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## LEGAL STRATEGIES FOR ECONOMIC EMPOWERMENT OF PERSONS IN RECOVERY

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Substance use disorders, which afflict nearly 8% of the U.S. population,<sup>1</sup> exact a devastating human and economic toll. The opioid epidemic has caused overdose deaths to quadruple since 1999.<sup>2</sup> In 2013 alone, the epidemic imposed an economic burden of over \$78.5 billion, including \$28.9 billion in spending on health care and substance abuse treatment.<sup>3</sup> These burdens increasingly fall on rural and under-resourced areas, particularly in the Appalachian region. The crisis has evoked a range of policy reforms to prevent addiction, investments in treatment for sufferers, and lawsuits against purveyors of addictive substances.

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<sup>1</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH 1-7 (2016) [hereinafter SURGEON GENERAL'S REPORT], <https://addiction.surgeongeneral.gov/surgeon-generals-report.pdf>.

<sup>2</sup> Carina Storrs, *Public Health Experts: Decriminalize Minor Drug Offenses*, CNN (Mar. 25, 2016, 5:09 PM), <http://www.cnn.com/2016/03/25/health/decriminalize-minor-drug-offenses-public-health/index.html>.

<sup>3</sup> Curtis S. Florence et al., *The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States*, 54 MED. CARE 901, 904 (2016).

Ultimately, however, society must assist the millions of people in recovery from substance use disorders to become productive, self-sufficient members of their communities.

Approximately 10% of Americans are in recovery from substance use disorders.<sup>4</sup> They face many obstacles to gainful employment, including stigma, compromised work histories, employer risk perception, and (in many cases) records of interaction with the criminal justice system. Substance use disorders and related criminal records can also prevent people in recovery from obtaining occupational licenses necessary to become employed or start a business. Such barriers are compounded for individuals in rural areas, where access to vocational training, employment, and enterprise incubation services is already limited.

This essay focuses on legal strategies to expand employment and entrepreneurship opportunities for persons in recovery. The topic is vital because economic wellbeing contributes to “recovery capital” — the internal and external resources that sustain long-term sobriety.<sup>5</sup> The need for effective legal interventions is particularly acute in Appalachia, which suffers from a disproportionate share of both substance use disorder and economic despair. Part I provides an overview of substance use disorder and the recovery process. Part II explores the acute impact of substance use disorder in Appalachia and how the region’s socioeconomic dynamics impede economic reintegration of persons in recovery. Part III identifies three frequent obstacles to finding employment experienced by persons in recovery: spotty work histories, stigma, and records of criminal justice involvement. Part IV addresses opportunities for policy reform in the areas of employment nondiscrimination, rehabilitative employment, employer tax incentives, risk management, and the employment impact of crimes related to substance use disorder. Part V addresses access to occupational licensing, a crossover concern for individuals interested in entrepreneurship or employment.

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<sup>4</sup> See SURGEON GENERAL’S REPORT, *supra* note 1, at 1-7.

<sup>5</sup> William Cloud et al., *Conceptualizing Recovery Capital: Expansion of a Theoretical Construct*, 43 *SUBSTANCE USE & MISUSE* 1971, 1973 (2008).

## I. SUBSTANCE USE DISORDERS AND RECOVERY

Substance use disorders<sup>6</sup> are characterized by persistent use of drugs despite significant adverse physiological, behavioral, and social consequences.<sup>7</sup> The diagnosis may apply to use of alcohol, opiates, stimulants, hallucinogens, inhalants, and several other substances.<sup>8</sup> There are four general categories of diagnostic criteria: (1) impaired control over one's use of the drug; (2) social impairment due to the drug; (3) risky use of the drug; and (4) pharmacological criteria such as tolerance and withdrawal.<sup>9</sup> Substance use disorders may be mild, moderate, or severe, depending on the number of criteria present.<sup>10</sup> Sufferers typically experience changes to their brain structure and function that persist and produce cravings for the drug long after detoxification.<sup>11</sup> Particularly in severe cases, this physiological addiction may result in repeated relapses.<sup>12</sup>

There are many definitions of recovery from substance use disorder. These definitions typically include abstinence but may also encompass a range of other life changes.<sup>13</sup> There is little consensus in the literature as to when recovery becomes durable and stable.<sup>14</sup> More than 60% of people who receive treatment relapse within one year of being discharged.<sup>15</sup> It can take 4–5 years before relapse risk drops below 15%, comparable to the general population's lifetime risk of developing a substance use disorder.<sup>16</sup> Generally, sufferers of serious substance use disorders are encouraged to remain in some form of

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<sup>6</sup> This essay uses the term “substance use disorder” in accordance with the Fifth Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V). AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 481 (5th ed. 2013) [hereinafter DSM-V]. The DSM-V introduced the term as an umbrella replacement for its previous categories of “substance abuse disorder” and “substance dependence disorder.” See *id.* The DSM-V discourages clinical use of the term “addiction” due to its negative connotations. *Id.* at 485.

<sup>7</sup> *Id.* at 481.

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

<sup>9</sup> *Id.* at 483–84.

<sup>10</sup> *Id.* at 484.

<sup>11</sup> *Id.* at 481.

<sup>12</sup> *Id.*

<sup>13</sup> WILLIAM L. WHITE, RECOVERY/REMISSION FROM SUBSTANCE USE DISORDERS: AN ANALYSIS OF REPORTED OUTCOMES IN 415 SCIENTIFIC REPORTS, 1868–2011, at 8, [https://www.naadac.org/assets/1959/whitewl2012\\_recoveryremission\\_from\\_substance\\_abuse\\_disorders.pdf](https://www.naadac.org/assets/1959/whitewl2012_recoveryremission_from_substance_abuse_disorders.pdf); SURGEON GENERAL'S REPORT, *supra* note 1, at 5-5 (86% of study participants viewed abstinence as part of their recovery. Other components include personal growth and service to others.).

<sup>14</sup> WHITE, *supra* note 13, at 11.

<sup>15</sup> SURGEON GENERAL'S REPORT, *supra* note 1, at 2-2.

<sup>16</sup> *Id.* at 5-7.

treatment for at least one year.<sup>17</sup> The Fifth Edition of the Diagnostic and Statistical Manual refers to “early remission” as the absence of any diagnostic criteria (other than craving) for at least three months.<sup>18</sup> Sustained remission means that the individual has not met any of the diagnostic criteria (other than craving) for a period of 12 months.<sup>19</sup> Approximately half of adults with substance use disorder ultimately attain sustained remission.<sup>20</sup>

A number of psychosocial factors can impact the odds of recovery, including supportive relationships, spiritual life, education, and employment.<sup>21</sup> One of the most significant prognostic variables is “having something to lose,” such as employment, social support, or freedom, if relapse occurs.<sup>22</sup> Stable employment provides a legal source of income, self-esteem, and an opportunity for social integration among peers who are not using drugs.<sup>23</sup> Generating economic opportunities for persons in recovery can, therefore, reinforce the recovery process.

## II. RECOVERY AND OPPORTUNITY IN APPALACHIA

The Appalachian region suffers from both troubling levels of substance use disorder and a deficit of opportunity. While Appalachia generally trails the rest of the country in abuse of most substances, it has disproportionately high rates of opioid and alcohol use disorder.<sup>24</sup> Appalachian men in the prime of their lives (ages 25–44) are 72–78% more likely to die of an overdose than non-

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<sup>17</sup> *Id.* at 4-18.

<sup>18</sup> DSM-V, *supra* note 6, at 491 (alcohol). For Cannabis, see *id.* at 510; for phencyclidine, see *id.* at 521; for hallucinogens, see *id.* at 524; for inhalants, see *id.* at 534; for opioids, see *id.* at 541; for sedatives, hypnotics, or anxiolytics, see *id.* at 551; for stimulants, see *id.* at 562; for tobacco, see *id.* at 571; and for other or unknown substances, see *id.* at 578.

<sup>19</sup> See *id.* at 491.

<sup>20</sup> SURGEON GENERAL’S REPORT, *supra* note 1, at 5-2.

<sup>21</sup> *Id.* at 5-8; Paul Duffy & Helen Baldwin, *Recovery Post Treatment: Plans, Barriers and Motivators*, 8 SUBSTANCE ABUSE TREATMENT, PREVENTION, & POL’Y 2, 1 (2013), <http://www.substanceabusepolicy.com/content/8/1/6> (discussing the components of recovery capital). Participants leaving treatment characterized employment as a longer-term goal due to concerns about stress triggering relapse. *Id.* This may also have been influenced by the fact that participants all resided in England and generally had access to public benefits. *Id.*

<sup>22</sup> Alexandre B. Laudet et al., *Pathways to Long-Term Recovery: A Preliminary Investigation*, 34 J. PSYCHOACTIVE DRUGS 305, 308 (2002).

<sup>23</sup> Jerome J. Platt, *Vocational Rehabilitation of Drug Users*, 117 PSYCHOL. BULLETIN 416, 416–17 (1995).

<sup>24</sup> ZHIWEI ZHANG ET AL., APPALACHIAN REG’L COMM’N, AN ANALYSIS OF MENTAL HEALTH AND SUBSTANCE ABUSE DISPARITIES & ACCESS TO TREATMENT SERVICES IN THE APPALACHIAN REGION 3–4 (2008), [https://www.arc.gov/assets/research\\_reports/AnalysisofMentalHealthandSubstanceAbuseDisparities.pdf](https://www.arc.gov/assets/research_reports/AnalysisofMentalHealthandSubstanceAbuseDisparities.pdf).

Appalachian men in the same age group.<sup>25</sup> The mortality rate for Appalachian women in that age bracket is 92–104% higher than the mortality rate for women outside Appalachia.<sup>26</sup> Opioids caused nearly 69% of all overdose deaths in the region in 2015.<sup>27</sup>

Over 40% of Appalachia's 25 million residents live in rural areas, compared to 20% of all Americans.<sup>28</sup> Rural residents generally have limited access to recovery resources due to geographic dispersion and resource constraints.<sup>29</sup> Treatment programs have difficulty achieving economies of scale.<sup>30</sup> Transportation costs and lack of insurance are greater barriers to treatment in rural areas than in urban ones.<sup>31</sup> As a result, rural residents are approximately half as likely to receive treatment as urban residents.<sup>32</sup>

The social and economic structure of Appalachian communities presents special challenges to the reintegration of persons in recovery. Despite impressive strides in the past 60 years, Appalachia has higher poverty,<sup>33</sup> less access to transportation and communication infrastructure, and less labor force participation than the rest of the U.S. (due in part to a dearth of rural job opportunities).<sup>34</sup> While Appalachia has traditionally relied on large mining and manufacturing companies for employment, those businesses and their payrolls have been shrinking for decades.<sup>35</sup> Small businesses, meanwhile, are less likely

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<sup>25</sup> MICHAEL MEIT ET AL., APPALACHIAN REG'L COMM'N, APPALACHIAN DISEASES OF DESPAIR 14 (2017), [https://www.arc.gov/assets/research\\_reports/AppalachianDiseasesofDespairAugust2017.pdf](https://www.arc.gov/assets/research_reports/AppalachianDiseasesofDespairAugust2017.pdf).

<sup>26</sup> *Id.* at 15.

<sup>27</sup> *Id.* at 16.

<sup>28</sup> APPALACHIAN REG'L COMM'N, APPALACHIA THEN AND NOW: EXAMINING CHANGES TO THE APPALACHIAN REGION SINCE 1965, at 42 (2015) [hereinafter ARC THEN AND NOW], [https://www.arc.gov/assets/research\\_reports/AppalachiaThenAndNowCompiledReports.pdf](https://www.arc.gov/assets/research_reports/AppalachiaThenAndNowCompiledReports.pdf).

<sup>29</sup> MATHEMATICA POLICY RESEARCH, INC., RURAL RESEARCH NEEDS AND DATA SOURCES FOR SELECTED HUMAN SERVICES TOPICS 63 (2005), <https://aspe.hhs.gov/system/files/pdf/139376/voll.pdf>.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 64–65.

<sup>32</sup> *Id.* at 66.

<sup>33</sup> *Relative Poverty Rates in Appalachia, 2011–2015*, APPALACHIAN REGIONAL COMMISSION [https://www.arc.gov/research/MapsofAppalachia.asp?MAP\\_ID=128](https://www.arc.gov/research/MapsofAppalachia.asp?MAP_ID=128) (last visited Mar. 29, 2018) (citing a U.S. average of 15% and an Appalachian average of 17.1%). In rural counties, the poverty rate is twice as high as the national average. Martin T. Hall et al., *Sobriety Treatment and Recovery Teams in Rural Appalachia: Implementation and Outcomes*, 94 CHILD WELFARE 119, 121 (2015) (cataloguing the region's health-related challenges).

<sup>34</sup> ARC THEN AND NOW, *supra* note 28, at 6–12.

<sup>35</sup> *Id.* at 8–9.

than large companies to hire high-risk employees,<sup>36</sup> perhaps because they have less demand for employees or less capacity to absorb risk. Entrepreneurs in Appalachia continue to have limited access to debt and equity capital, despite the expansion of microcredit programs.<sup>37</sup> Finally, rural areas have higher “acquaintance density” (i.e., likelihood of familiarity with other community members),<sup>38</sup> so employers have greater knowledge of applicants, including their history of substance use disorder and related legal troubles.

While persons in recovery nationwide face obstacles to economic opportunity, the socioeconomic characteristics of Appalachia exacerbate these challenges. The cumulative effects of growing opioid use disorder, geographic dispersion, and a still-diversifying economy increase the need for effective policy interventions. This essay’s proposals, which address discrimination, employer risk aversion, and other barriers to economic reentry, have the potential to empower this vulnerable group of citizens in Appalachia and beyond.

### III. OBSTACLES TO EMPLOYMENT OF PERSONS IN RECOVERY

People recovering from substance use disorder often have difficulty finding stable employment due to blemished work histories and pervasive stigma.<sup>39</sup> While former substance use disorder is generally considered a disability under civil rights laws,<sup>40</sup> persons in early stages of recovery have little protection from discrimination. Finally, many people in recovery have encountered the criminal justice system, which dramatically increases the likelihood of joblessness.<sup>41</sup> This Section recommends legal and policy reforms to facilitate second-chance and rehabilitative employment, incentivize hiring, and reduce employer risk with respect to persons in recovery.

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<sup>36</sup> Eric J. Wodahl, *The Challenges of Prisoner Reentry from a Rural Perspective*, 7(2) W. CRIMINOLOGY REV. 32, 39 (2006) (stating that small employers are most averse to hiring ex-offenders).

<sup>37</sup> RUPRI CTR. FOR RURAL ENTREPRENEURSHIP, CREATING AN ENTREPRENEURIAL APPALACHIAN REGION 8 (2008), [https://www.arc.gov/assets/research\\_reports/creatinganentrepreneurialappalachia.pdf](https://www.arc.gov/assets/research_reports/creatinganentrepreneurialappalachia.pdf).

<sup>38</sup> Wodahl, *supra* note 36, at 38.

<sup>39</sup> See Dieter Henkel et al., *Unemployment and Substance Use: A Review of the Literature (1990–2010)*, 4 CURRENT DRUG ABUSE REVS. 4, 11 (2011).

<sup>40</sup> See, e.g., 42 U.S.C. § 12114(b) (2012).

<sup>41</sup> See Amy L. Solomon, *In Search of a Job: Criminal Records as Barriers to Employment*, 270 NAT’L INST. JUST. J. 42, 43–44 (2012).

### A. Flawed Employment Histories

Substance use disorders adversely affect employment.<sup>42</sup> Sufferers are less likely to work, and their jobs are more likely to be temporary and part-time.<sup>43</sup> Explanations include lower productivity, absenteeism, drug-induced health problems, and interactions with the criminal justice system.<sup>44</sup> Even after attaining sustained remission, people in recovery may have a higher risk of job loss due to discrimination.<sup>45</sup> People in recovery may, therefore, have resume gaps and weak references, making it harder to obtain gainful employment.

### B. Stigma and Discrimination

Substance use disorder is heavily stigmatized in the workplace. A full 78% of Americans tell researchers that they would not be willing to work closely with an addict.<sup>46</sup> Nearly two-thirds of Americans believe that employers should be permitted to deny employment to persons with a substance use disorder, while only one quarter of Americans take this position with respect to other mental illnesses.<sup>47</sup> Some of this stigma is likely to attach to people in recovery, since most Americans believe that treatment options are ineffective and nearly 30% believe that recovery is not possible at all.<sup>48</sup> In one study, respondents rated fictional job applicants with histories of substance abuse significantly lower than candidates without such histories with respect to qualities such as stability, reliability, and safety.<sup>49</sup>

The Americans with Disabilities Act (“ADA”) prohibits employer discrimination against any “qualified individual on the basis of disability” in

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<sup>42</sup> Henkel et al., *supra* note 39, at 11.

<sup>43</sup> *Id.* at 12.

<sup>44</sup> *Id.* at 11.

<sup>45</sup> Marjorie L. Baldwin et al., *Job Loss Discrimination and Former Substance Use Disorders*, 110 J. DRUG & ALCOHOL DEPENDENCE 1, 3–5 (2010). Research has shown a job loss rate for people in sustained remission that is 15–23% higher than people without histories of substance abuse disorder. *Id.* at 3.

<sup>46</sup> Colleen L. Barry et al., *Stigma, Discrimination, Treatment Effectiveness, and Policy: Public Views About Drug Addiction and Mental Illness*, 65 PSYCHIATRIC SERV. 1269, 1271 (2014).

<sup>47</sup> *Id.*

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

<sup>49</sup> Aaron U. Bolin, *The Effects of Applicant General and Substance Use History on Perceptions of Job Applicants*, 1 AM. J. PSYCH. RES. 45, 55 (2005), <https://www.mcneese.edu/f/c/5700d16d/ajpr5.pdf>. Respondents rated their behavioral expectations of applicants in areas such as stability, dependability, safety, punctuality, trustworthiness, and overall effect on business. *Id.* at 51. Applicants with histories of alcohol abuse rated higher than those with histories of drug abuse. *Id.* at 53–54. Women were particularly stigmatized by former substance use disorders. *Id.* at 54–55.



hiring, compensation, and all other terms of employment.<sup>50</sup> A disability refers to “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . .”<sup>51</sup> A substance use disorder may constitute a disability so long as the individual is not currently engaging in the illegal use of drugs.<sup>52</sup> The ADA expressly offers coverage to abstinent individuals who are in a supervised treatment program, have completed treatment, or have otherwise been rehabilitated.<sup>53</sup> Thus, an individual who has recovered from a sufficiently severe<sup>54</sup> substance use disorder would come under the ADA’s protection as a person with a “record of . . . impairment.”<sup>55</sup>

The ADA’s protections against employment discrimination are substantial but not airtight. Employers cannot ask job applicants about disabilities unless the question is “job-related and consistent with business necessity.”<sup>56</sup> They must provide reasonable accommodations to persons with disabilities who are otherwise qualified for the employment in question, unless doing so would impose an undue hardship on the employer.<sup>57</sup> Employers may, however, verify that employees are no longer using drugs by requiring periodic drug tests and imposing other behavioral standards.<sup>58</sup>

Two gaps within the ADA’s protections may harm the employment prospects of persons in recovery. First, the ADA does not protect persons in *early* recovery stages from termination or the denial of job opportunities. The term “currently engaging in the illicit use of drugs” is generally construed to encompass individuals who have used drugs recently enough that the employer may reasonably believe it remains a problem.<sup>59</sup> For example, the Fourth Circuit

<sup>50</sup> 42 U.S.C. § 12112(a) (2012).

<sup>51</sup> *Id.* § 12102(1)(A).

<sup>52</sup> *See id.* § 12114(a).

<sup>53</sup> *Id.* § 12114(b).

<sup>54</sup> The ADA imposes a severity standard by defining disability as an “impairment that substantially limits one or more major life activities.” *Id.* § 12102(1)(A). Major life activities include activities such as caring for oneself, learning, reading, concentrating, thinking, communicating, or working. *Id.* § 12102(1)(B). Such disabilities may be episodic so long as they meet the severity threshold when active. *Id.* § 12102(4)(D).

<sup>55</sup> *Id.* § 12114(1)(B).

<sup>56</sup> *Id.* § 12112(d)(4)(A).

<sup>57</sup> *Id.* § 12112(b)(5)(A).

<sup>58</sup> *Id.* § 12114(b).

<sup>59</sup> Interpretive guidance in the regulations provides that “currently engaging” is not intended to be limited to the use of drugs on the day of, or within a manner of days or weeks before, the employment action in question. 29 C.F.R. app. § 1630.3 (2012). Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct. *Id.* Similarly, the Conference Report on the ADA states that the exclusion of current users

may consider drug use current if it occurs “in a periodic fashion during the weeks and months” prior to the adverse employment action.<sup>60</sup> Courts assess whether drug use is current on a case-by-case basis<sup>61</sup> and have denied coverage to individuals who have been abstinent for three or four months.<sup>62</sup> At nine or twelve months of sobriety, however, courts hold that they are not current users.<sup>63</sup> The Author has not found case law assessing whether persons who have abstained for five to eight months are considered current users.

Second, the ADA allows companies to permanently ban from employment any person who fails a drug test while suffering from a substance use disorder, even after the individual has successfully rehabilitated.<sup>64</sup> In *Raytheon Co. v. Hernandez*,<sup>65</sup> a 25-year employee was forced to resign due to a positive drug test and reapplied over two years later, after participating in a recovery self-help program.<sup>66</sup> The employer rejected his application per its policy

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is intended to ensure that employers may discharge or deny employment to persons who illegally use drugs on that basis, without fear of being held liable for discrimination. The provision is not intended to be limited to persons who use drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to a person whose illegal use of drugs occurred recently enough to justify a reasonable belief that a person’s drug use is current . . . . Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem.

H.R. REP. NO. 101–596, at 64, as reprinted in 1990 U.S.C.C.A.N. 267, 573.

<sup>60</sup> *Shafer v. Preston Mem’l Hosp. Corp.*, 107 F.3d 274, 278 (4th Cir. 1999), *abrogated by* *Baird ex rel. Baird v. Rose*, 192 F.3d 462 (4th Cir. 1999).

<sup>61</sup> *Shirley v. Precision Castparts Corp.*, 726 F.3d 675, 680 (5th Cir. 2013).

<sup>62</sup> *Greer v. Cleveland Clinic Health Sys.*, 503 Fed. Appx. 422, 431 (6th Cir. 2012) (employee who had not used drugs in three months was a current user under the ADA); *Lyons v. Johns Hopkins Hosp.*, No. CCB-15-0232, 2016 WL 7188441, at \*4 (D. Md. Dec. 12, 2016) (four months without drug use was “not such a lengthy period that Mr. Lyons cannot qualify as a recent user” given his long history of drug use, apparent denial about his addiction, and failure to complete inpatient treatment); *Quinones v. Univ. of P.R.*, Civil No. 14–1331(JAG), 2015 WL 631327, at \*6 (D.P.R. Feb. 13, 2015) (employee who had not used drugs for over three months was a current user under the ADA). A significant number of cases arise from termination of healthcare professionals, which may impact the holdings. *See, e.g., Zenor v. El Paso Healthcare Sys. Ltd.*, 176 F.3d 847, 857 (5th Cir. 1999) (noting that the employee’s position as a pharmacist “required a great deal of care and skill”); *Quinones*, 2015 WL 631327, at \*6 (“[This] holding today becomes even more forceful after considering Plaintiff’s responsibilities as an ophthalmology resident . . .”).

<sup>63</sup> *United States v. Southern Mgm’t Corp.*, 955 F.2d 914, 921–23 (4th Cir. 1992) (finding that individuals who had not used drugs in one year are not current users under the Fair Housing Act); *Wallace v. Veterans Admin.*, 683 F. Supp. 758, 759–61 (D. Kan. 1988) (finding that a nurse who had been free of drug use for nine months was covered under the Rehabilitation Act of 1973).

<sup>64</sup> *Lopez v. Pac. Mar. Ass’n.*, 657 F.3d 762, 768 (2011).

<sup>65</sup> 540 U.S. 44 (2003).

<sup>66</sup> *Id.* at 47.

of refusing to rehire employees who violated workplace conduct rules.<sup>67</sup> In the subsequent litigation, the Supreme Court deemed the no rehires policy a “legitimate, nondiscriminatory” penalty for misconduct on the job.<sup>68</sup> In a later case, the Ninth Circuit extended this reasoning to permit a one-strike policy against applicants who never held a position in the company.<sup>69</sup> Santiago Lopez, then an addict, was denied a longshoreman position in 1997 after failing a drug test.<sup>70</sup> After undergoing treatment and becoming sober, he reapplied in 2004 and was rejected under the employer’s one-strike policy.<sup>71</sup> The Ninth Circuit held that the policy did not facially discriminate against persons with disabilities because it penalized misconduct engaged in by both disabled and non-disabled persons.<sup>72</sup> The court also found that Lopez had not provided evidence that the one-strike rule resulted in “fewer recovered drug addicts in Defendant’s employ, as compared to the number of qualified recovered drug addicts in the relevant labor market.”<sup>73</sup> (As the court conceded, providing such evidence would be challenging given the legal restrictions on inquiring into a person’s history of substance use disorder).<sup>74</sup> Allowing such permanent bans on employment will likely foreclose opportunities from many individuals in recovery, particularly those who work in industries or reside in areas dominated by a few large companies.<sup>75</sup>

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

<sup>68</sup> *Id.* at 54.

<sup>69</sup> *Lopez*, 657 F.3d at 764–66.

<sup>70</sup> *Id.* at 764.

<sup>71</sup> *Id.*

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

<sup>73</sup> The court deemed such a showing necessary to sustain a disparate impact claim under the ADA. *Id.* at 767.

<sup>74</sup> *Id.* at 768. In his dissent, Judge Pregerson declared it

manifestly unreasonable to require statistical data regarding the number of recovering addicts either hired by an employer or screened out by a drug test. Recovering addicts are unlikely to identify themselves to employers, or to a plaintiff’s investigator in a lawsuit such as this, even if asked. One of the primary limitations suffered by individuals recovering from addiction is the continuing stigma associated with their prior drug and alcohol use. . . . Thus, statistical evidence on recovering addicts is, as a practical matter, rarely available.

*Id.* at 769 (Pregerson, J., dissenting) (citation omitted).

<sup>75</sup> The *Lopez* dissent laments that the employer “exercises singular control over an industry spanning the whole west coast of the United States, [so] the potential impact of the policy is broad and pervasive.” *Id.* at 770.

### C. Criminal Justice Involvement

Substance disorders increase the likelihood of interaction with the criminal justice system.<sup>76</sup> According to one study, people receiving treatment for opioid addiction had a 38% rate of arrest within the next two years.<sup>77</sup> Unsurprisingly, a high proportion of incarcerated individuals meet the diagnostic criteria for substance use disorder.<sup>78</sup> People of color have disproportionately high arrest and conviction rates for drug-related offenses, despite using illicit drugs at similar levels as whites.<sup>79</sup> While drug courts divert a small fraction of offenders with substance use disorder from incarceration,<sup>80</sup> even these comparatively fortunate individuals may not be able to expunge the charge or conviction from their record.<sup>81</sup>

A great deal has been written about the collateral consequences of criminal records, including the widespread denial of employment opportunities and occupational licenses.<sup>82</sup> Criminal convictions can disqualify one from

<sup>76</sup> William H. Fisher et al., *Co-Occurring Risk Factors for Arrest Among Persons with Opioid Abuse and Dependence: Implications for Developing Interventions to Limit Criminal Justice Involvement*, 47(3) J. SUBSTANCE ABUSE TREATMENT 197, 201 (2014) (finding that 26% of individuals enrolled in Massachusetts Medicaid who had a diagnosis of opioid dependence or abuse were arrested in 2010).

<sup>77</sup> Elizabeth E. Harris et al., *Criminal Charges Prior to and After Initiation of Office-Based Buprenorphine Treatment*, 7 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL'Y 10, 19 (2012).

<sup>78</sup> 58% of state prisoners and 63% of sentenced jail inmates met the DSM-IV criteria for drug dependence or abuse. JENNIFER BRONSON ET AL., *DRUG USE, DEPENDENCE, AND ABUSE AMONG STATE PRISONERS AND JAIL INMATES, 2007–2009*, at 1 (2017), <https://www.bjs.gov/content/pub/pdf/dudaspi0709.pdf>.

<sup>79</sup> HUMAN RIGHTS WATCH, *DECADES OF DISPARITY: DRUG ARRESTS AND RACE IN THE UNITED STATES 1* (2009), [https://www.hrw.org/sites/default/files/reports/us0309web\\_1.pdf](https://www.hrw.org/sites/default/files/reports/us0309web_1.pdf).

<sup>80</sup> The Urban Institute estimates that only 3.8% of arrestees at risk for substance use disorder are eligible for drug court. AVINASH SINGH BHATI ET AL., *URBAN INSTITUTE, TO TREAT OR NOT TO TREAT: EVIDENCE ON THE PROSPECTS OF EXPANDING TREATMENT TO DRUG-INVOLVED OFFENDERS 33* (2008), <https://www.urban.org/sites/default/files/publication/31621/411645-To-Treat-or-Not-to-Treat.PDF>.

<sup>81</sup> Procedures vary among drug courts. Some require a guilty plea to avoid prison time, while others dismiss charges upon successful completion of the drug court program. RYAN S. KING & JILL PASQUARELLA, *DRUG COURTS: A REVIEW OF THE EVIDENCE 3* (2009), <http://sentencingproject.org/wp-content/uploads/2016/01/Drug-Courts-A-Review-of-the-Evidence.pdf>. In Georgia, for example, access to information about a drug charge may be restricted if the individual successfully completes the drug court treatment program with no additional arrests. GA. CODE ANN. § 35-3-37(h)(2)(D).

<sup>82</sup> See, e.g., A.B.A. COMM'N ON EFFECTIVE CRIMINAL SANCTIONS, *INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS* (2009), <https://www.americanbar.org/content/dam/aba/migrated/cecs/internal exile.authcheckdam.pdf>; Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012); Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness*,

employment in the public sector, with government contractors, and in some regulated industries.<sup>83</sup> In addition, the vast majority of human resources managers conduct some sort of background check on prospective hires. Implications for occupational licensing are discussed in Part V.

#### IV. REFORMS TO INCREASE EMPLOYMENT OF PERSONS IN RECOVERY

Policymakers should leverage the law to promote employment opportunities for persons in recovery. Opportunities for positive reform include (1) implementing nondiscrimination provisions to protect persons who have undergone treatment; (2) relaxing tax rules to facilitate nonprofit rehabilitative employment programs; (3) reforming the Work Opportunity Tax Credit to incentivize hiring of persons in recovery; (4) reducing the risk to employers when they hire persons in recovery; and (5) addressing the collateral consequences of drug-related convictions.

##### A. *Non-Discrimination Laws*

A legislative remedy is necessary to avoid outcomes like in *Lopez*, where a rehabilitated individual was categorically barred from employment based on a failed drug test seven years earlier, when he was not an employee and, therefore, could not have violated any company policy.<sup>84</sup> At a minimum, the law should prohibit employers from enforcing such bans beyond a reasonable interval of time. A more protective law would cover former employees whose only offense was a failed drug test, who used the drug in the course of a substance use disorder, and who obtain a certificate of sustained remission (denoting one year without symptoms) from a treatment program. In cases where substance use poses a greater danger to business operations and safety (e.g., heavy machinery operations), the required interval of remission could perhaps be extended. Such an extension should not, however, go beyond the time at which the individual's risk of relapse drops to 15%, the lifetime rate of risk that an individual will develop substance use disorder. The appropriate policy measure would protect against discrimination while recognizing the legitimate interests of employers in enforcing company policies and guaranteeing a drug free workplace.

##### B. *Rehabilitative Employment*

As the case law demonstrates, persons in early recovery cannot rely on nondiscrimination laws to protect their ability to earn a living. One potential

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*Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753 (2011).

<sup>83</sup> Chin, *supra* note 82, at 1800.

<sup>84</sup> See *supra* notes 69–75 and accompanying text.

remedy is rehabilitative employment, giving people the opportunity to develop positive work history and demonstrate their readiness for the workforce. While charities<sup>85</sup> are the most likely organizations to absorb the risk involved in providing this opportunity, current law impedes them from doing so.

In order to retain their tax-exempt status, charities must operate for primarily educational, charitable, scientific, literary and other similar purposes.<sup>86</sup> They may not conduct a substantial commercial or other non-exempt activity.<sup>87</sup> The IRS evaluates whether an activity is commercial based on all of the attendant facts and circumstances but consistently finds that the following factors point to illicit commercial purposes: (1) competing with for-profit entities; (2) pricing goods and services above cost; (3) accumulating unreasonably large reserves; (4) “commercial”-seeming promotional and marketing practices; and (5) complete reliance on earned income rather than grants and donations.<sup>88</sup>

Under this “commerciality” test, a charity may not conduct a commercial enterprise for the purpose of providing employment to the unemployable.<sup>89</sup> Charities may, however, conduct vocational training as an educational activity, and they may temporarily employ beneficiaries in a “commercial” operation as part of on-the-job vocational training.<sup>90</sup> However, such employment may not extend beyond the period necessary to implement the training curriculum.<sup>91</sup> This construct does not allow charities to provide, as a substantial part of their overall activities, rehabilitative employment to individuals who merely require an opportunity to prove themselves.

The IRS should recognize that providing transitional employment to persons in early recovery constitutes a charitable activity by preventing relapse and facilitating their reentry into the economy. Without repudiating the commerciality doctrine, the IRS could recognize that charities absorb greater risk due to these employment practices than commercial ventures would typically undertake.<sup>92</sup> For example, the IRS could rule that a charity may provide non-training rehabilitative employment in an earned-income setting so long as (i) the

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<sup>85</sup> For the purposes of this essay, charities are defined as organizations exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended.

<sup>86</sup> I.R.C. § 501(c)(3); Treas. Reg. 1.501(c)(3)-1(d)(1)(i) (2017).

<sup>87</sup> See, e.g., Rev. Rul. 73-127, 1973-1 C.B. 221.

<sup>88</sup> See *Living Faith, Inc. v. Comm’r.*, 950 F.2d 365, 373 (7th Cir. 1991); *Airlie Found. v. IRS*, 283 F. Supp. 2d 58, 63–65 (D.D.C. 2003); *B. S. W. Grp., Inc. v. Comm’r.*, 70 T.C. 352, 357 (1978).

<sup>89</sup> I.R.S. Priv. Ltr. Rul. 201525012 (June 19, 2015).

<sup>90</sup> Rev. Rul. 73-127, 1973-1 C.B. 221.

<sup>91</sup> *Id.*

<sup>92</sup> A similar rationale allows charities to provide microfinance services to businesses that would not otherwise obtain access to credit. While business lending is typically considered a commercial activity, the IRS distinguishes nonprofit microfinance programs from their commercial counterparts based on their level of risk. Rev. Rul. 74-587, 1974-2 C.B. 162; Rev. Rul. 68-117, 1968-1 C.B. 251.

participants cannot otherwise obtain employment due to their current or recent substance use disorder; (ii) the participants constitute virtually the entire staff; and (iii) the participants engage in regular job-seeking activities. These programs could thus provide a transition between substance treatment and conventional employment.

### C. Hiring Incentives

Beyond rehabilitative employment by charities, for-profit enterprises should have an incentive to hire persons in recovery to permanent positions. This should include reforming how the Work Opportunity Tax Credit (“WOTC”), designed to encourage employment of at-risk individuals, affects persons in recovery. The available research, which generally uses the welfare recipient target group, shows moderate positive effects of the WOTC on employment in the first year after certification and less effect in the long term.<sup>93</sup> Research is impeded, however, by underutilization of the WOTC by employers.<sup>94</sup>

Enacted in 1996 as part of comprehensive welfare reform,<sup>95</sup> the WOTC allows employers to claim a tax credit for hiring disadvantaged veterans, recently released felons, certain recipients of public assistance (including disability benefits), people referred from State vocational rehabilitation programs, and others.<sup>96</sup> For most of these targeted groups, the tax credit equals 40% of the employee’s first-year wages,<sup>97</sup> provided that the employee works at least 400 hours. For employees who work at least 120 hours but fewer than 400 hours, the employer may claim only a 25% tax credit.<sup>98</sup> However, employers may typically only count \$6,000 in each employee’s wages towards the credit,<sup>99</sup> capping the per-employee credit at \$2,400.<sup>100</sup>

The WOTC targets two categories of persons with disabilities: recipients of disability benefits and participants in vocational rehabilitation programs. In practice, this excludes many people in recovery. First, the Social Security Act

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<sup>93</sup> Sarah Hamersma, *The Effects of an Employer Subsidy on Employment Outcomes: A Study of the Work Opportunity and Welfare-to-Work Tax Credits*, 27(3) J. POL’Y ANALYSIS & MGMT. 498, 509 (2008).

<sup>94</sup> *Id.* at 510.

<sup>95</sup> Pub. L. No. 104-188, § 1201, 110 Stat. 1755 (1996) (codified as amended at 26 U.S.C. § 51). The WOTC represented a reform of the Targeted Jobs Credit, which targeted low-wage, low-skill workers generally and was found to operate as a windfall for companies that would have hired such workers irrespective of the credit. CHRISTINE SCOTT, CONG. RES. SERV., THE WORK OPPORTUNITY TAX CREDIT (WOTC) 6 (2013), <https://fas.org/sgp/crs/misc/RL30089.pdf>.

<sup>96</sup> 26 U.S.C. § 51(d)(1) (2012).

<sup>97</sup> *Id.* § 51(a).

<sup>98</sup> *Id.* § 51(i)(3)(A).

<sup>99</sup> *Id.* § 51(b)(3).

<sup>100</sup> This figure is based on the author’s calculation of 40% of \$6,000 in wages.

was amended in 1996 to abolish eligibility for disability benefits on the grounds of substance use disorder.<sup>101</sup> The amended law also prohibits disability benefits where “alcoholism or drug addiction [is] a contributing factor material” to the disability determination.<sup>102</sup> The individual claiming benefits bears the burden of demonstrating that substance use is not a material factor in the disability—i.e., that the disability would persist absent substance use.<sup>103</sup> Disentangling the symptoms of substance use and a comorbid mental or physical disability is a monumentally difficult task, particularly for claimants without access to counsel or substantial resources.<sup>104</sup> As a result, even otherwise eligible individuals may be denied disability benefits—and with them, WOTC eligibility—due to their substance use disorder.

Second, the requirements for vocational rehabilitation (“VR”) referrals create a significant barrier to WOTC eligibility. To be eligible as a VR referral, an individual must be certified by the State employment security agency<sup>105</sup> as (1) having a physical or mental disability that constitutes or results in a “substantial handicap to employment,” and (2) having completed (or being in the process of completing) VR services through a state-certified agency, the Ticket to Work program, or the U.S. Department of Veteran Affairs.<sup>106</sup> This creates a number of barriers. First, many people in recovery are not eligible for the Ticket to Work program (available to SSI/SSDI recipients) or veterans’ services. Second, VR services may be time-consuming, inaccessible, or redundant to assistance provided by treatment facilities or other organizations. In order to begin VR, an individual must successfully apply for services,<sup>107</sup> wait for services to become available,<sup>108</sup> and receive an individualized assessment and written plan for

<sup>101</sup> The Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 105, 110 Stat. 847 (1996) (codified as amended at 42 U.S.C. § 423).

<sup>102</sup> 42 U.S.C. § 423(d)(2)(C) (2012).

<sup>103</sup> Soc. Sec. Rul. 13-2p: Evaluating Cases Involving Drug Addiction and Alcoholism (Titles II and XVI), 78 Fed. Reg. 11,939-01 (Feb. 20, 2013); *see also* Delk v. Colvin, 675 F. App’x 281, 284 (4th Cir. 2017); Cage v. Comm’r of Social Sec., 692 F.3d 118, 124 (2d Cir. 2012).

<sup>104</sup> *See* Soc. Sec. Rul. 13-2p, *supra* note 103 (“We do not know of any research that we can use to predict reliably that any given claimant’s co-occurring mental disorder would improve, or the extent to which it would improve, if the claimant were to stop using drugs or alcohol.”); *see also* Max Selver, *Disability Benefits and Addiction: Resolving an Uncertain Burden*, 91 N.Y.U. L. REV. 954 (2016).

<sup>105</sup> The Act of June 6, 1933, made certain New Deal assistance contingent on States creating a State agency to cooperate with the federal government in delivering employment-related services to job seekers. 29 U.S.C. § 49c (1999).

<sup>106</sup> 26 U.S.C. § 51(d)(6) (2012).

<sup>107</sup> Applicants must receive an eligibility decision within 60 days. 34 C.F.R. § 361.42 (2018).

<sup>108</sup> Long wait lists are common. Federal law requires that States serve individuals with the severest disabilities first. 34 C.F.R. § 361.36(a)(3) (2018). Maryland has thousands of people on its waiting list and estimates that many must wait as long as 36 months for VR services. *The Waiting List*, MD. ST. DEP’T EDUC. DIVISION REHABILITATION SERVS.,



employment.<sup>109</sup> As a result of these barriers, few people with disabilities have the WOTC credit claimed for them.<sup>110</sup>

Even if a person in recovery is WOTC-eligible, restrictions in the program may render it ineffectual. The tax credit does not apply to rehires of any previous employee,<sup>111</sup> even if the employee's departure was precipitated by the same facts that provide the basis for WOTC eligibility (e.g., incarceration, disability, etc.). The rationale for this rule is likely to prevent employers from exploiting the WOTC by "churning" employees and repeatedly claiming tax credits. In regions that rely on a small number of large employers, this rule could render the WOTC ineffectual for many job seekers.

There are a number of WOTC reforms that could expand access to employment for people in recovery. First, individuals in recovery from substance use disorder should be designated as a targeted group, relieving them from the need to obtain state-sponsored vocational rehabilitation. Instead, eligibility should derive from certified completion of a treatment program for substance use disorder within the past year or other reasonable interval. Second, the prohibition on tax credits for rehires should be relaxed to allow rehiring of people whose job loss was caused by substance use or who have been separated from the employer for a prescribed period of time. This would address the concern about employer churning without penalizing residents of areas with little economic diversity. Third, the maximum credit amount should increase, at least for smaller employers that cannot scale their participation, to compensate for the risk and costs associated with hiring people in recovery.

#### D. Employer Risk Reduction

In order to encourage employment of persons in recovery, the law must address employer risk management concerns. Employers may fear that a relapse into substance use will result in poor employee behavior (e.g., absenteeism, tardiness, bringing illicit substances to the workplace, etc.) or accidents, imposing costs on the employer and perhaps necessitating a new hire. Employers may also fear liability to third parties. If an employee causes harm to a third party while acting in the scope of employment, then the employer is vicariously liable to the third party.<sup>112</sup> Even if the employee acted outside the authorized scope of

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<http://dors.maryland.gov/consumers/Pages/waiting.aspx> (last visited Feb. 15, 2018). Kentucky categorizes eligible individuals in five categories and currently only has the capacity to assist the highest-priority category. *Eligibility & Order of Selection*, KY. CAREER CTR., <https://kcc.ky.gov/Vocational-Rehabilitation/eligibility/Pages/eligibilityandOOS.aspx> (last visited Apr. 2, 2018).

<sup>109</sup> 34 C.F.R. § 361.45(a) (2018).

<sup>110</sup> SCOTT, *supra* note 95, at 13.

<sup>111</sup> 26 U.S.C. §51(i)(2) (2012).

<sup>112</sup> RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006).

work, an employer may nevertheless be liable to the injured third party for negligent hiring, supervision, or retention of the employee.<sup>113</sup> This risk gives employers good cause to exercise caution in hiring.

The Department of Labor currently administers a program to minimize the risk to employers of hiring persons in recovery, but its scope is limited. The Federal Bonding Program (“FBP”) provides fidelity bonds to cover workplace dishonesty (i.e., theft, forgery, embezzlement, and larceny) during the first six months of employment of certain “at-risk” individuals,<sup>114</sup> including persons who are in recovery, who have criminal records, or who have been dishonorably discharged from the military.<sup>115</sup> The FBP is necessary because insurance policies for employee dishonesty typically exclude any employee hired or retained by the employer in knowledge of past dishonest acts.

Job placement agencies (public or private) may purchase packages of FBP’s fidelity bonds with a value of \$5,000 each.<sup>116</sup> They then issue those bonds to employers at no charge to the employer or job seeker.<sup>117</sup> Agencies have discretion to issue up to five bonds per employee, for maximum coverage of \$25,000.<sup>118</sup> If six months elapse without a claim on the employee, the insurer will make the bond available to purchase by the employer at a regular commercial rate.<sup>119</sup> The FBP is remarkably free of red tape for employers and job seekers. There are no forms to complete, there are no premiums or deductibles, and the bonds apply to any full- or part-time job in any state.<sup>120</sup>

The FBP has built-in constraints on its effectiveness. First, the program only covers employee dishonesty and does not address the other risks and liabilities that an employee can generate. While employers can and do purchase insurance to mitigate these risks, each claim can still drive up premiums, cause employers to pay deductibles, and consume considerable time. Second, employers may worry about meeting the burden of proof in order to obtain payout of the FBP bond. The absence of any governing regulations may help to

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<sup>113</sup> RESTATEMENT (THIRD) OF TORTS § 7.19 (2010).

<sup>114</sup> *Federal Bonding Program At-a-Glance*, U.S. DEP’T LABOR, <http://bonds4jobs.com/wp-content/uploads/2017/06/At-A-Glance.pdf> [hereinafter *Federal Bonding*] (last visited Apr. 2, 2018).

<sup>115</sup> *Employers and Job Seekers Brochure*, U.S. DEP’T LABOR, <http://bonds4jobs.com/wp-content/uploads/2017/06/FBP-Employers-Job-Seekers-Brochure.pdf> [hereinafter *Job Seekers*] (last visited Apr. 2, 2018); *Federal Bonding*, *supra* note 114.

<sup>116</sup> For example, an organization can purchase a package of 100 bonds valued at \$5,000 each for \$8,400. See *Fidelity Bond Purchase Agreement*, U.S. DEP’T LABOR, [http://bonds4jobs.com/wp-content/uploads/2017/11/Bond-Purchase-Agreement\\_UIG-Fillable-2.pdf](http://bonds4jobs.com/wp-content/uploads/2017/11/Bond-Purchase-Agreement_UIG-Fillable-2.pdf) (last visited Apr. 2, 2018).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Job Seekers*, *supra* note 115.

minimize red tape, but it also undercuts employer certainty about the process of redeeming the bond.

In light of these limitations, the FBP should be supplemented with other measures to reduce employer risk. One possibility is to expand the FBP to cover employer costs associated with an employee's relapse. If an employee fails a drug test or leaves work to seek treatment, the FBP could pay out a modest sum to defray the costs of hiring and training a replacement. This scenario is both more likely and easier to prove than employee dishonesty.

Another possibility is for states to legislatively limit employer liability under the common law theories of negligent hiring and retention. For example, plaintiffs could be barred from recovering in a negligence action against a business solely on the grounds that the business knowingly hired an employee in recovery. Alternatively, liability could be statutorily limited, either to a maximum dollar amount or to the amount of general liability insurance carried by the employer. A similar construct is used in some jurisdictions to limit the liability of nonprofits for the acts of their employees and volunteers.<sup>121</sup>

#### *E. Reducing Collateral Consequences of Crimes Related to Substance Use Disorder*

Finally, a legislative solution is needed to address employment barriers encountered by persons whose substance use disorder has resulted in law enforcement involvement. Commentators have urged, and some jurisdictions have begun to adopt, policies aimed at expanding employment opportunities to the formerly incarcerated or otherwise justice-involved. Recommendations include so-called "Ban the Box" laws, which prohibit employers from inquiring about criminal records in the early stages of hiring;<sup>122</sup> laws allowing more liberal sealing and expungement of criminal records;<sup>123</sup> and credentialing regimes whereby the state can certify an ex-offender's rehabilitation.<sup>124</sup> These legal reforms should take into account the impact of substance use disorder on criminal

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<sup>121</sup> See, e.g., S.C. CODE ANN. §§ 33-56-180 (2018) 15-78-120 (limiting the liability of charitable organizations for certain torts of their employees to \$300,000 per claimant and \$600,000 per occurrence); D.C. CODE § 29-406.90(d) (2018) (limiting the liability of charities for the conduct of volunteers to the applicable limits of their insurance coverage).

<sup>122</sup> See, e.g., Home, BAN THE BOX CAMPAIGN, <http://bantheboxcampaign.org/>; NAT'L EMP'T LAW PROJECT, BAN THE BOX (2012), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

<sup>123</sup> See, e.g., Fruqan Mouzon, *Forgive Us Our Trespasses: The Need for Federal Expungement Legislation*, 39 U. MEM. L. REV. 1 (2008).

<sup>124</sup> See, e.g., Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715 (2018) (recommending reforms to and replication of New York's certification regime). In Ohio, some convicted offenders can obtain a "certificate of qualification for employment," which removes certain collateral sanctions and provides employers with immunity for negligent hiring. OHIO REV. CODE ANN. § 2953.25 (G)(2) (West 2018).

records. For example, certification and expungement opportunities could become available earlier for individuals whose record is directly related to their substance use disorder. Jurisdictions that are reluctant to adopt sweeping legislation in these areas should carve out narrower provisions for persons with drug offenses related to substance use disorder.

## V. OCCUPATIONAL LICENSING

Occupational licensing, the regime of government-issued authorization to practice various professions,<sup>125</sup> affects access to entrepreneurship as well as employment opportunities. Since the 1950s, the percentage of workers required to have a license has skyrocketed from 5% to 25%.<sup>126</sup> Although occupational licensing theoretically protects the consuming public from incompetent and unfit professionals,<sup>127</sup> a range of commentators have assailed it as an unnecessary and protectionist barrier to entry.<sup>128</sup> State legislatures have broad discretion to regulate occupations<sup>129</sup> and licensing requirements span the spectrum of vocations. In addition to professions like medicine, where credentialing serves a clear public protection function, licenses are also required to practice low-skill, low-risk vocations such as makeup artists, florists, barbers, tree trimmers, and manicurists.<sup>130</sup> Because these vocations require relatively little formal training, they could otherwise provide an accessible path to gainful employment or self-employment for persons with limited education or financial resources.<sup>131</sup>

Typically, state or local legislation sets forth basic requirements for licensure and delegates the development of more specific standards to a

<sup>125</sup> DEP'T OF TREASURY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 6 (2015), [https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing\\_report\\_final\\_nonembargo.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf).

<sup>126</sup> *Id.*

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

<sup>128</sup> See, e.g., MORRIS M. KLEINER, THE HAMILTON PROJECT: REFORMING OCCUPATIONAL LICENSING POLICIES (2015); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014); Michelle Cottle, *The Onerous, Arbitrary, Unaccountable World of Occupational Licensing*, ATLANTIC (Aug. 13, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-obama-occupational-licensing/536619/>.

<sup>129</sup> In order to survive Constitutional scrutiny, occupational licensing requirements need only have a rational relation to a legitimate state interest. *Williamson v. Lee Optical*, 348 U.S. 483, 487–88 (1955) (upholding a law designed to favor certain eye care professionals over others).

<sup>130</sup> Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y, 209, 216–18 (2016).

<sup>131</sup> James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. REV. 1555, 1567 (2010).

profession-specific licensing board.<sup>132</sup> Licensure may require educational credentials, prior practical experience, an examination, and/or verification of good character.<sup>133</sup> These requirements often involve fees, disadvantaging individuals without financial resources.<sup>134</sup> Additionally, many states permit the denial or revocation of occupational licenses based on substance use disorder. These rules are most common in the health professions<sup>135</sup> but affect lower-skill occupations as well. For example, Tennessee law allows the denial, suspension, or revocation of a cosmetologist's license based on "addiction to intoxicating liquors or drugs."<sup>136</sup> Likewise, Ohio permits the denial, suspension, or revocation of a barber's license based on "habitual drunkenness or possession of or addiction to the use of" any illicit drug.<sup>137</sup> While it is unclear how often these rules are invoked, they may deter people from seeking treatment or applying for licenses when they are in recovery.

Title II of the ADA prohibits exclusion of persons with disabilities from the services, programs, and activities of a public entity,<sup>138</sup> including occupational licensing.<sup>139</sup> Accordingly, public licensing authorities may not establish eligibility criteria that "screen out or tend to screen out any individual with a disability . . . unless such criteria can be shown to be necessary" for the licensing program.<sup>140</sup> Like Title I, Title II also contains an exception for addicted individuals who are "currently" engaging in the use of illicit drugs.<sup>141</sup> While no court has addressed the meaning of "currently" in this context, the regulatory guidance indicates that it should be interpreted to mean "recently enough to justify a reasonable belief that a person's drug use is current or that continuing use is a real and ongoing problem."<sup>142</sup> As noted previously, this interpretation operates to remove protection from persons in early recovery.

Occupational licensing laws also frequently disqualify persons with criminal records, including for minor drug-related offenses. Depending on how

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<sup>132</sup> Larkin, *supra* note 130, at 213.

<sup>133</sup> *Id.*

<sup>134</sup> Cooper & Kovacic, *supra* note 131, at 1567.

<sup>135</sup> See *Legal Barriers for People in Recovery from Drug and Alcohol Addiction: Licenses and Credentials – Chart*, NAT'L ALL. FOR MODEL STATE DRUG LAWS (2011), <http://www.namsdl.org/library/7C3198E2-1C23-D4F9-744D6A7B0274BFCB/> (cataloguing the addiction-related restrictions on licensing to engage in the and counseling professions).

<sup>136</sup> TENN. CODE ANN. § 62-4-127(b)(3) (2018).

<sup>137</sup> OHIO REV. CODE ANN. § 4740.06(i)(2) (West 2018).

<sup>138</sup> 42 U.S.C. § 12132 (2012).

<sup>139</sup> 28 C.F.R. § 35.130(b)(6) (2012); *Clark v. Va. Bd. of Bar Exam'rs*, 880 F. Supp. 430, 446 (E.D. Va. 1995) (holding that a broad question about mental health on the application for bar admissions discriminated against applicants with disabilities).

<sup>140</sup> 28 C.F.R. § 35.130(b)(8) (2012).

<sup>141</sup> *Id.* § 35.131(a)(1).

<sup>142</sup> 28 C.F.R. pt. 35, app. B (2018).

the state's laws are formulated, the license restrictions may apply regardless of the offense's magnitude, recentness, or relatedness to the occupation. In some cases, the laws may target arrests that did not result in convictions, or convictions that have been expunged or sealed. Because substance use disorders correlate positively with criminal records, many persons in recovery must contend with these restrictions on licensure. Failure to obtain required licenses can obstruct them from employment opportunities and prevent them from self-employment in the relevant fields.

The National Employment Law Project ("NELP") has proposed a model law framework for occupational licensing with respect to criminal records.<sup>143</sup> This framework draws on guidance from the Equal Employment Opportunity Commission ("EEOC") regarding the use of criminal records in employment decisions under Title VII of the Civil Rights Act.<sup>144</sup> NELP recommends 10 features of fair licensing laws, including (1) the absence of any automatic, blanket exclusions based on criminal records; (2) limiting criminal inquiries to job-related convictions; (3) requiring case-by-case assessment based on the individual and occupation involved; (4) requiring consideration of rehabilitation and mitigating circumstances; (5) requiring the licensing body to provide the applicant with notice of the background check and an opportunity to respond; and (6) prohibiting the licensing agency from performing criminal record inquiries until they have determined other facets of the applicant's eligibility.<sup>145</sup> The last recommendation is designed to lower the risk that the licensing authorities will discard an otherwise qualified applicant due to bias.<sup>146</sup>

Where licensing serves a legitimate public safety interest,<sup>147</sup> the NELP recommendations offer a reasonable framework to balance consumer protection with the societal and individual interest in offender rehabilitation. However,

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<sup>143</sup> See generally MICHELLE NATIVIDAD RODRIGUEZ & BETH AVERY, NAT'L EMP'T LAW PROJECT, UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS (2016), <http://www.nelp.org/content/uploads/Unlicensed-Untapped-Removing-Barriers-State-Occupational-Licenses.pdf> [hereinafter NELP] (last visited Apr. 2, 2018).

<sup>144</sup> See EEOC, ENFORCEMENT GUIDANCE, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2010), [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm). Use of criminal records in a way that treats individuals differently based on their race, national origin, or other protected characteristic (e.g., treating white applicants with criminal records more favorably than black applicants with similar records) violates Title VII, as does use of criminal records in a way that disproportionately screens out Title VII protected groups. *Id.*

<sup>145</sup> NELP, *supra* note 143, at 21–24.

<sup>146</sup> *Id.* at 25–26.

<sup>147</sup> It is the position of this essay that many professional licensing requirements serve little public purpose and should be abolished. Examining precisely which requirements merit preservation is beyond the scope of this essay. Licensing requirements that remain in place should integrate the three elements described here.

licensing law reforms should incorporate additional consideration of persons in recovery from substance use disorder. First, license exclusion of persons with substance use disorder should only operate when the disorder has impacted, or is likely to impact, the person's performance in a way that jeopardizes public health or safety. Second, upon certified completion of a supervised treatment program and/or the passage of a reasonable period of time, individuals who have lost their license should be entitled to a rebuttable presumption of fitness to carry out their professions. Third, substance use disorder should be legislatively deemed a mitigating factor with respect to offenses directly related to that disorder (e.g., possession of an illicit drug to which the person is addicted).

The exclusion of individuals from certain occupations based on their history of substance use disorder or related criminal offenses operates as a significant barrier to economic empowerment. Moreover, these restrictions frequently bear little relationship to the risks involved in the occupations. In order to help individuals in recovery reintegrate successfully into the economy, state and local licensing regimes must adapt and allow fairer, individualized, and flexible consideration of substance use disorder histories.

## VI. CONCLUSION

The human and economic costs of substance use disorder necessitate a strategy not only of prevention and treatment, but also of economic empowerment. Providing opportunity to persons in recovery allows them to become productive members of society and reinforces their recovery process. In Appalachia, where the opioid epidemic continues to accelerate and socioeconomic circumstances create additional challenges, there is a particular need to expand access to "recovery capital." Policymakers can boost the economic outlook for these vulnerable individuals by strengthening protections against discrimination, facilitating rehabilitative employment through charities, expanding hiring incentives to cover persons in recovery, constructively addressing employer risks, and incorporating consideration of substance use disorder in reforms to reduce the collateral consequences of criminal records. Such reforms will expand opportunities for persons in recovery to build promising economic futures.