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TAXATION AND REDUCING RECIDIVISM: A LEGAL COMPARATIVE ANALYSIS OF REDUCING RECIDIVISM IN STATES AND A FEDERAL SOLUTION FOR THE FUTURE

Israel X. Nery and Scott B. Astrada*

INTRODUCTION

More than half a million people released from federal and state penitentiaries every year face the question of how someone reintegrates into society after incarceration.¹ One of the first challenges facing ex-offenders is determining how they are going to pay for the new life that they are trying to build. This challenge presents a major barrier for ex-felons, especially considering the discrimination they encounter during the hiring process when they seek employment after they are released. As the length of unemployment increases for ex-offenders, so does the potential for recidivism. Additionally, research has consistently shown that individuals face a variety of barriers in health, employment, and housing access after being released from incarceration. The causal factors for these challenges are varied and complex, so there are a multitude of proposed policy solutions to remediate their damaging repercussions. Without stable employment, housing and health outcomes decline, and the chance for recidivism increases. For some time, tax-based incentives for employers to hire formerly incarcerated individuals, among other at-risk groups, have been utilized to addresses these barriers and challenges. Federal and state programs have been subject to extensive research determining efficiency, programmatic gaps, and potential policy reform. A large component of this research arrives at a consensus that tax-based incentives are effective, but more can be done, both on the state and federal level, to ensure that tax programs are as effective as possible to benefit individuals trying to reintegrate into society and build a secure and stable life.

In this article, we will focus on employer-based tax incentives for hiring ex-offenders. Central to the discussion will be the Work Opportunity Tax Credit (“WOTC”), which provides a tax credit to employers who hire qualified employees/ex-offenders under the program. Additionally, we will explore various state programs modeled on a tax-based incentive and conduct a comparative assessment of where federal and state programs are effective and where there is potential for reform. Without targeted policy solutions to address employment obstacles, ex-offenders are left

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facing persistent employment barriers as they attempt to return to their communities and start a new life after incarceration. Potential reforms that build upon a tax-based incentive can create win-win models of reform, boost workforce participation, and provide pathways to economic and rehabilitative opportunities for ex-offenders.

I. USING FEDERAL TAX-BASED PROGRAMS TO MEET THE CHALLENGES OF EX-OFFENDER REINTEGRATION

While there is an obvious adjustment in lifestyle for ex-offenders, a major obstacle for individuals trying to reintegrate into society is the lack of access to gainful employment and sustainable housing. Additionally, there is a significant body of research that shows consistent, stable housing and employment significantly reduces the possibility of recidivism. However, barriers are widespread for many ex-offenders as they face discrimination, navigate a job market with a lack of relevant work experience, and suffer from housing insecurity. These barriers are especially pronounced for communities of color. Ultimately, for the vast majority of previously incarcerated individuals, lack of access to stable employment is one of the main barriers to successful reintegration into the community. Unfortunately, between 60%-75% of ex-offenders do not have a job for up to a year after their release. The resulting prolonged unemployment is exacerbated by the fact that some states limit ex-offenders that have drug-related charges from social safety net programs such as Supplemental Nutrition Assistance Program (“SNAP”) or Temporary Assistance for Needy Families (“TANF”), further limiting access to crucial resources for stable housing and food. These programs provide critical resources for individuals living at or below the poverty line (this is not even addressing the fact that they have been targeted for program-wide defunding). There are many opportunities for reform when it comes to the reintegration process, from “ban the box” policies to ensuring access to relevant training during incarceration that provides viable skills. Thus, it is critical to compare and reexamine federal tax incentives for employers that provide employment opportunities to individuals seeking to

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5 Hanks, supra, note 1.


8 Id.


reintegrate into society by entering into the workforce, while also analyzing the gaps and shortcoming of these policies to provide effective policy recommendations.

**A. Federal Law and Discrimination**

Title VII of the Civil Rights Act of 1964, prohibits private employers and state and local governments from discriminating on the basis race, color, gender, national origin, or religion when making hiring decisions. However, Title VII does not expressly prohibit inquiries during the application period about someone’s criminal history. Nonetheless, it does restrict the use of such information when it results in a discriminatory impact on protected classes (disparate impact). There is a substantial body of research and case law that delves into the question of whether the type and recency of a conviction have a bearing on an employer’s ability to consider criminal history a part of its employment decision, however, this inquiry is beyond the scope of this article.

**B. The Work Opportunity Tax Credit (WOTC)**

In addition to the limited protections to prevent discrimination outlined above, policy makers have also created incentives for employers to hire ex-offenders. The central federal tax program meant to encourage private employers to hire individuals from persistently unemployed populations is the WOTC. Employers can receive a federal income tax credit for wages paid to employees from one of ten targeted groups. These groups include unemployed veterans, recipients of TANF and SNAP benefits, designated community residents (residents of Rural Renewal Counties or Empowerment Zones), and qualified ex-felons. For an ex-felon to qualify for the program, he or she must have been convicted of a felony under state or federal law, and within one year of their conviction or release from prison, obtain an offer for employment. If an employer wishes to claim a tax credit for hiring a qualified ex-felon, they must receive a certification from their state employment security agency that the individual is indeed a qualified ex-felon under [citations].

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12. See id.; see also Deborah Sudbury & Elaine Rogers Walsh, The EEOC Revisits Criminal Background Checks, THE PRAC. LAW., Aug. 2012, at 31, 32. (“Title VII provides two theories of employment discrimination: disparate treatment and disparate impact. Although disparate treatment requires a showing of intent on the part of the employer, disparate impact requires no such discriminatory animus. Instead, as the U.S. Supreme Court explained in Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977), Title VII prohibits ‘employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.’ As a result, assuming a disparate impact, the relationship between the applicant’s criminal history and the job requirements must be affirmatively demonstrated.”).
16. Id. at 3.
WOTC. Once certified, the employer can claim a tax credit on the first $6,000 in wages paid to the qualified ex-felon in his or her first year of employment if the ex-felon works at least 120 hours in the first year of employment. In addition, the value of the credit increases with the number of hours worked. If an ex-felon works between 120 and 399 hours in his or her first year of employment, the employer receives a tax credit of 25% of the first $6,000 in wages. If the ex-felon works 400 or more hours, the employer receives a tax credit of 40% of the first $6,000. As a result, the maximum tax credit an employer can receive per qualified ex-felon is $2,400.

C. General review of WOTC outcomes

Data collection on WOTC is limited and research results on its effectiveness are mixed. For example, despite the tax incentive and the broader social benefits, ex-felons do not account for a large portion of employees claimed by employers under WOTC. According to the Department of Labor’s 2014 statistics, only 30,062 working ex-felons were qualified under the program—this number of working ex-felons represented only 2.3% of the certifications issued that year. One research study concluded that there was little evidence that employers considered the WOTC tax incentive as part of their hiring decision. However, the study found that employees hired and paid under the WOTC program earned higher wages than their non-certified counterparts. It is critical, however, to note that this research was centered on welfare recipients and youth workers as WOTC recipients broadly, and not solely on ex-offenders. However, there is research linking employer participation with job duration, meaning that low employer participation is partially caused by the qualifying employee not working at least 120 hours in the first year that they are employed (or the higher tax credit rate which only applies for qualifying employees working more than 400 hours).

Some policymakers question whether the hour requirement thresholds are also contributing to the low participation rate. Other policymakers raised concerns that the WOTC tax credit would drive employee churn (the overall rate that employees leave the company and new staff is hired), as employers would replace current workers with WOTC qualifying employees. This concern has been mostly addressed by a General Accounting Office (now the Government Accountability Office) study that found 93% of employers reported that churning of employees would not be cost

17 Id. at 3.
18 Id. at 3.
19 Id. at 3.
20 Id. at 3.
23 Id.
24 Employment Tax Incentives and Ex-Offender Health, supra note 7, at 5.
25 Id.
26 Id.
effective because the WOTC applies to about 47%, of recruiting, hiring, and training expenses.\footnote{Id. at 5, citing U.S. GEN. ACCOUNTING OFF., GAO-01-329. WORK OPPORTUNITY TAX CREDIT: EMPLOYERS DO NOT APPEAR TO DISMISS EMPLOYEES TO INCREASE TAX CREDITS 1 (2001), available at https://www.gao.gov/assets/240/231115.pdf.} The report concluded that there were no findings of employee churn.\footnote{Id.}

Other research from the Rand Corporation also shows similar findings that incarceration has broad and significant consequences for ex-offenders searching for employment, notably the fact that people with criminal records are discriminated against as they try to enter the labor market.\footnote{Id. at 1.} Rand research studied employer preferences regarding policy options targeted to incentivize them to hire individuals with one nonviolent felony conviction. The study “found employers were 69 percent more likely to consider hiring an ex-offender if a hiring agency also provides a guaranteed replacement worker in the event the ex-offender was deemed unsuitable and 53 percent more likely to hire an ex-offender who can provide a certificate of validated positive previous work performance history.”\footnote{Id. at 13.} One of the most significant findings of the research showed if the tax credit was increased from 25% to 40%, employers were 30% more likely to consider an ex-offender for employment.\footnote{New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).} In addition to WOTC, there are state variations in how tax base incentives are deployed to address labor force participation for ex-offenders.

II. **Comparative State Tax Law on Hiring Formerly Incarcerated Individuals**

Supreme Court Justice Louis Brandeis once stated in his dissent that “state[s] may, if its citizens choose, serve a laboratory; and try novel social and economic experiments without risk to the rest of the country.”\footnote{See Michael S. Greve, Laboratories of Democracy: Anatomy of a Metaphor, AM. ENTER. INST. (2001), http://www.aei.org/publication/laboratories-of-democracy/.} That statement is now colloquially known as the “states as a laboratories of democracy” metaphor where states can be innovative in finding solutions to issues that might be pervasive nationwide. If successful, federal policy makers would use a solution as a model for federal programs and legislation.\footnote{Tax Policy Center, State Economic Development Strategies Toolkit, URB. INSTITUTE & BROOKINGS INSTITUTION (2018), https://www.taxpolicycenter.org/feature/state-economic-development-strategies-toolkit.} Under this doctrine, states are at the forefront of tackling issues that might plague the rest of the nation. State tax law is arguably no exception, as it can be a catalyst to spur policy goals by state governments.\footnote{Id. at 13.} Whether it is to incentivize investment in underserved communities (i.e., Opportunity Zones), increase homeownership (i.e., allowing deductions in mortgage interest), increase economic growth (i.e., reducing capital gains taxation),
to motivate citizens to save for retirement (i.e., IRA Tax Refundable Credit), tax law is often times the common denominator in spurring these policy goals. As alluded in the previous section, current federal tax law can go farther to incentivize employment of formerly incarcerated individuals. Although federal law might be unable to provide a definitive solution, states have been at the forefront of finding a solution to this ongoing issue. Below, we will compare four states: i.) Iowa, ii.) Louisiana, iii.) Illinois and iv.) California. This section will also highlight previously adopted tax credits that have expired and state tax credits that have been proposed in state legislatures. Each state has taken a unique approach in utilizing tax credits or deductions to incentivize employers to hire formerly incarcerated individuals. The analysis will focus on the structure of each. Individual credit or deduction along with any metrics that signify its success or failure.

A. Iowa

The Iowa Workforce Development in partnership with the Iowa Department of Corrections administers a state tax credit aimed at incentivizing employers in the Hawkeye State to hire ex-felons. If an employer hires an ex-felon, they can receive a 65% state tax deduction of the wages paid in the first twelve months of employment. The maximum tax credit an employer can claim the first year is $20,000. For an employer to be able to claim this credit, the ex-felon must meet any of the following criteria:

i) Has been convicted of a felony in [Iowa] or any other state or the District of Columbia; ii) Is on parole pursuant to Iowa Code Chapter 906; iii) Is on probation pursuant to Iowa Code Chapter 907 for an offense other than a simple

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36 Employment Tax Incentives and Ex-Offender Health, supra note 7.


misdemeanor; or iv) Is in a work release program pursuant to Iowa Code Chapter 247A.\textsuperscript{41}

The statute outlining the respective state tax credit is worth examining given the oversight mechanisms used to prevent employers from circumventing the policy purpose of the credit. For example, the state tax credit cannot be issued to an ex-offender hired to replace an employee who was terminated within a twelve-month period of being hired.\textsuperscript{42} The exception to this provision applies when the employee being replaced left voluntarily, or was discharged for misconduct in connection with their employment; then a deduction will be allowed for the ex-felon replacing this employee.\textsuperscript{43} This determination is made on a case-by-case basis by the Iowa Department of Workforce Development.\textsuperscript{44} There is a cap on the number of employees a business can hire under this state tax credit. An employer can have no more than twenty full-time equivalent employees.\textsuperscript{45} Full-time for the purposes of this section is an employment position averaging a work week of forty or more hours per week; where compensation is made on a salaried full-time basis; or aggregation of part-time positions which equals one full-time position.\textsuperscript{46} The part-time position aggregation criteria determines that an average of thirty-five or more hours weekly is the equivalent of one full-time position.\textsuperscript{47} Moreover, if the employer files its state tax return claiming this credit, but the ex-felon(s) hired does not successfully complete probationary period, which is six months if the employer does not have a written policy, the employer will have to amend its return and add back the additional credit for wages.\textsuperscript{48}

The state tax credit provides a possible substantial decrease in tax liability by deducting up to $20,000 of the hired ex-felon’s wages.\textsuperscript{49} Moreover, it allows the ex-felon to hold more than one job and allow each employer to take advantage of the tax credit for that twelve-month period.\textsuperscript{50} This tax credit also has a substantial geographical scope in the sense that an ex-felon qualifies for this credit notwithstanding the felony being committed outside of Iowa.\textsuperscript{51} Potential rebukes of the tax credit would be that there is no incentive to keep this employee past the first year of employment, which is the only time that an employer can claim this credit. Moreover, the fact that an employer has to amend its return if an ex-felon does not complete its probationary employment period can be a deterrent for employers to hire ex-felons. Arguably, the statute does not provide exemptions for adding back this credit in situations where the employer is not at fault (e.g., egregious misconduct at the workplace by the ex-felon hired).

\textsuperscript{41} Id.
\textsuperscript{42} Iowa Code Ann. §701-40.21(1) (2018).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} §701-40.21(2)(a).
\textsuperscript{46} §701-40.21(2)(a)(3).
\textsuperscript{47} Id.
\textsuperscript{48} §701-40.21(6).
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
B. Louisiana

The Creole State’s Department of Revenue has a tax credit for employers who hire ex-felons. The criteria are much narrower in comparison to other states utilizing this tool. The provision under Louisiana law is called “Tax Credit for employment of first-time nonviolent offenders.” The name itself demonstrates the narrow scope of the law. The provision states that there shall be a tax credit against tax liability for each employer who provides full-time employment to an individual who was previously convicted of a first-time nonviolent offense. The credit is only up to one hundred forty-four dollars per taxable year and eligible first-time nonviolent offender. The employer is allowed to claim only one credit per taxable year per employee; the maximum the employer can receive the credit is two years per employee. For the credit to be claimed, the ex-felon’s probation officer must certify that the prospective employee has successfully completed a court-ordered drug treatment or rehabilitation program (or any other court program as designated by the Judge). Moreover, the employee needs to work at least 180 days for the employer that is claiming the credit. The credit does require the employee to be working full-time, which under Louisiana law constitutes working a minimum of thirty hours per week. When an employer claims the credit, it must provide a statement signed by both the employer and employee (non-violent first-time offender) certifying the full-time work status for the year.

C. Illinois

The Department of Revenue and Department of Employment Security in The Prairie State implemented a tax deduction to incentivize employers to hire ex-felons (or referred to ex-offender for the purposes of this specific tax deduction). This tax deduction is often referred to as the “Illinois Ex-Felons Jobs Credit.” For tax years beginning on or after January 1, 2007, this deduction allows employers to deduct 5%, not to exceed $1,500 for each qualified individual, of qualified wages paid during the tax year to an employee who qualifies as an ex-offender. An employer can take the credit for up to five years on employees that qualify as ex-offenders. To qualify as an ex-offender, the individual has to meet all of the following criteria:

i) has been convicted of a crime in this State or of an offense in any other jurisdiction, not including any offense or attempted offense that would subject a person to

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53 Id.
54 Id.
55 Id.
56 Id.
57 Id.
58 Id.
59 Id.
62 Id.
registration under the Sex Offender Registration Act; (ii) was sentenced to a period of incarceration in an Illinois adult correctional center and; (iii) was hired by the taxpayer within three years after being released from an Illinois adult correctional center.\textsuperscript{63}

The deduction, rather than credit, cannot reduce an employer's tax liability to less than zero.\textsuperscript{64} Should the amount of credit exceed the tax liability for the employer, the excess can be carried forward for the following five taxable years and applied to any tax liability incurred during that time frame.\textsuperscript{65} Illinois exercises a "first in first out" approach for the deduction which allows the early credit to be applied first for future tax liabilities.\textsuperscript{66} The wages calculated as part of the tax credit cannot include any amounts that were paid or incurred by an employer when it was receiving federal funds for the on-the-job training of that qualified ex-offender.\textsuperscript{67} Moreover, the tax credit only includes the wages earned during that one-year period when the qualified ex-offender first began working for the employer.\textsuperscript{68} The one caveat for employers who receive the credit is that if the employer has received any payment from a program established under Section 482(e)(1) of the federal Social Security Act, then the employer must reduce its credit by the amount of the payment received.\textsuperscript{69} When initially passed on October 15, 2013, State Representative Arthur Turner, who sponsored the bill stated that he is hopeful more employers will make the most of the incentive, stating "Programs like this must be part of a creative approach to reducing recidivism and addressing the larger challenges of unemployment and violence in our communities."\textsuperscript{70}

\textbf{D. California}

The Golden State is also one of the few states to offer tax credits to employers hiring ex-felons. California law provides that an employer who employs a "qualified employee in a target tax area" during a taxable year can claim the following credits:

i) Fifty percent of qualified wages in the first year of employment; (ii) Forty percent of qualified wages in the second year of employment; (iii) Thirty percent of qualified wages in the third year of employment; (iv) Twenty percent of qualified wages in the fourth year of employment; and (v) Ten percent of qualified wages in the fifth year of employment.\textsuperscript{71}

\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Sara Burnett, Quinn signs bills to help ex-offenders get jobs, NORTHWEST HERALD, available at https://www.nwherald.com/2013/08/03/quinn-signs-bills-to-help-ex-offenders-get-jobs/adlk0yl/?page=42.
\textsuperscript{71} Cal. Rev & Tax Code § 23634(a) (Deering 2018).
An ex-felon can qualify as a qualified employee if immediately preceding its qualified commencement of employment with an employer, he/she was an ex-offender. The wages counted towards this credit, referred to as qualified wages in this provision, cannot exceed 150% of the state minimum wage ($11 as of August 2018). The provision also has an oversight provision where reemployment in connection with an employer’s reoccurring seasonal increase (i.e., seasonal hires), does not constitute commencement of employment for the purposes of this state tax credit. The qualified employee or ex-felon must carry out at least 90% of their services for the employer during the taxable year directly related to the conduct of the employer’s business located in an enterprise zone. Finally, to claim the credit, the qualified employee must be hired subsequent to the area in which the employer operates, being designated as an enterprise zone. Although the bill is still in effect, current employers can only use the credit if the ex-felon was hired on or before January 1, 2014. The bill is scheduled to expire on December 1, 2019. Although current new credits have been proposed by the past Gubernatorial Administration, there is no current legislation that has been enacted to replace this current credit.

E. Formerly Existing and Currently Proposed State Tax Credits

The State of Maryland had a tax credit aimed at incentivizing employers hiring ex-felons, entitled “Long-Term Employment of Qualified Ex-Felons Tax Credit.” Under this former provision, employers that operated in Maryland, and hired one or more ex-felons for at least one year during the period of January 1, 2007, through December 31, 2011, would be eligible for a credit for the portion of the wages paid. Maryland used the IRS’s definition of an ex-felon as a qualified employee. Under the IRS’s definition, an ex-felon is a person who is hired within a year of i) being convicted of a felony or ii) being released from prison from the felony. The employer could not claim the credit for a qualified ex-felon who was hired to replace a laid-off employee or an employee who was on strike, or during a period in which the employer was

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72 Cal. Rev. & Tax Code § 23634(VI) (Deering 2018).
76 Id.
77 Id.
78 Id.
79 Id.
81 Id.
82 Id.
83 Id.
84 Id.
simultaneously receiving federal or state employment training benefits. Moreover, the employer could not claim other applicable state credits for hiring the ex-felon. Similar to Illinois, Maryland’s state tax credit could only lower the tax liability up to zero, and any credit not used could be carried forward up to five years from the beginning of the time when the credit was earned. As of December 31, 2011, no new applications for this state tax credit were being accepted.

The State of Ohio has also entertained the idea of adopting a state tax credit to incentivize employers hiring ex-felons during the 125th Ohio Legislature Session. Assembly Bill 206 (“AB 206”) was proposed and would have provided a nonrefundable credit up to 40% of the wages paid to the qualified felon, not exceeding $2,400 per qualified “reforming felon.” For an employer to receive the full tax credit, the qualified reforming felon must have worked at least 400 hours for the employer during its taxable year. If the qualified reforming felon worked less than 400 hours but worked at least 120, the employer could claim a 25% credit on the wages paid, not to exceed $1,500. Similar to current state tax credits used to hire ex-felons, an employer would be unable to claim this credit if they were simultaneously receiving federally funded payment for on-the-job training of qualified reforming felons. Moreover, this credit could not be claimed if the qualified reforming felon was being paid wages that were substantially similar to those earned by another employee currently on strike or lockout. In the event the qualified reforming felon and employer severed ties, the employer would hypothetically be unable to claim the credit unless the qualified reforming felon voluntarily terminated employment, was unable to continue employment (due to disability or death), or was terminated for cause.

Notably, many city councils across the nation have attempted to adopt local solutions to incentivizing employers to hire ex-felons. The city of Philadelphia through the Philadelphia Re-Entry Employment Program offers opportunities for an employer to claim a tax credit against their business tax up to $10,000 each year for three years for each ex-offender hired for at least six months, for up to a total of $30,000. San Francisco once tabled a local tax credit to incentivize hiring ex-felons which would have deducted $10,000 of a business’s local tax burden for every ex-felon it would have hired full time. Unfortunately, in light of unemployment being high at that

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86 Id. at 3.
87 Id.
88 Id. at 1.
89 AB 206, 125th Assembly Reg. Sess. (Ohio 2004).
90 Id.
91 Id.
92 Id.
93 Id.
94 Id.
time, and the substantial pool of job seekers with no records of felonies, the San Francisco Board of Supervisors voted down the measure.  

III. PROPOSED FEDERAL SOLUTION

As states have taken a lead role in incentivizing employers via taxation to reintegrate ex-felons into the workforce, it is time to incorporate a comprehensive robust solution at the federal level. Each day, many previously convicted men and women fulfill their debt to society by completing their prison sentence and are released back to society. These individuals face an uphill battle to successfully reintegrate into society. For most, among other obstacles, ex-offenders cannot vote, obtain professional licenses, qualify for public assistance, and have to “check the box” for employment applications. Moreover, the Manhattan Institute conducted research that found “the sooner ex-offenders are employed, the less likely they will commit future crimes leading to further jail and prison time.” States generally view that the reduction in recidivism is in their best interest in terms of economic growth and labor force participation. This is especially significant considering the fact that crime imposes a substantial fiscal burden on the federal government. In 2016, the United States Government spent over $270 billion to fund the criminal justice system. It is time to revamp the WOTC by integrating the best practices employed by other states on their respective tax credits aimed at incentivizing employers hiring ex-felons.

A. Potential Revamped Federal Tax Credit Aimed at Reducing Recidivism

When examining potential national solutions to revamp the WOTC, the government should focus on providing a tax hiring incentive to employers to offset the potential cost of hiring employees from target groups, such as ex-felons. Moreover, we should also encourage the initial investment in hiring an ex-felon by incentivizing the length of tenure of that employee. A combination of the solutions outlined by the State of Iowa and Illinois should be viewed as a viable federal solution. Illinois and Iowa offer their respective tax credits to any employer who hires an
ex-felon, rather than limiting it to a certain location. Minimizing geographic restrictions is ideal to allow any employer willing to take a chance on hiring an ex-felon to receive the benefit of this tax credit. Iowa offers the tax credit for only the first year of employment, whereas Illinois offers the tax credit for up to five years. Research shows that when an employer hires ex-felons, the ex-felons tend to be very loyal to the businesses that took a chance on them. The tax credit should be one that rewards longevity and that dissuades an employer from engaging in “churning,” which is discussed and debunked in a subsequent section. Perhaps offering longevity on the tax credit, such as the one Illinois offers, will help employers realize the long-term value of hiring an ex-felon while at the same time helping the community by reducing recidivism. We recommend the length of the credit be for three years, considering workers are changing jobs more frequently in today’s workforce. The Bureau Labor of Statistics in January 2016 reported that the average employee tenure was 4.2 years, down from 4.6 years in January 2014. The current trends show this number will continue to decrease. We believe maintaining the tax credit for three years will help ex-felons achieve upward mobility through a higher paying, longer term job, while also incentivizing the employer to hire additional ex-felons. The hours required for an ex-felon to work for an employer to claim the credit should be a full-time job. A full-time job ideally provides the financial security to an ex-felon that would otherwise be absent without this requirement. At the same time, full-time employment encourages longevity of tenure by both employer and ex-felon. When it comes to the amount of the credit itself, we believe that Iowa’s approach should be followed. This is because offering a deduction of 65% of the wages paid to the ex-felon, up to $20,000, offers a significant incentive for an employer to partake in hiring ex-felons. By doing so, an employer will see the huge tax incentive and mitigate the risk by engaging in what is arguably a risky hire.

While states with tax incentives provide little data on the effectiveness of their tax incentives, there are success stories. The proposed tax credit should also require monitoring by the Department of Labor program office coordinating the WOTC to collect data on the effectiveness of the credit to measure potential metrics of success. By creating a more robust federal tax credit modeled on the aforementioned States best practices, both in amount and length of the credit, employers will be incentivized to increase the number of ex-felons they hire.

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108 Id.
B. Political Palatability

Political palatability is always a factor to consider when enacting forward looking solutions to populations that are historically politically controversial. Assisting ex-felons has long been identified as controversial political topic. Supporting measures such as building new schools and infrastructure are very politically salient for legislators to support.\(^1\) When the County of San Francisco voted down a proposed measure to use tax credits to incentivize employers to hire ex-felons, County Supervisor Ross Mirkarimi noted that such a tax credit was controversial because it assisted “a very unpopular constituency.”\(^1\) It is no secret that this sentiment is shared nationwide. Supporting policy allowing ex-felons to reintegrate into society has arguably even crushed presidential campaigns.\(^1\) Politicians across the nation are hesitant to help ex-felons because the possibility of engaging in such actions will make them unpopular with their constituents.\(^1\) With the current Presidential Administration’s focus on a “law and order agenda”, ex-felon’s reintegration into society may be facing substantially more difficult obstacles than ever before.\(^1\) Notwithstanding the law and order agenda, President Donald Trump stated that: “we will embark on reforming our prisons to help former inmates who have served their time get a second chance.”\(^1\) The Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act (“FIRSTSTEP”) was recently passed and encourages inmates to participate in activities to enhance their vocational skills.\(^1\) There is still a failure to address incentivizing employers to hire ex-felons that is more effective than the WOTC.

A political issue that various sub-groups face are obstacles in securing employment. For example, upon conclusion of service to our country, many veterans have difficulty obtaining civilian employment.\(^1\) The persistent issue of Veterans obtaining full-time employment is also one that needs to be addressed. The purpose of this point is not to compare one group with the

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other, but rather to identify the constituency in which lawmakers are responsible to. It is much more salient for a legislator to engage with popular constituencies rather than unpopular ones that might bring unwanted negative scrutiny. Notwithstanding that common perception, the public discourse should not be me versus you, or a certain constituency versus another one, but rather how we contribute the most towards societal good. Reducing recidivism through tax credits which incentivize employers to hire ex-felons contributes to societal good. It is historically and statistically proven to reduce the likelihood of ex-felons in reengaging in crime. President George W. Bush once said that “America is the land of the second chance – and when the gates of the prison open; the path ahead should lead to a better life.” The prevailing discourse that stigmatized all ex-offenders needs to be changed to ensure that, when attempting to reduce recidivism, policies aimed at fixing the issue should not be viewed as being “soft on crime” but rather an increase in societal good. Tax credits incentivizing hiring ex-felons should also be viewed as a fiscally sound strategy to reduce government expenditure which benefits the community as a whole. The federal government currently spends a substantial amount of money on the criminal justice system. By reducing recidivism, the federal government can substantially lower costs associated with recidivism and reallocate funds to measures that can promote the public good.

C. Dispelling Common Arguments Against Tax Credits to Hire Ex-Felons

One of the common arguments against using tax credits or any incentive is the possible practice of “churning” by an employer. An employer engages in churning when an employee is terminated because the employer is no longer eligible to receive a tax credit by employing them. Statutory oversight provisions could combat this potential practice. The state of Iowa is a great example of the use of provisions to disallow the practice of churning. Iowa’s provision provides that the employer cannot receive a tax credit if they are using a new employee who would qualify under this tax credit to replace an ineligible employee (unless termination is due to misconduct, mutual separation, etc.). Currently, the WOTC does not have a provision that might dissuade an employer engaging in churning. Although a provision such Iowa’s can be a salient point to those concerned about churning, it should be noted that the concern of churning is something that is exaggerated but rarely occurs. The General Accountability Office (GAO) has conducted studies on employers engaging in churning. GAO has found that for the most part, employers decide against engaging in churning for many reasons, but most importantly because of the cost-benefit analysis. An employer engaging in churning will incur significant costs of recruiting, hiring,

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121 Id.
123 Id. at 7.
124 Id. at 13.
and training new employees replacing the former employee, which will far outweigh the tax credit to be earned from the new employee.125 From a practical standpoint, it would not make sense for an employer to fire a high-performing employee who has first-hand knowledge of the business, to then hire a new employee who may or may not be able to perform at the same level, and who will require careful training and supervision for the first few months of their tenure.

IV. CONCLUSION

The States of Iowa and Illinois provide an excellent blueprint for a federal tax credit aimed at incentivizing employers hiring ex-felons. A combination of the two states respective tax statutes provides a viable solution at the federal level to incentivize employers to hire ex-felons. By hiring ex-felons, employers are not only gaining a potential tax benefit but are also helping the community by doing their part to reduce recidivism. This type of tax credit will provide ex-felons with viable opportunities to work and successfully reintegrate after paying their debt to society. This tax credit might reduce tax revenue but it will reduce the federal expenditures in the criminal justice system, which is arguably a much bigger expense than the credit we propose. The tax credit will by no means be the silver bullet that will eliminate the societal problem of recidivism and the successful reintegration of ex-felons back into society, but it will be a step in the right direction. President Abraham Lincoln once stated that: “In this age, in this country, public sentiment is everything. With it, nothing can fail; against it, nothing can succeed.”126 It is time to start shaping public opinion on this subject and convince the mass populous of the societal benefits of engaging in policy discussions aimed at reducing recidivism. By reducing recidivism, we create safer communities. Also, by increasing the financial stability of ex-felons reintegrating into society through obtaining full-time employment, we live up to President George W. Bush’s quote on this land being one of second chances.127

125 Id.