

# FAIR-CHANCE HIRING FOR WORKERS WITH CRIMINAL RECORDS

## THE PROBLEM

Nearly one in three adults in the United States—or 70 million people—have some type of criminal record that will show up on a routine background check for employment.<sup>1</sup>

As background check screening becomes more common in employment, the stigma of having a criminal record creates a challenging barrier for many jobseekers—even years after the offense. Men with records accounted for approximately 34 percent of the nonworking men of prime working age, in one survey.<sup>2</sup> The existence of a criminal record reduces the likelihood of a job callback by 50 percent among equally qualified applicants,<sup>3</sup> which is even more pronounced for Latino and Black applicants.<sup>4</sup> 17% of whites with a criminal record get a call back on a job interview, down from 34% without a record, while only 5% of black applicants with a record receive call backs from employers, down from 14%.<sup>5</sup> These statistics demonstrate the severe disadvantage facing those with a criminal record, particularly people of color who already face racial discrimination in the job market.

The widespread, excessive use of background checks thus exacerbates racial and economic inequality. Furthermore, the prejudice created by these unfair practices lowers the employment rate nationwide by over 1.5 percentage points and costs the nation over \$57 billion a year in lost output.<sup>6</sup>

## THE SOLUTION

Providing pathways to employment for people with criminal records can dramatically improve people's lives, increase public safety, and generate measurable economic returns in local communities.<sup>7</sup> One of the most promising hiring reforms, gaining bipartisan support and national attention, is “fair chance” hiring. One com-

ponent of a fair-chance policy is to “ban the box” that asks about convictions on a job application. The “box” discourages people from applying and artificially narrows the pool of qualified workers.<sup>8</sup> Too often, employers automatically reject applications with the checked box, regardless of the applicant's qualifications. Ban the Box or Fair Chance initiatives provide applicants a fair chance by removing conviction history questions on a job or housing application and delay the background check inquiry until later in the hiring/approval.

In addition to banning the box, fair-chance hiring integrates federal best practice guidelines on the use of arrest and conviction records in employment decisions, including evaluating conviction job-relatedness, the time passed since the offense, and rehabilitation.<sup>9</sup> In addition, employers should provide applicants with the opportunity to dispute the accuracy or relevance of any records.

Fair-chance hiring policies help to lift the stigma of a record and allow a person's skills and qualifications to come first. Referring to federal guidelines, researchers found that such “laws give jobseekers the chance to make contact with prospective employers—contact that this study suggests is crucial to the hiring process” because it presents the “opportunity to overcome negative stereotypes and reveal positively valued traits.”<sup>10</sup>

Where local entities have tracked hiring, they have found a measurable impact. In **Durham County, North Carolina**, the number of applicants with criminal records recommended for hire nearly tripled in the two years since its fair hiring policy passed. On average, 96.8 percent of those with records recommended for hire ultimately received the job.<sup>11</sup>

After **Minneapolis** implemented its policy, the city found that removing the conviction disclosure box from initial applications and postponing background checks

until a conditional offer of employment decreased the amount of transactional work for staff, did not slow down the hiring process, and resulted in more than half of applicants with convictions being hired.<sup>12</sup>

The movement for policies to dismantle barriers to employment for workers with records has gained significant traction across the political spectrum. As of April 2016, there were over 100 cities and counties and 23 states that have adopted policies to delay conviction history inquiries in hiring.<sup>13</sup> In 2015, Former President Obama announced that federal agencies would adopt ban-the-box and in April 2016, the White House launched the Fair Chance Business Pledge, garnering pledges from major corporations.<sup>14</sup>

Fair hiring initiatives are increasingly facing legal hurdles in the form of state government pre-emption measures. Arkansas and Tennessee have both enacted state laws that limit the ability of local governments to pass laws protecting classes of individuals, in this case those with a criminal history, from anti-bias laws.<sup>15</sup> Indiana and Texas have both introduced and passed legislation that would ban municipalities from passing their own “Ban the Box” laws.<sup>16</sup>

To proactively avoid these issues, legislation should be drafted with care, and ideally with bipartisan and industry support, and should include exceptions for sensitive employers such as schools, hospitals, and security companies which will engender less opposition.

## **POLICY ISSUES**

To craft a fair-chance policy, including ban-the-box, here are key principles.<sup>17</sup>

**AVOID STIGMATIZING LANGUAGE** such as “ex-offenders” or “ex-felons.” Use terms that lead with “people,” such as “people with records.”<sup>18</sup> A background check may be unnecessary for a job position because most jobs do not entail safety risks. Even if a background check is legally mandated, it is unnecessary to exempt a position from the majority of these best practices. If a background check is necessary, only consider those convictions with a direct relationship to job duties and responsibilities and consider the length of time since the offense. Avoid consideration of records of arrest not followed by a valid conviction, sealed, expunged, or old offenses.

**DON'T INQUIRE ABOUT CONVICTION HISTORY UNTIL A CONDITIONAL OFFER HAS BEEN MADE.**<sup>19</sup> The most effective policy is to delay all conviction inquiries, oral or written, until after a conditional offer of employment. Avoid provisions that bypass the policy through “voluntary disclosure” of record information from the applicant or that use self-disclosure of this information as a misguided “truth test.” If a job applicant

is rejected because of a record, inform the applicant. Provide the applicant with written notice of the specific job-related item in the report and a copy of the report.

**PROVIDE THE APPLICANT THE RIGHT AND SUFFICIENT TIME** to submit evidence of mitigation or rehabilitation before a final decision. Hold the position open until the review is complete.

**EXPAND THE FAIR-CHANCE POLICY TO PRIVATE EMPLOYERS.** To maximize the impact of the fair-chance policy, apply the policy to government contractors and private employers. Localities that have done so include New York City, Austin, Buffalo, and San Francisco among others.<sup>20</sup> Several of these cities have required that private employees perform background checks only for some positions, only after a conditional offer, and give applicants various rights regarding appeals, complaints, and notices of denial.<sup>21</sup>

**COMBINE DATA COLLECTION AND EFFECTIVE ENFORCEMENT.** At a minimum, a government agency should process complaints and audit compliance. Strong penalties for employers and incentives for complainants, such as directing the penalty funds to complainants, or making available significant monetary remedies, will incentivize private employers to comply and jobseekers to come forward. With government contractors, the contract should be rescindable without compliance. Data collection to track disqualifications and hiring will also support enforcement. Plus, agency-directed investigations can direct resources to high-impact cases.<sup>22</sup>

## **LANDSCAPE AND RESOURCES**

For more information, visit the National Employment Law Project’s fair-chance hiring campaign page.<sup>23</sup> Two resources are the Ban the Box State and Local Guide,<sup>24</sup> which documents policies across the country, and the Fair Chance – Ban the Box Toolkit,<sup>25</sup> which is a comprehensive resource for advocates.

The grassroots organization, All of Us or None, coined the phrase “ban the box” and sparked the movement to remove the check-box. Ban-the-box resources are available on its website.<sup>26</sup>

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*Co-authored by the National Employment Law Project*

