

August 10, 2012

Ohio Joins Handful of States that Offer Tort Liability Protections for Businesses that Hire and Employ Rehabilitated Ex-Offenders

By Rod Fliegel, William Simmons, and Inna Shelley

In enacting protections from tort liability for negligent hiring and retention claims for businesses that hire and employ rehabilitated ex-offenders, Ohio joins a handful of other states that are introducing such measures to help facilitate the reintegration of ex-offenders into the workforce.

Ohio Senate Bill 337, effective September 28, 2012, contains many provisions that amend the definitions of certain crimes and affect the ability of individuals with prior criminal histories to obtain employment. For example, the bill expands opportunities for individuals to seal their criminal record histories and limits disqualifications for occupational licenses based on criminal convictions. The most important provisions of the new law for employers, however, relate to the establishment of a procedure for certain individuals to obtain a "certificate of qualification for employment," and the corresponding limitation of tort liability for employers that hire and retain individuals who are issued such certificates.

Under the new law, individuals who have been convicted of or pleaded guilty to certain criminal offenses, who have been released from incarceration and from all other sanctions, and who have completed probation, may obtain from the court of common pleas a "certificate of qualification for employment" that will provide relief from certain statutory bars to employment or occupational licensing. Individuals who have been convicted of a felony may apply for the certificate one year after the date of their release from incarceration and all periods of post-release supervision. Individuals who were not incarcerated may apply one year after final release from all other sanctions imposed for the crime. Individuals who have been convicted of a misdemeanor may apply for the certificate six months after the end of incarceration, supervision, or other sanctions imposed for the misdemeanor.

A certificate of qualification for employment will not, however, release an individual from all collateral sanctions resulting from a prior conviction. For instance, the certificate will not release an individual from complying with the requirements of Ohio's Sex Offender Registration and Notification Law, and, depending on the nature of the underlying conviction, the new law will not reverse the denial, ineligibility, or automatic suspension of health care professionals' licenses.

Importantly for employers, however, the new law attempts to assuage some of the liability concerns that otherwise might result from hiring and retaining individuals with criminal histories. First, the new law grants immunity to employers for any negligent **hiring** claims based on wrongdoing by an individual with a certificate of qualification for employment where the employer knew of the certificate at the time of hiring. Second, the new law limits liability of employers in civil actions related to the **retention** of individuals possessing certificates of qualification for employment by providing that an employer can only be held liable if the “person having hiring and firing responsibility” for the employer had **actual** knowledge that the employee demonstrated dangerousness (an undefined term) or had a felony conviction after his or her hire, and the person nevertheless **willfully** retained the individual as an employee. Third, the new law provides that, in any judicial or administrative proceeding alleging negligence or fault, employers can use the certificate of qualification for employment as evidence of due care in transacting business or engaging in activity with the individual to whom the certificate was issued, provided that the employer actually knew about the certificate at the time of the alleged negligence or fault.

In enacting these protections for employers from tort liability for negligent hiring and retention claims, Ohio joins other states, such as Colorado, Florida, Illinois, Massachusetts, New York, and North Carolina. Employers should be mindful of the scope of these protections. It remains to be seen what protections, if any, they offer in employment-related actions other than common law tort claims, such as in sexual harassment matters. Employers also must continue to assess the impact of, and watch for further developments regarding, a broad array of laws and regulations when evaluating their ex-offender hiring policies. Earlier this year, the U.S. Equal Employment Opportunity Commission issued updated enforcement guidance on employer use of arrest and conviction records in hiring under Title VII of the Civil Rights Act of 1964.¹ In addition, when using third-party screening companies to obtain background information on applicants or existing employees, employers must continue to follow the requirements of the federal Fair Credit Reporting Act (FCRA), including the FCRA’s provisions requiring advance consent for the background check and providing appropriate notices when any adverse employment decision is made based in whole or in part on the information disclosed in a background report.²

1 See Rod Fliegel, Barry Hartstein, and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 20, 2012), available at www.littler.com/publication-press/publication/eec-issues-updated-criminal-record-guidance-highlights-important-str.

2 See Rod Fliegel and Jennifer Mora, *The FTC Staff Report on “40 Years of Experience with the Fair Credit Reporting Act” Illustrates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011), available at www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin.

[Rod Fliegel](#), Co-Chair of Littler Mendelson’s Hiring and Background Checks Practice Group, is a Shareholder in the San Francisco office, [William Simmons](#) is an Associate in the Philadelphia office, and [Inna Shelley](#) is an Associate in the Cleveland office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Mr. Fliegel at rfliegel@littler.com, Mr. Simmons at wsimmons@littler.com, or Ms. Shelley at ishelley@littler.com.