

NEWS

Lawyers Say Lawsuit Protection May Not Spur Hiring of Ex-Offenders

Lawyers say employer liability protection proposals are 'helpful' but not strong incentive to hire ex-offenders

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Robert Sands, who represents employers, says they “are more concerned with skill sets and reliability” of prospective workers than with the chance of negligent hiring lawsuits. *John Disney/Daily Report*

A legislative proposal from Gov. Nathan Deal's criminal justice reform council to protect employers who hire ex-offenders from lawsuits may not move the needle on helping former convicts find employment as much as supporters hope, say some area labor and employment lawyers.

"It is helpful, but I don't think it's all that significant," said Robert Sands, a partner in the Atlanta office of Ogletree, Deakins, Nash, Smoak & Stewart who represents employers.

"I'm not saying there are employers who aren't concerned about [negligent hiring liability], but I haven't found in my practice that it's a primary concern," Sands added. "Employers are more concerned with skill sets and reliability. If someone is in prison, they may not be developing the skills needed for employment and they don't have a proven track record for reliability. And [once released], they may not have transportation or a stable environment."

The Georgia Council on Criminal Justice Reform, a panel of gubernatorially appointed lawmakers, lawyers, judges and law enforcement officials, last month issued a 41-page report containing several policy proposals related to ex-convict re-entry, including negligent hiring liability protection for employers.

Under Georgia law, employers may be liable for negligent hiring if an employee who has a criminal background commits a new offense on the job. A victim of the new offense who sues currently must prove that the company knew or reasonably should have known about the employee's propensity to commit such a crime. Lawsuits arise most often when there is violent behavior by an employee against a customer or coworker, Sands said.

"It could be a situation in which a company hires an employee who goes into someone's home to provide a service, like making repairs, and that employee engages in some improper behavior such as sexual assault or a violent crime against somebody in the household, and the homeowner sues the company for being negligent in hiring or retaining that employee," said Sands. "To win, they have to show that the company did not properly screen or monitor the employee's behavior."

Peter Farley, a partner at Sutherland Asbill & Brennan who represents employers, said negligent hiring claims also frequently arise as add-ons to other torts, such as sexual harassment, and "find their way to dismissal land pretty quickly." But when negligent hiring claims move forward to trial, they can be high stakes because juries are unpredictable, he said.

While there is no legislation formally before the Georgia General Assembly yet, the criminal justice reform council has recommended two options: creating a rebuttable presumption that an employer acted with due care or complete immunity for employers.

Under either option, in order for an employer to gain liability protection, any ex-offender hired must have received a rehabilitation certificate from the state Department of Corrections. The certificate would state the ex-offender successfully completed required treatment programs and vocational training and complied with the terms of the offender's probation or parole. The council's proposal does not outline how the DOC should decide to issue or revoke certificates and instead states that the DOC should come up with its own rules. In its

report, the council also noted that North Carolina and Ohio offer negligent hiring liability protection that is dependent on certification.

Since at least 2012, the Georgia Justice Project has been pushing for policies similar to those recommended by the governor's council.

"Many Georgia employers impose blanket bans on hiring or even interviewing individuals who have a criminal history, including records of arrest that did not result in conviction," GJP states on its website. "Such blanket bans violate Title VII of the Civil Rights Act of 1964, a fact that was recently reiterated by the EEOC when it issued a revised guidance for employers on using criminal history information in making employment decisions."

Georgia Justice Project has advocated for increased employer education coupled with negligent hiring liability protection in certain instances.

"Employers also discriminate because they overestimate the risk of liability based on hiring an individual with a criminal history," according to the GJP. "Georgia law should be revised to create a presumption that an employer was not negligent when hiring an individual with expunged, sealed, or pardoned charges."

Sands and Farley said they believe most employers are heeding the EEOC's guidance, though they still inquire about past arrests and convictions on employment applications with the disclaimer that an affirmative answer doesn't automatically disqualify someone from consideration.

Bill Clark, chief lobbyist for the Georgia Trial Lawyers Association, said his group has been following closely the criminal justice reform council's work related to ex-convict re-entry and has mixed feelings about the negligent hiring liability protection recommendations.

"[W]e are supportive of that initiative. However, we are skeptical of a measure that would immunize an employer just because their applicant has been given some bureaucratic 'seal of approval,'" Clark said in a written statement. "But, if the employer has conducted a sufficient background check to make sure there is no nexus between the applicant's criminal history and the job for which they are being considered, we support the idea that such an employer would be entitled to a rebuttable presumption that they have not negligently hired that applicant."

Farley and Sands both said employers obviously would prefer immunity over a rebuttable presumption but realize there would likely be stronger opposition to that idea.

"I imagine there would be other people who would have a problem with it because it's an absolute blank check," Farley said.

But like Sands, Farley said he isn't sure the council's proposal of a rebuttable presumption would provide a strong enough incentive to be effective. "I think that many employers are going to have some difficulty with the idea that there's this certification from the DOC about someone's ability to be able to work and that being an appropriate shield [from claims]," Farley said. Basically, he said, no company would want to be the test case.

Plus, said Sands, even with a rebuttable presumption, a company could still find itself involved in costly litigation if it hires someone with a criminal record.

"There are jobs programs already in place and agencies out there that are trying to help folks with criminal backgrounds be employed," Farley said. "One thing to consider is that employers will always adjust their practices based on what the law provides and what they think is best for business. I think the governor and Legislature need to have a two-way street conversation with employers."

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