehabilitation and the results of those efforts.

## **OKLAHOMA**

*Department of Human Services – General Provisions for Child Care Licensing Services – Criminal History Investigations*<sup>352</sup>

Oklahoma law requires that every child care facility arrange to have a criminal history investigation conducted for any person applying to establish or operate a child care facility and any person to be employed by a child care facility, including all positions<sup>353</sup> that have the potential to involve unsupervised access to children.<sup>354</sup>

State licensing representatives review the criminal history reports and conduct further investigation as necessary. If a criminal history report indicates a conviction for an offense listed in the licensing requirements, the licensing representative will advise the owner or director of the child care facility or the family child care home provider that the prospective or current employee

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<sup>352</sup> Okla. Admin. Code § 340:110-1-8.1 (2000).

<sup>353</sup> The list of positions is lengthy, and includes lab students, WEP workers, contracted staff, volunteers, and custodians.

<sup>354</sup> Okla. Stat. tit. 10, § 404.1 (2002).

does not meet licensing requirements. The licensing representative will notify the child care facility or home provider that it may request a waiver from the statewide licensing coordinator, unless the individual was convicted of a crime pursuant to the Sex Offenders Registration Act,<sup>355</sup> and will provide a list of the items considered for a waiver. The licensing representative will document assurance from the child care facility or home provider that the person in question will not be employed, work with children, or be present in the home when children are in care until a decision has been made regarding the request for a waiver.

The child care facility or home provider can request a waiver from employment prohibition for an individual with criminal history. However, a waiver cannot be granted to any individual who is required to register pursuant to the Sex Offenders Registration Act.<sup>356</sup> The decision to grant a waiver is made by the statewide licensing coordinator and is based on documentation indicating that the health, safety, and well-being of children will not be endangered if the individual is employed. A number of criteria are considered, including the type of crime or offense for which the individual was convicted, nature of the offense, age of the individual at the time of the offense, circumstances surrounding commission of the offense that demonstrate whether it is likely that the person will re-offend, number of offenses for which the individual was convicted, length of time that has elapsed since the last conviction, relationship between the offense and the ability to care for children, evidence of rehabilitation, activities since the offense was committed, education, statement from the individual with the criminal history, and opinions of reliable community members concerning the individual in question.

## **OREGON**

### *Criminal Record Review for Mental Health and Developmental Disability Services Division Providers*<sup>357</sup>

Oregon law requires that all current and prospective employees of the Mental Health and Developmental Disability Services Division (“the Division”) be subject to a criminal information

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<sup>355</sup> Okla. Stat. tit. 57, § 581 (2002).

<sup>356</sup> *Id.*

<sup>357</sup> Or. Admin. R. 309-018-0000 to 309-018-0120 (2002).

record check. The law's stated purpose is "to reduce or eliminate the risk of exploitation and/or abuse of persons in the care of or receiving services from any of the Division's facilities."<sup>358</sup>

Designated rules provide guidelines on the procedures by which the Division obtains criminal background information on persons who apply for employment, are employed, contract with, or volunteer for the Division, and how the Division applies criminal background information in making decisions regarding employment, provision of services, and volunteers.

This regulation states that the Division has determined that certain serious felonies and misdemeanors increase the risk of exploitation and/or abuse of persons in the care of or receiving services from any of the Division's facilities. The Division retains the discretion to determine whether an individual who has been convicted of any crime listed in the regulation, or has made false statements about a conviction, should be approved for or disqualified from the position sought with the Division. In determining whether to approve or deny the position, the Division will consider many factors, including the type and number of offenses, passage of time since the offense was committed, circumstances surrounding the commission of the offense which would demonstrate that repetition is unlikely, intervening circumstances since commission of offense, and relationship between the offenses and the specific requirements of the position.

Individuals can challenge a review, provided they notify the Division of their request for a contested case hearing no later than ten calendar days from the date of service of a denial notice. The Division is entitled to rely on the criminal offender information supplied by the Oregon State Police or the FBI unless either agency notifies the Division that the information has been changed or corrected. Prior to the contested case hearing being scheduled, a mandatory pre-hearing conference between the Division and the individual (who may bring a legal or other representative) is convened to review all available information and determine the need for a contested case hearing.

The issues that can be contested by an individual are limited to (a) whether the individual has made a false swearing as to the non-conviction of a crime, (b) whether the criminal offender

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<sup>358</sup> Or. Admin. R. 309-018-0000(1).

information provided to the Division by the Oregon State Police or the FBI describes any crime which the Division has determined is relevant to the risk of exploitation and/or abuse or safety of individuals, and (c) if the individual has admitted the commission of a crime which has been determined to be relevant, whether the relationship between the facts which support the conviction and all intervening circumstances would permit the individual to be employed by the Division.

## **PENNSYLVANIA**

### *Background Checks of Prospective School Employees*<sup>359</sup>

Pennsylvania law requires all prospective school employees<sup>360</sup> for positions that may involve any direct contact with children to submit, with their employment application, a report of criminal history record information, or a statement that no record exists, from the Pennsylvania State Police. If the criminal history record information indicates that the applicant has been convicted of any of the offenses listed in the statute<sup>361</sup> within the five years immediately preceding the date of the report, the applicant cannot be employed. This statute provides the prospective employee no opportunity for reconsideration or rebuttal if the criminal history record information indicates that the prospective employee has been convicted of one of the listed offenses.

No regulation or statute pertaining to criminal history record checks with respect to positions in human services or the equivalent in Pennsylvania could be found.

## **SOUTH CAROLINA**

### *Licensing of Foster Care Providers*<sup>362</sup>

South Carolina law requires prospective foster parents to submit to a criminal record check. The granting of a license is influenced by the existence of a criminal record, but there is

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<sup>359</sup> 24 Pa. Consol. Stat. Ann. § 1-111 (West 2002).

<sup>360</sup> This statute applies to all prospective employees of public and private schools, and area vocational-technical schools, including independent contractors and their employees.

<sup>361</sup> Offenses include, among others, homicide, assault, harassment and stalking, kidnapping, unlawful restraint, sexual assault, indecent exposure, and felony drug offenses.

<sup>362</sup> S.C. Code Regs. 114-550 (2002).

some room for discretion. Foster parents who have been convicted of a crime of moral turpitude must submit written documentation regarding any type of rehabilitation program attended and the effects that these rehabilitation programs have had on their lives or behavior. This must include an evaluation of the proposed foster parent by a counselor or therapist and must be submitted to the Department of Social Services. After submission of that documentation, the Commissioner of the Department of Social Services, or his designated representative, considers the circumstances and evaluates whether a license can be issued. If a currently licensed foster parent or parents partakes in criminal activity, then the family's license will be revoked. For both denial of an initial license or revocation of an existing license, there is a right of appeal. After receiving notification of denial or revocation of a license a family has 30 days in which to appeal to the Department of Social Services.

## **SOUTH DAKOTA**

### *Medical Facilities Personnel*<sup>363</sup>

South Dakota law prohibits any person who has been convicted of abusing another person from working in a medical facility under the Department of Health. Abuse is defined as an intentional act toward an individual indicating mistreatment toward an individual or any conduct toward a patient or resident that results in harm, pain, fear, or mental anguish.<sup>364</sup>

## **TENNESSEE**

### *Criminal History Information Required of Persons Having Access to Children*<sup>365</sup>

Tennessee law requires that any individual wishing to volunteer, apply for a license, or work in any position in which there is significant contact with children within a child care agency or in the Department of Welfare submit to a criminal background investigation. Any individual who serves for more than 36 hours within a year as a substitute staff person, paid or unpaid, must also submit to a criminal background investigation. An applicant may be accepted conditionally, pending a criminal history review.

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<sup>363</sup> Admin. R. S.D. 44:04:04:04 (2002).

<sup>364</sup> Admin. R.S.D. 44:04:01:01 (2002).

<sup>365</sup> Tenn. Code Ann. § 71-3-507 (2002).

The applicant must consent to the criminal history review and provide a fingerprint sample and a list of any pending criminal charges and any conviction involving a sentence. The applicant must also consent to a review of her status in the Department of Health's vulnerable persons registry. The applicant is allowed to present mitigating circumstances that should be considered in the hiring, volunteering, or licensing decision. Both the criminal history review and the status review must be done within 10 days of being hired, accepted as a volunteer, or licensed. The cost of the obtaining, handling and processing of the fingerprint sample is the responsibility of the child care agency, but the cost of the criminal history review is borne by the Department of Welfare.

Any individual whose criminal history includes a conviction, plea of guilty or no contest, pending warrant, indictment, or presentment involving physical, sexual, or emotional abuse of a child, gross neglect of a child, or a crime of violence against a child cannot be employed by a child care agency or the Department of Welfare. Such an individual cannot provide substitute services or have any access whatsoever to children in a child care agency, nor can they be employed within the department in a position having significant contact with children. Any individual who has, within the last five years, been charged with operating a motor vehicle under the influence of an intoxicant cannot be hired as a driver or transporter of children for a child care agency.

A person who is denied a position may appeal the results of the criminal history check within 10 days of the date of the notice. The department of welfare must provide an administrative hearing in which the applicant may challenge the accuracy of the report or the failure to grant an exception. A review process must include the participation of an advisory group consisting of law enforcement personnel, persons experienced in child protective services, persons experienced in child development issues, and child care providers. This review process can be used to rebut the disqualification of an applicant with a criminal background by taking into consideration extenuating circumstances.

## **TEXAS**

### *Nursing Facility Requirements for Licensure and Medicaid Certification*<sup>366</sup>

Texas law requires all prospective employees for positions that involve direct contact with residents of nursing facilities under the Department of Human Services to submit to a criminal background history, unless the prospective employee is licensed. Before the offer of employment can be made, the check must be completed. One who has been convicted of certain crimes may not be employed in nursing facilities. Before a nursing facility hires an unlicensed employee the employer must also search the employee misconduct registry and the nurse's aide registry to discover if the applicant has been designated in either registry as having abused, neglected, or exploited a resident or a consumer of a facility.

## **UTAH**

### *Background Screenings of Health Care Facility Employees*<sup>367</sup>

Utah law requires all new health care facility employees or volunteers be subject to a criminal background screening. Once an applicant is hired, requests a license, renews a license, or is accepted as a volunteer in a health care facility under the Department of Health, the facility must submit the applicant's information and all necessary fees and released to the Department of Health within ten days. If the prospective employee has not been a resident of Utah for the last five years, the individual must submit fingerprints for an FBI national criminal history record check. If the criminal background screening indicates that the individual has a criminal record with a conviction of a felony or misdemeanor, the Department will either approve or deny the individual for licensing or employment. The Department will review any criminal convictions to determine if action should be taken to protect the health and safety of patients and residents receiving health care services in the covered health care facility. If the Department takes an action adverse to any individual, based upon the criminal background screening, the Department

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<sup>366</sup> Tex. Admin. Code tit. 40, § 19.1921 (2002).

<sup>367</sup> Utah Admin. Code r. 432-35-4 (2003).

must send a Notice of Agency Action to the health care provider and the individual explaining the action and the right of appeal.

## **VERMONT**

### *Requirements Imposed Upon Day Care Facilities*<sup>368</sup>

Vermont law requires all new employees of child care facilities to undergo a criminal records check as well as a search of the child abuse registry before hiring can be approved.

## **VIRGINIA**

### *Criminal Records Checks for Nursing Facility Employees*<sup>369</sup>

Virginia law requires all prospective employees of licensed nursing facilities under the Department of Health to submit to a criminal record check. An applicant cannot be hired if she has been convicted of or has pending criminal charges for any of the following offenses: murder, abduction for immoral purposes, assault or bodily wounding, pandering, crimes against nature involving children, taking indecent liberties with children, abuse and neglect of children, failure to secure medical attention for an injured child, obscenity offenses, and abuse or neglect of an incapacitated adult.

An original criminal record clearance or an original criminal history record must be obtained from the Central Criminal Records Exchange for every employee who is hired. There is no discretion in hiring when the applicant's record shows any of the crimes listed above, but an applicant may be hired by the nursing facility if their conviction is more than five years old and did not involve abuse, neglect, or moral turpitude. Reimbursement for the history check will be provided by the Department of Medical Assistance Services (a division of the Department of Health), but will be limited to the actual charges from the Central Criminal Records Exchange request. The information must be obtained within 30 days of employment and these records must be maintained for five years after the employee's termination.

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<sup>368</sup> Vt. Stat. Ann. tit. 33, § 3502 (2003).

<sup>369</sup> 12 Va. Admin. Code 30-90-180 (2002).

There appears to be no avenue for rebutting the report of the Central Criminal Records Exchange, nor does there appear to be an avenue for rebutting the presumption of ineligibility.

## **WASHINGTON**

### *Department of Social and Health Services – Background Check Requirements*<sup>370</sup>

Washington law requires that, in order to be considered as a final applicant by the Department of Social and Health Services for any position “in which a person will or may have unsupervised access to children, vulnerable adults, or individuals with mental illness or developmental disabilities,”<sup>371</sup> an applicant must authorize the Secretary of the Department of Social and Health Services to conduct a background check. An applicant may be hired conditionally, pending the results of the background check, but failure to authorize a background check disqualifies an applicant from consideration for any of these positions. The results of the background check will be used solely to determine the character, competence, and suitability of an applicant. The background check information consists of conviction records, pending charges, disciplinary board final decisions, and any evidence that substantiates or mitigates convictions or pending charges. The Department of Health may go to any authorities to have the background check performed.

An applicant may request a review by the appointing authorities, but this must be requested in writing and received by the appointing authority within fifteen calendar days of the postmark date of the notification. The basis for the Health Department’s final decision includes, but is not limited to, the applicant’s background check authorization and disclosure form, the applicant’s age at the time of conviction, the nature and severity of the offense, the length of time since the conviction, the nature and number of previous offenses, the vulnerability of the service recipients to which the employee or applicant will or may have unsupervised access, and the relationship between the nature of the offense and the duties of the employee or applicant.

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<sup>370</sup> Wash. Admin. Code 356-56-203 (2002).

<sup>371</sup> Wash. Admin. Code 356-56-203(1) (2002).

## **WEST VIRGINIA**

### *Family Day Care Facility Certification Requirements – Personnel*<sup>372</sup>

West Virginia law prohibits family day care facilities from knowingly hiring or continuing to employ anyone who has contact with children in the facility if, for example, they have been convicted or indicted or have admitted guilt to any felony offense; they have been involved in any criminal activity involving violence against a person, including adult or child abuse or neglect; or they have been determined to have abused or neglected an adult or a child.

## **WYOMING**

### *Access to and Dissemination of Criminal History Record Information*<sup>373</sup>

Wyoming law requires the dissemination of criminal records to the Department of Health, but does not indicate how the records are used in the hiring processes or whether ex-offenders may rebut any decisions made based upon their criminal record. There does not appear to be any particular legislation regarding the hiring of ex-offenders under the auspices of the Health and Human Services Department.

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<sup>372</sup> W. Va. R. tit. 78, § 18-5 (2002).

<sup>373</sup> Wyo. Stat. Ann. § 7-19-106 (2001).

## POLICY OPTIONS

Overall, the EOHHS employment regulations are only a small component of the numerous and complex challenges faced by ex-offenders when seeking employment. The EOHHS regulations appear to be affecting a small percentage of Table A ex-offenders who seek employment with EOHHS and must rebut their presumption of dangerousness by either a parole officer or mental health assessment, regardless of time passed since their crime or other evidence of rehabilitation. The field research team did not encounter or learn of an ex-offender who qualified for employment at EOHHS, had committed a Table A criminal offense, and was not able to rebut the presumption of dangerousness through the two means provided in the EOHHS regulation. But, the regulations have a symbolic impact on ex-offenders who are attempting to reintegrate into the community, as they codify perceptions that ex-offenders are irredeemable and still must pay for their crimes post-release.

The field research team encountered various stakeholders who suggested that, in relative terms, the EOHHS regulations were not a significant challenge for a preponderance of ex-offenders. The nine parole officers interviewed by the field research team all agreed that the denial of EOHHS jobs to ex-offenders is not a major concern to them or their parolees. One parole officer stated that out of a caseload of 40-45 parolees, perhaps only one would be qualified for an EOHSS job.<sup>374</sup> Parole officers see basic employment skills as the more difficult challenge facing ex-offenders. One parole supervisor explained that there are no longer education and job training programs in the prisons.<sup>375</sup> Ex-offenders are being released from incarceration with very little education, low literacy skills, and few job skills.<sup>376</sup> These basic employment challenges are the primary barriers to employment, not the EOHHS regulations. However, the assessment of such broad challenges was largely beyond the scope of this project.

The field research suggests that the latest iteration of the EOHHS regulations may effectively constitute an absolute bar to employment for Table A ex-offenders, thereby not

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<sup>374</sup> Interview with Jim O'Neal, Mike Joyce, and Dan Joyce.

<sup>375</sup> Interview with Debbie Wornham, Arthur Isberg, and 4 anonymous parole officers.

<sup>376</sup> *Id.*

complying with *Cronin v. O'Leary*, and conflicting with the intent of the legislature as indicated in the FY 2002 budget language. Conversely, it should be noted that it cannot yet be definitively stated whether the EOHHS regulations provide a meaningful opportunity for all ex-offenders to rebut the presumption of ineligibility, as required in *Cronin v. O'Leary*. The field research team learned of only one Table A offender that had become employed under the current EOHHS regulations. However, it is clear that regardless of their nominal compliance with *Cronin v. O'Leary*, the current EOHHS regulations pose a profound and daunting challenge for an ex-offender trying to gain employment in the health and human services field without some degree of modification. The overall message received in the field is that the EOHHS regulations are suited to handle jobs involving vulnerable populations, but that the regulations unduly limit the ability of human service providers to hire the best applicant for the job and place an unnecessary burden on employment for ex-offenders.

The audit of similar state regulations revealed that the EOHHS regulations are significantly broader in scope and more restrictive of employment than their equivalents in other states. The executive agencies of most states are structured such that employment regulations only affect a limited set of organizations and agencies and not all human service providers in the state, as is the situation in Massachusetts. However the audit has produced a number of promising practices that can serve as models for how to modify the EOHHS regulations so as to create additional employment opportunities for ex-offenders and increase compliance with *Cronin v. O'Leary*.

#### **INCREASE DISCRETIONARY DECISION-MAKING POWER FOR EOHHS & HIRING AGENCIES**

EOHHS regulations could be amended to impart more discretion into the decision making process for ex-offenders who are seeking employment at EOHHS funded agencies so that all ex-offenders can be considered as individual applicants. Discretion already exists in the decision making process for Table B and C applicants; agencies must consider the time passed since conviction, the age at the time of offense, seriousness and circumstances of the offense, the

nature of the work performed, the number of offenses, evidence regarding rehabilitation, and any other relevant information. This discretion could be expanded to cover all applicants. Discretion could be integrated into the decision making process at two levels, either by giving it directly to the hiring agency and eliminating the categorization of crimes into tables, or, if that is not possible, by increasing it at EOHHS.

#### Full Agency Discretion

Massachusetts could look to New York as a model regulatory scheme that has granted full discretion directly to the hiring agency. This scheme resembles the current EOHHS regulations in that it would still require that a CORI check be conducted by the hiring agency for every job applicant and that new hires be documented for EOHHS. However instead of having specific and limited means of challenging the presumption of dangerousness, the hiring agency would simply use the factors set forth in the current regulations regarding Tables B and C. Under this scheme, all crimes could be considered together under one table, which would eliminate the differential treatment of ex-offenders based upon a potentially arbitrary judgment of severity as is contained in the current scheme of Table A, B, and C crimes. Agencies themselves already consider the severity of the crime when considering an application. Alternatively, the current system of categorizing crimes could be maintained, which would incorporate guidelines for differing levels of scrutiny for EOHHS-funded agencies to use when hiring ex-offenders.

Massachusetts service providers have also indicated that broadening their discretion would increase their ability to hire the applicant best suited for the job. Service providers have the most expertise regarding the specific and unique needs of their programs and clients, which makes them the best decision-makers regarding employment decisions. No responsible human service provider would knowingly put their clients at risk, and they know from experience what personalities and experiences best suit the culture of their agency and their clients. If discretion is given to the hiring agency, it could still be monitored by EOHHS through the current reporting and veto procedures, so as to ensure some level of oversight.

#### EOHHS Discretion

Alternatively, EOHHS could make a discretionary decision to approve the hiring of ex-offenders who are unable to obtain a positive parole officer or mental health professional evaluation but can otherwise demonstrate that they are qualified for the position sought and do not pose an unacceptable risk to program clients. This policy option would create potentially fewer opportunities and maintain barriers to employment for both ex-offenders and service providers than conferring full discretion on the hiring agency, primarily because it would likely maintain, informally, the current system of crime tables and presumptive disqualification for Table A ex-offenders. Regardless, the employer who wants to hire a Table A offender and is unable to get the parole officer or mental health evaluation could ask that EOHHS review the case and grant an approval to the hire based upon other evidence or rehabilitation or suitability for employment.

Good faith waivers are a means of making an exception to what is ordinarily a firm rule to account for mitigating circumstances in an ex-offender's situation that could demonstrate that an ex-offender does not pose a danger to public safety for a specific position. In essence, a good faith waiver gives an applicant the opportunity to obtain employment in the human services sector even though an otherwise restricting criminal record exists. For example, in Illinois a direct care facility can request a waiver for an applicant who has a criminal record.

If a good faith waiver were integrated into the current EOHHS regulation scheme, it would provide more flexibility and would arguably be a more feasible means of rebutting the presumption of dangerousness for Table A ex-offenders, whether it be decided by a panel or an individual. One method of utilizing the benefits of a good faith waiver would be to give EOHHS the authority to grant a good faith waiver to an ex-offender who has committed a Table A crime yet EOHHS has found poses no increased risk to public safety. While a good faith waiver is certainly not a guarantee of employment, it has the potential for opening doors for ex-offenders to re-integrate into the community, since an agency that would like to hire a Table A ex-offender could petition EOHHS to review the particulars of the job and crime committed. The scope of a good faith waiver could be extended beyond the job-specific approval

available in both Illinois and Wisconsin to providing a permanent assessment of the person's rehabilitation for all human services positions for which he or she may apply in the future. The challenge with this broad waiver is that the general approval might be difficult to obtain, since the granting authority would likely prefer to consider, on a more case-specific basis, the responsibilities of the position sought and the degree of contact with vulnerable populations. The job specific approach is more in line with the trend to consider all the circumstances and nexus between the position sought and the crime committed, and would likely garner less opposition than a universal waiver.

The ex-offenders interviewed expressed a strong desire for the opportunity to present their case to a state official in person – a face-to-face opportunity to rebut a presumptive disqualification, rather than a process that is strictly on paper and impersonal. Such a process would help put a human face and story to a crime and would allow the ex-offender to personally explain why he committed the offense, why he's disqualified for the job, and why he does not pose a danger to the public. The legislators interviewed by the field research team seemed to support this idea, but suspected that funding would be a barrier to implementation nearly impossible to overcome. However, given the small number of ex-offenders who are qualified for EOHHS positions, the actual cost may not in fact be prohibitive.

The authority to make the discretionary hiring decision can either be vested in an individual or a panel. A panel decision-making model can be combined with other formal procedures which would make for a more feasible means of challenging a presumption of dangerousness as outlined in *Cronin v O'Leary*, maintain a focus on each ex-offender as a valued individual, and balance the competing public interests at the same time.

## **IMPROVING THE IMPLEMENTATION OF THE CURRENT PROCEDURE**

There is also a possibility for meaningful reform within the current constructs of the EOHHS regulations that would provide a more feasible means for Table A ex-offenders to rebut the presumption of dangerousness.

### Revising the Parole Officer Procedure

The EOHHS regulations could establish a clearer process through which parole officers can issue evaluations. This would require two components – defining who is responsible for making a final decision, and defining and limiting potential liability. A procedure needs to be established to handle requests that parole officers receive to determine who will be the final decision-maker and how that decision will be made. The decision is a difficult one, as parole officers are trained for, and primarily responsible for, *supervision* of parolees, not specific assessments of dangerousness. Parole officers are generally not qualified to conduct such evaluations. To remedy this conflict, the requirement of an evaluation could be embodied in a standardized form that requires the parole officer to report only the ex-offender's compliance with the conditions of probation or parole.

Finally, the overwhelming concern of all of the parole officers is the perception that they would be held personally liable for providing a positive evaluation for one of their clients. The issue of liability is vague and yet to be determined. Regardless, there is an overwhelming perception of personal liability which makes parole officers reluctant to provide positive evaluations for their clients. In addition to standardization, the process must involve indemnification through which the parole officers can be confident that they will not be held liable for their good-faith approval should the subject of the evaluation commit a crime against an EOHHS client.

### Funding Options for the Mental Health Assessment

The cost of the mental health assessment is currently borne by the hiring agency and is prohibitive for most agencies that operate with scarce resources. One option is for the state legislature to appropriate money to fund the cost of mental health assessments for Table A ex-

offenders, thereby reducing the disincentives for the hiring agency to consider such ex-offenders. Given that there appears to be a small number of Table A ex-offenders currently applying for EOHHS jobs, the necessary funding would be relatively small and would guarantee one means for an ex-offender to challenge the presumption of dangerousness.

#### Tax Incentives

Councilor Feeney recommended the extension of tax breaks to employers who hire ex-offenders, thereby offsetting some of the costs incurred during the application process.<sup>377</sup> As of 2002, such federal incentive programs were in place, but Massachusetts did not sponsor or provide any such programs itself.<sup>378</sup>

### **REVISING THE CRIME TABLES**

Altering the tables of crimes that employers must use to restrict employment is a way to maintain the same overall procedure, while changing the effect of the regulation in order to increase employment opportunities for ex-offenders. Of all of the possible reforms, changing the crime tables is likely to meet the least amount of resistance given the discrete nature of the change.

#### Limit Restrictions to a Shorter List of Crimes

Many of the other states had less extensive lists of crimes that limit employment opportunities for ex-offenders. For example, drug possession triggers the employment restrictions in Massachusetts, but not in any of the five focus states that were investigated. While many states have tables or lists of crimes that were similar to Table A, B, and C of the EOHHS regulations, few of them were as expansive. Removing crimes that are associated with addiction is a logical choice to increase opportunities yet maintain public safety. Shortly after Procedure 001 was implemented, the Alcohol and Drug Abuse Association recommended removing prostitution, driving under the influence, shoplifting, and drug possession from the crimes

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<sup>377</sup> Interview with Maureen Feeney.

<sup>378</sup> Clean Slate Project, *CORI-Based Employment Discrimination: Issues and Possible Solutions for Employers*, <<http://www.cleanslateproject.org/cori.html>> (accessed March 23, 2003).

triggering a presumptive disqualification.<sup>379</sup> These recommendations are still pertinent, as they are each currently included in Tables B and C in some form, yet establish no conclusive evidence that the ex-offender would place EOHHS clients at risk, especially if he or she has been sober for a period of time. Another means of focusing the list of crimes to those that are most related to public safety is to limit the list to those crimes that include violence against a person, and to remove petty crimes and those that involve only property. Shoplifting and possession of drugs or drug paraphernalia are some such “victimless crimes” that are currently included in the Tables. Using either method of limiting the exclusionary crimes would increase the number of opportunities for ex-offenders seeking jobs with EOHHS funded agencies while recognizing that there are some serious crimes that are more relevant to public safety concerns.

Another means of limiting the crimes which trigger employment restrictions in the EOHHS setting is to advocate for the liberalization of the availability of criminal record sealing, as is modeled by the Second Chance legislation.<sup>380</sup> Non-violent drug offenses could be sealed and would thus not appear on the CORI at the time of job application. However, sealing records would likely be even more difficult to effect politically than a change in the regulation that would enable providers to evaluate each applicant on a case-by-case basis. One benefit of sealing the records is that the ex-offender need demonstrate rehabilitation from a non-violent crime only once, and would not be required to bear the burden and stigma of the criminal record for the rest of his or her job-seeking life. Additionally, this strategy is broader and would cover all fields of employment, not just EOHHS positions; many individuals have expressed that in the universe of jobs that match the skills and experience of most ex-offenders, barriers to EOHHS human services positions are not as important to address as barriers facing general private employment.

#### Limiting Restricted Areas of Employment to Vulnerable Populations

Limiting the restricted fields of employment to those that involve direct contact between the ex-offender employee and vulnerable populations, such as children, the elderly, or the

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<sup>379</sup> Letter from Anne Taft.

<sup>380</sup> *Winning the War on Drugs*, 113 Harv. L. Rev. 1485.

mentally disabled, would reduce the impact of regulations and more narrowly tailor the restrictions to increase public safety. In essence, limiting the tables would codify the implicit balancing test that already exists in the discretionary decision-making prescribed in the regulations for Table B and C ex-offenders by requiring a nexus between the vulnerabilities of the client population and the ex-offender's crime. For example, Wisconsin has a regulatory scheme that prohibits discrimination based upon a criminal record, but permits an employer to refuse to employ a person who has a criminal record that "substantially relates" to the employment responsibilities.<sup>381</sup> As applied, this would mean, for example, that an ex-offender who has committed child sexual abuse would be barred from working with children in any capacity. The goal here is to protect vulnerable populations by allowing ex-offenders to work with other ex-offenders or in drug treatment programs. This would both provide meaningful employment for ex-offenders and a unique perspective for those clients receiving services.

EOHHS jobs are varied and ex-offenders have a different level of risk to public safety in each position, yet as the EOHHS regulations are currently implemented, there is no differentiation between high-risk and low-risk jobs. Arguably, the issues involved with an ex-offender working as an administrative assistant are vastly different from an ex-offender who is working as a child counselor. However, both employment opportunities are restricted by the same EOHHS regulations. The impact of limiting the restrictions on employment to vulnerable populations would be to create more opportunities by lessening the restrictions on numerous jobs with a lower risk to the public, as was supported by City Councilor Turner. Substance abuse treatment providers and/or homeless services serve adults in crisis. Outreach and treatment is successful with a peer model – someone who has actually been through addiction or homelessness.

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<sup>381</sup> Wis. Stat. § 111.335(1)(c)(1).

## CONCLUSION

The importance of meaningful employment is emphasized in the policy research studies as well as echoed in the sentiments of those stakeholders interviewed in Massachusetts. Field research uncovered the importance of considering applicants as individuals and underscored the importance of a discretionary system to do so. Various policies explored in the state audit provide many promising practices that can be further researched and adapted to fit the unique needs of Massachusetts in order to increase the opportunities for ex-offenders to obtain gainful and meaningful employment. Any one of the outlined policy alternatives would open additional doors for ex-offenders seeking employment, whether they are used in an effort to reform EOHHS regulations or hiring practices in general. Each of the policy alternatives is a promising practice that attempts to balance more reasonably the public safety concerns with the interests in the integration of ex-offenders back into the community and the benefits of their contribution to the community.