

“Ban the Box” Policies and Legislation: A Brief Overview

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What is Ban the Box and How Does It Work?

“Ban the Box” refers to initiatives removing the requirement that candidates disclose their criminal histories in initial job applications. Employers may implement Ban the Box initiatives voluntarily or they may be required to do so by state or local laws and rules or governmental executive order. Initiatives typically allow employers to review an applicant’s criminal history at a later stage in the hiring process. For example, Walmart, a Ban the Box employer, makes conditional offers and then implements an individualized process for interviewing applicants with criminal histories.¹ Target does the same.² While these companies run background checks after conditional offers, other employers or jurisdictions may implement Ban the Box by running background checks after initial interviews,³ removing questions on initial applications regarding applicants’ willingness to submit to a background check,⁴ or creating policies that also protect current employees from termination based on criminal records.⁵

How Widespread Are Ban the Box Initiatives?

At least thirty-five states have adopted some form of Ban the Box policies or laws governing public employers.⁶ For example, an executive order signed in Georgia precludes “the use of a criminal record as an automatic bar to employment.”⁷ It further directs public employers to “provide qualified applicants with the opportunity to discuss any inaccuracies, contest the content of a criminal record, and provide information that demonstrates rehabilitation.”⁸ Some state legislatures have chosen to focus on particular offenses. For example, in Virginia, employers are prohibited from requiring an applicant to disclose arrests, charges, or convictions

¹ “Human Capital: Good Jobs & Advancement for Associates.” WALMART.COM,

<https://corporate.walmart.com/esgreport/human-capital-good-jobs-advancement-for-associates>.

² “Ban the Box and Target: Have We Hit the Tipping Point?” S. COAL. FOR SOC. JUS. (Accessed 28 Oct. 2022) <https://southerncoalition.org/ban-the-box-and-target-have-we-hit-the-tipping-point/>

³ See, e.g., Colorado Chance to Compete Act, COLO. REV. STAT. § 8-2-130 (2019).

⁴ See, e.g., Phila, Pa., Code § 9-3504(1).

⁵ *Id.* at § 9-3504(2).

⁶ Beth Avery and Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT’L EMP. L. PROJECT (1 Oct. 2021) <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>. The states include Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, and Wisconsin. *Id.*

⁷ Executive Order 02.23.15.03, Gov. Nathan Deal, 23 Feb. 2015.

⁸ *Id.*

relating to marijuana possession.⁹ In 2020, North Carolina Governor Cooper signed Executive Order 158, prohibiting state employers from inquiring about criminal history on employment applications, but allowing them to do so after the candidate’s initial interview.¹⁰ The Executive Order further prevents state agencies from considering convictions unrelated to the job, arrests not resulting in convictions, dismissed charges, and those resulting in acquittal.¹¹ A number of North Carolina counties ban the box for public employees.¹²

Fifteen states and the District of Columbia have Ban the Box laws governing private employers.¹³ For example, Maryland prohibits private employers with at least fifteen full-time employees from requiring disclosure of criminal records before an in-person interview,¹⁴ and in Illinois, employers may not ask applicants to disclose criminal records until selected for an interview or made a conditional offer.¹⁵

At the federal level, Congress passed the Fair Chance to Compete for Jobs Act in 2019.¹⁶ That law provides that federal agencies may not ask a civil service applicant to disclose criminal history record information a conditional offer is made.¹⁷

Additionally, many companies have voluntarily adopted ban the box practices. In addition to Walmart and Target noted above, the Coca-Cola Company, PepsiCo, Facebook, Google, Koch Industries, and Georgia Pacific have all taken pledges to “delay[] criminal history inquires until later in the hiring process”¹⁸ and “ensur[e] that information regarding an applicant’s criminal record is considered in proper context.”¹⁹

What Are Some of the Arguments for and against Ban the Box?

Advocates of Ban the Box assert that the initiatives are necessary to promote fairness in the use of criminal background checks, citing problems of accuracy, competency in evaluation of records, and applicants’ lack of opportunity to present evidence of rehabilitation as common

⁹ VA ST § 19.2-389.3(b) (2021). Virginia residents have since voted to legalize the possession of certain amounts of marijuana. The statute, in effect until the amendments are in place or 2025, automatically seals the record of arrests, charges, and convictions relating to certain marijuana offenses.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Ban the Box Community Initiative Guide*, S. COAL. FOR SOC. JUST., <https://southerncoalition.org/justice-system-reform/safe-reentry/ban-the-box-community-initiative-guide/> (last visited Dec. 7, 2022). North Carolina counties that ban the box include Alamance, Buncombe, Catawba, Cleveland, Cumberland, Durham, Forsyth, Halifax, Henderson, McDowell, New Hanover, Orange, Rowan, Rutherford, Wake, and Wilkes. *Id.*

¹³ *Id.* The states are California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. *Id.*

¹⁴ Maryland Senate Bill 839/House Bill 994 (2020).

¹⁵ Illinois House Bill 5701 (2014). In 2021, Illinois legislators amended the Illinois Human Rights Act to give person with conviction history a cause of action for discrimination. The Employee Background Fairness Act, Senate Bill 1480 (2021).

¹⁶ Fair Chance to Compete for Jobs Act, P. L. 11-92 (2019) (codified as 5 U.S.C. §§ 9201 *et seq.*).

¹⁷ 5 U.S.C. § 9202(a). Subject to certain exceptions, e.g., federal law enforcement officers. *See* sections (b) and (c). Additionally, certain convictions—such as for treason—incur a lifelong ban on federal employment (18 U.S.C. § 2381).

¹⁸ Press Release, The White House, Off. of the Press Sec’y, FACT SHEET: White House Launches the Fair Chance Business Pledge (Apr. 11, 2016) (<https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>).

¹⁹ *Id.*

concerns.²⁰ Some advocates aim to “address deep racial disparities in the criminal-justice system, which disproportionately affect[] people of color.”²¹ The consequences of these disparities can extend after the criminal case has concluded, as difficulty in finding employment may lead to recidivism.²² Some proponents note that while employment does not guarantee a lack of future criminality, “unemployment strains critical family supports and provides financial incentives to engage in illegal behaviors.”²³

Opponents of Ban the Box initiatives assert that it may add unnecessary delays to the hiring process, especially when an applicant’s criminal history is a legitimate reason to deny an offer, for example, denying a financial management position to a person convicted of embezzlement.²⁴ Also, employers may be forced to spend strained resources on applicants who may ultimately be denied employment.²⁵ Some employers have expressed concerns about endangering current employees and customers and the risk associated with negligent hiring claims.²⁶ Others assert that the initiatives “encourage statistical discrimination,”²⁷ noting that employers may simply make assumptions about the criminal history of minority applicants, which may lead to fewer minority hires.

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²⁰ DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUST., *THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC 3* (2014).

²¹ Margaret Barthel, *Employers Are Still Avoiding Former Inmates*, THE ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/11/are-states-complying-ban-box-laws/601240/>.

²² Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1081-1082 (2019).

²³ Anastasia Christman and Michelle Natividad Rodriguez, *Research Supports Fair Chance Policies* 1 (1 Aug. 2016), <http://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>.

²⁴ Roy Maurer, *‘Ban the Box’ Turns 20: What Employers Need to Know*, SOC’Y FOR HUMAN RES. MGMT., <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/ban-the-box-turns-20-what-employers-need-to-know.aspx> (November 12, 2018).

²⁵ *Id.* (statement of Juanita Duggan, President and CEO of The Nat’l Fed’n of Indep. Bus) (“Ban-the-box laws make it harder for employers to talk about a criminal record at a time that is convenient for them. [...] This means that a small-business owner may spend hours, days, or even weeks going through the hiring process only to find a worker is unqualified.”). See also Dallan F. Flake, *supra* note 23, at 1085 (“Some commentators argue that banning the box merely delays an employer’s inevitable decision not to hire an ex-offender, often until both the employer and applicant have heavily invested in the job-hiring process.”)

²⁶ Kenneth I. Sondik, *Ban the Box Leaves Employers Liable for Negligent-Hiring Lawsuits*, N.Y. TIMES (Apr. 13, 2016), <https://www.nytimes.com/roomfordebate/2016/04/13/should-a-jail-record-be-an-employers-first-impression/ban-the-box-leaves-employers-liable-for-negligent-hiring-lawsuits> (“Negligent-hiring liability turns on whether the behavior of an ex-offender employee who harms a third party...was ‘foreseeable’—meaning the only certainty is that the employee’s criminal record will be plaintiff’s Exhibit 1.”).

²⁷ Dallan F. Flake, *supra* note 23, at 1085.