Pre-employment Screening, Negligent Hiring, and Policy Concerns for Illinois Municipalities

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Competing laws and policy concerns may present challenges for Illinois' municipal employers with regard to knowing if, when, and how they should proceed in conducting pre-employment background checks. Worries about tensions between Ban-the-Box legislation, negligent hiring, Title VII, and considerations of public policy are complex and may even seem vexing at first glance. However, when the dots are connected between these laws and policy concerns, the picture becomes clearer.

Ban-the-Box

Growing policy concerns regarding employment opportunities for those persons with criminal histories have given rise to legislation that addresses the issue. Many states, counties, and local governments have adopted so-called "Ban-The-Box" statutes or ordinances that prohibit employers from inquiring into or considering applicants' criminal histories right away in the hiring process. The now colloquial term for these laws originated from employment applications, which required a job candidate to check a box indicating whether he or she had ever been convicted of a crime. The idea behind such laws is that delaying the employer from seeing criminal histories will give the applicant an opportunity to be evaluated based on his qualifications, rather than his application being summarily cast aside. Advocates of the laws believe that it is in the public interest to eliminate barriers to employment for people with criminal convictions so that they will not return to committing crimes. Proponents of these laws report that they are effective in alleviating the underlying policy issues. However, critics argue that the statutes make no difference, or even have the unintended effect of sweeping in those who would not have suffered employment discrimination absent such laws. Additionally, these statutes bring about new concerns for municipal employers who worry about possible liability for negligent hiring when they are unsure how far they can look into the backgrounds of

applicants without running afoul of Ban-the-Box laws. However, the language of Illinois' Ban-the-Box legislation excludes public employers from its scope. 820 ILCS 75/15.

Still, there are good reasons for municipalities to exercise caution in conduction pre-employment background checks. While concerns about liability for negligent hiring may lead to the inclination to investigate the criminal histories and other personal information of applicants, those worries are misplaced. Moreover, such investigations could expose municipalities to liability for violating Title VII, and produce the effect of acting contrary to the public policies behind the Illinois Job Opportunities for Qualified Applicants Act. *Id*.

History/Policy Concerns:

What led to the enactment of Ban-The-Box legislation? The policy behind these laws is attributed to concerns about the large numbers of prisoners being released from incarceration, the ease with which employers can now conduct criminal history checks, employers' preferences not to hire individuals with criminal histories, and the rate of recidivism linked to unemployment among individuals with criminal records[1].

Studies and data show that African-American males experience the highest rate of imprisonment [2], as well as the highest rate of unemployment following release from

[1] "Each year approximately 650,000 inmates are released from State and Federal prisons . . . Without assistance to make a successful transition, the majority of ex-offenders return to criminal activity. According to the U.S. Department of Justice, almost three out of five returning ex-offenders will be charged with new crimes within three years of their release from prison and two out of five will be re-incarcerated." U.S. Department Of Labor, Employment and Training Administration, *Notice of Availability of Funds and Solicitation for Grant Applications for Reintegration of Ex-Offenders – Adult Program Grants*, https://www.doleta.gov/grants/pdf/SGA-DFA-PY-10-10-2011.pdf.

[2] As of the end of 2001, "[t]he rate of ever having gone to prison among adult black males (16.6%) was over twice as high as among adult Hispanic males (7.7%) and over 6 times as high as among adult white males (2.6%)." Thomas P. Bonczar, *Bureau of Justice Statistics Special Report: Prevalence of Imprisonment in the U.S. Population, 1974-2001*, (2003).

incarceration. By the year 2000,

> "the number of federal prisoners being released each year reached "nearly 600,000," the largest number in history. [The Department of Justice] figures indicated that the proportion of the American adult population that has served time in prison rose from 1.8% in 1991 to 3.2% in 2007 and was continuing to rise rapidly: trends implied a future figure of 6.6% for the cohort born in 2001."

Joseph Fishkin, The Anti-Bottleneck Principle in Employment Discrimination Law, 91 Wash. U.L. Rev. 1429 (2014).

One author summarizes that,

> "Ban the Box legislation gained popularity on the left in the mid-2000s. During that period, previously incarcerated individuals were re-entering the work force in never-before-seen numbers, as a long-term "aftershock" of the tough-on-crime policies of the 1980s and 90s that greatly increased mass incarceration. The legislation, to be clear, is race-neutral and designed to help white previously incarcerated job applicants as well as people of color."

William J. Rainsford, *No, "Ban The Box" Does Not Worsen Racial Inequality: A rebuttal to the "unintended consequences" argument that "Ban the Box" legislation worsens overall hiring outcomes for people of color*, (April 2, 2017, 4:56 PM), https://medium.com/labor-for-millennials/no-ban-the-box-does-not-worsen-racial-inequality-fd49603e4f50.

By the time these individuals were being released in the 2000's, employers were making use of technological advances that made conducting criminal background checks much easier than such inquiries had ever been. The Equal Employment Opportunity Commission explained that it has updated its policy statements on criminal background checks, in part because, "In the twenty years since the Commission issued its three policy statements . . . technology made criminal history information much more accessible to employers." *Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII*, https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

Therefore, ban-the-box legislation was introduced as a means of helping ex-offenders secure employment, and more to the point, to reduce the rates of unemployment and recidivism

among those populations statistically most likely to be rejected for employment and become repeat offenders: African-American males[3].

Concerns That Ban-the-Box Conflicts With Negligent Hiring Claims:

Employers want to know about the criminal histories of applicants for more reasons than concerns about productivity. In particular, worries about liability for negligent hiring may motivate employers to seek information about the criminal pasts of job candidates. According to the EEOC,

> "In one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring."

EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, 915.002, (issued 4/25/2012), https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.

To further illustrate this concern, one article explains that "In the majority of jurisdictions . . . negligent hiring is a cause of action that holds employers liable for hiring persons who the employer knew or should have known would create a foreseeable risk of injury to others. Generally, the employer is negligent if the employer should have screened applicants more scrupulously and did not, or if the employer failed to respond to actual or constructive

[3] "Both theory and evidence suggest that connecting ex-offenders with jobs can keep them from re-offending. The classic Becker (1968) model of criminal behavior suggests that better employment options reduce crime. In practice, increasing the availability of jobs for re-entering offenders reduces recidivism rates . . . [S]ince black and Hispanic men are more likely to have criminal records, making a clean record a condition for employment could exacerbate racial disparities in employment." Jennifer L. Doleac & Benjamin Hansen, *Does "Ban the Box" Help or Hurt Low-Skilled Workers? Statistical Discrimination and Employment Outcomes when Criminal Histories Are Hidden* (Nat'l Bureau of Econ. Research, Working Paper No. 22469, 2016), http://www.nber.org/papers/w22469 [https://perma.cc/MRU3-CZAP].

knowledge of the facts related to the heightened risk of harm. Because of a belief that ex-offenders are more likely to commit crime, employers may end up discriminating against ex-offenders for fear of being exposed to liability under negligent hiring law."

The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation, 85 Temp. L. Rev. 921, 922 (2013).

A lawsuit brought under the theory of negligent hiring and retention is likely what most employers who worry about liability for hiring individuals with criminal records fear. In Illinois, to state a claim for negligent hiring a plaintiff must show: (1) the defendant-employer knew or should have known that an employee had a particular unfitness for his position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the hiring, retention, or failure to supervise; and (3) that this particular unfitness proximately caused the plaintiff's injury. This rule came out of, and was well explained in *Van Horne v. Muller*:

> "To successfully plead a cause of action for negligent hiring or retention, it is not enough for the plaintiff to simply allege that the employee was generally unfit for employment. 'There are many kinds of unfitness for employment that do not give rise to tort liability for negligent hiring [or retention].' … Rather, liability arises in this context when a particular unfitness of an employee gives rise to a particular danger of harm to third parties … The particular unfitness of the employee must have rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position."

Van Horne v. Muller, 185 Ill.2d 299, 235 Ill.Dec. 715, 705 N.E.2d 898 (1998).

Employers are only liable for negligent hiring when the third party's injuries were proximately caused due to "employment of the unfit employee." *Johnson v. Mers*, 279 Ill. App. 3d 372, 376, 664 N.E.2d 668, 672 (1996). "The proximate causation element [of the test for negligent hiring or retention] is satisfied when the employee's particular unfitness rendered the plaintiff's injury foreseeable to a person of ordinary prudence in the employer's position."

Anicich v. Home Depot U.S.A., Inc., 852 F.3d 643, 649 (7th Cir. 2017), *as amended*, (Apr. 13, 2017). (Internal quotes omitted.)

Negligent hiring, unlike the doctrine of respondeat superior, leaves the employer open to liability beyond when the employee is acting within the scope of employment.[4] Thus, ban-the-box laws that do not specifically address the employer's liability when it hires ex-offenders who subsequently commit torts seem to leave open the question of whether and when the *private* employer is liable.

Illinois Municipalities Are Immune From Negligent Hiring Claims

Although there is significant motivation for employers to conduct internet searches of applicants to avoid liability for negligent hiring, ban-the-box-type legislation can effectively prevent an employer from doing what was previously considered due diligence in hiring. As the U.S. District Court for the Eastern District of New York explained,

> "While the "ban the box" campaign aimed at persuading employers not to ask about convictions has helped, numerous, palpable pressures nevertheless continue to discourage most employers from hiring individuals with criminal records. These pressures include insurance companies unwilling to cover employees who are former felons, *potential negligent hiring liability*, and strong societal stigma."

Stephenson v. United States, 139 F. Supp. 3d 566, 569 (E.D.N.Y. 2015). (Emphasis added).

Fortunately however, the Illinois General Assembly has given consideration to this issue with regard to units of local government. The Tort Immunity Act provides that municipalities are

[4] "Negligent employment (or negligent hiring), on the other hand, expands employer liability to include acts committed outside the scope of employment. Negligent employment theory is based on the duty of an employer to exercise reasonable care to ensure the safety of the public by hiring safe and competent employees. The degree of due care owed has been open to wide judicial interpretation, and it imposes an affirmative duty to reasonably investigate the potential dangers created by particular employees. Failure of an employer to investigate a employee's criminal record has resulted in liability for injuries."

Christopher Stafford, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism,* 13 Geo. J. on Poverty L. & Pol'y 261, 269–70 (2006).

immune from liability for negligent hiring. Under the Act, "[e]xcept as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." Additionally, a municipality "is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109.

Illinois courts have decided that the hiring of employees necessarily involves the determination of policy and exercise of discretion, and as such, municipalities are immune from negligent hiring liability under the Act. Therefore, both the City and its employee making a hiring decision are fully immune from claims of negligent hiring.

For example, In *Johnson v. Mers*, 279 Ill. App. 3d 372, 380, 664 N.E.2d 668, 675 (1996)[5], the Appellate Court of Illinois, First District, Third Division, held that even when a hiring plan is present, and includes an "application process, a polygraph examination, psychological testing, physical testing, and interviews," hiring an employee "is inherently discretionary and is not performed on a given state of facts in a prescribed manner," as the ultimate decision to hire or not hire an employee "require[s] the exercise of discretion." In a case out of the District Court for the Central District of Illinois, which is the district in which Champaign is located, the court said that public employers are immune from claims of negligent hiring even when that employer knew of information that would put it on notice that the hired job candidate had or may have had a particular unfitness for the job, and whether or not the

[5] *Johnson v. Mers* has been cited by the Seventh Circuit for the proposition that Illinois municipalities are immune from claims of negligent hiring under 745 ILCS 10/2-109. "[T]he Illinois state courts have determined that "[t]he decision to hire or not to hire . . . is an inherently discretionary act and, thus, is subject to the immunities contained in the Immunity Act." *Doe v. Village of Arlington Heights*, 782 F.3d 911, 922 (7th Cir. 2015).

hiring was merely negligent or willful and wanton. Further, even when a background check later reveals a history of violent or other concerning behavior, the public entity is immune from negligent hiring claims. *Doe 20 v. Bd. of Educ. of Cmty. Unit Sch. Dist. No. 5*, 680 F. Supp. 2d 957, 986-87 (C.D. Ill. 2010). In *Brooks v. Daley*, the Appellate Court of Illinois, First District, Third Division, upheld the decision in *Johnson v. Mers*, and added that "there is ample law to support the conclusion that hiring and firing decisions are considered policy determinations within the meaning of section 2-201 [of the Tort Immunity Act]."

Illinois Ban-the-Box Legislation Does Not Currently Apply to Municipal Employers

In addition to enjoying immunity from negligent hiring claim, Illinois municipalities are not subject to the state's Ban-the-Box statute. As of January 1, 2015, the Illinois Job Opportunities for Qualified Applicants Act, was in effect. Under the Act, an employer is prohibited from

> "inquir[ing] about or into, consider[ing], or require[ing] disclosure of the criminal record or criminal history of an applicant until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency or, if there is not an interview, until after a conditional offer of employment is made to the applicant by the employer or employment agency."

820 ILCS 75/15. For the purposes of the Act, an "employer" is defined as "any person or *private* entity that has 15 or more employees in the current or preceding calendar year, and any agent of such an entity or person." *Id*. (Emphasis added). Additionally, the prohibition does not apply to positions where

> "(1) employers are required to exclude applicants with certain criminal convictions from employment due to federal or State law; (2) a standard fidelity bond or an equivalent bond is required and an applicant's conviction of one or more specified criminal offenses would disqualify the applicant from obtaining such a bond, in which case an employer may include a question or otherwise inquire whether the applicant has ever been convicted of any of those offenses; or

> (3) employers employ individuals licensed under the Emergency Medical Services (EMS) Systems Act."

Id. Therefore, the Act applies only to individuals or private entities, and their agents, employing 15 or more people in the current or preceding calendar year. Clarifying the public policy behind the statute, the Illinois Congress found that

> "it is in the public interest to do more to give Illinois employers access to the broadest pool of qualified applicants possible, protect the civil rights of those seeking employment, and ensure that all qualified applicants are properly considered for employment opportunities and are not pre-screened or denied an employment opportunity unnecessarily or unjustly."

820 ILCS 75/5. Therefore, while public employers are not subject to the prescriptions within the Job Opportunities for Qualified Applicants Act, and because municipal employers are immune from claims of negligent hiring, they should consider the policies underlying the statute, and take care to act in accordance with them where they reasonably may do so.

Title VII and Background Checks

In addition to reasons of public policy, municipalities should be aware of potential liability for violating Title VII of the Civil Rights Act of 1964 when conducting background checks for job applicants. Particularly, when background checks result in hiring decisions that constitute disparate treatment of an individual, or have a disparate impact on groups protected under Title VII, the municipal employer is left open to liability. Jeremy Glenn & Katelan Little, *Illinois Passes New Law Limiting the Use of Criminal Background Information in Employment Applications and Hiring Decisions,* 27 DCBA Brief 28, 31 (2014). For instance, when a background check reveals a conviction, and the municipal employer exempt from 820 ILCS 75/15 makes an adverse hiring decision based on that revelation, even though Illinois courts have construed 745 ILCS 10/2-109 to mean that municipalities have tort immunity for hiring

decisions, Title VII preempts State laws.[6] Therefore, Illinois municipalities should be aware of practices that result in disparate treatment or disparate impact violative of Title VII.

Conclusion

Although Illinois municipalities are immune from negligent hiring claims, and are not currently subject to state Ban-the-Box legislation, leaving them free to inquire into the backgrounds of prospective employees without fear of what would constitute inquiring too far or not far enough, concerns about violating Title VII or acting contrary to the public policy behind Ban-the-Box laws should be considered. Because internet searches or other methods of inquiry may reveal an applicant's membership in a class protected under Title VII, caution in engaging in such research is warranted. Additionally, the state legislature has made the public policy behind its Ban-the-Box statute clear, even though it has not yet chosen to make the law applicable to public employers. Thus, an Illinois municipal employer should weigh its interests in conducting pre-employment background checks against the competing interests of public policy or the rights of members of protected classes.

[6] "Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 42 U.S.C.A. § 2000e-7.