

# FAIR-CHANCE HIRING FOR WORKERS WITH CRIMINAL RECORDS

## **THE PROBLEM**

Nearly one in three U.S. adults—or 70 million people—have an arrest or conviction record that can show up on a routine employment background check.<sup>1</sup>

As employment background checks grow more common, the stigma of a record becomes increasingly unshakeable—with job-seekers facing significant barriers even years after the offense. One survey revealed that approximately one-third of non-working men of prime working age have records.<sup>2</sup> A conviction record dramatically reduces the likelihood of a job callback among equally qualified applicants,<sup>3</sup> and this effect is even more pronounced for Latinx and black applicants.<sup>4</sup> Callbacks for white job applicants drop by half—from 34 percent to 17 percent—when the candidate indicates a record on their application materials. The impact of a record on job prospects is more severe for black applicants, whose likelihood of a callback drops from 14 percent to a mere 5 percent for those with a record.<sup>5</sup> Gender also plays a role, with employers more harshly penalizing women for having a record than similarly situated men.<sup>6</sup> These statistics demonstrate the severe disadvantage job-seekers with a record face, particularly people of color who already face racial discrimination in the job market.

The widespread, excessive use of background checks exacerbates racial and economic inequality. Nearly half of U.S. children have a parent with a record, and, when parents can't work, the next generation—particularly children of color—is deprived of needed resources and their shot at upward mobility.<sup>7</sup> Furthermore, the U.S. economy loses an estimated \$78 to \$87 billion in annual output because of the reduced employment prospects of people with records.<sup>8</sup>

## **THE SOLUTION**

Providing pathways to employment for people with conviction records can dramatically improve lives, increase public safety, and generate measurable economic returns in local communities.<sup>9</sup> Fair-chance hiring is

one of the most promising reforms to address the employment barriers facing people with records, and it is gaining bipartisan support and national attention. One component of a fair-chance policy is to “ban the box,” which means removing questions about conviction history from job applications. These questions discourage people from applying and artificially narrow the pool of qualified workers.<sup>10</sup> Too often, employers automatically reject applications with the checked box, regardless of the applicant’s qualifications, experience, or personality. Reforms such as “ban the box” or “fair chance” allow for fair consideration of applicants with records by removing conviction-history questions from job or housing applications and delaying background checks until later in the hiring process.

In addition to banning the box, fair-chance hiring means integrating federal guidelines on the proper use of arrest and conviction records into employment decisions. That includes simple yet potentially powerful requirements like evaluating the job-relatedness of a conviction, the time passed since the offense, and the applicant’s rehabilitation.<sup>11</sup> In addition, fair-chance policies incorporate simple due-process protections, such as the opportunity for an applicant to dispute the accuracy or relevance of any record relied upon by the employer.

Where local entities have tracked hiring, they have found a measurable impact. In Durham County, NC, the number of applicants with records recommended for hire nearly tripled in the two years after the county’s fair-hiring policy passed. On average, 96.8 percent of those with records recommended for hire ultimately received the job with the county.<sup>12</sup>

After **Minneapolis**, MN, implemented a fair-chance hiring policy, the city found that removing the conviction disclosure box from initial applications and postponing background checks until after 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>13</sup>

By increasing the likelihood of employment, ban-the-box laws also benefit public safety. A study of recidivism data in **Hawaii** observed a substantial decrease in felony offense among people with previous conviction records after the state adopted a fair-chance law in 1998.<sup>14</sup>

The movement for policies to dismantle barriers to employment for workers with records has gained significant traction across the political spectrum. As of May 2018, over 150 cities and counties and 31 states had adopted policies to delay conviction-history inquiries until later in the hiring process.<sup>15</sup> In 2015, President Obama announced that federal agencies would ban the box, and in April 2016, the White House launched the Fair Chance Business Pledge, garnering pledges from major corporations.<sup>16</sup>

Unfortunately, fair-hiring initiatives are increasingly facing legal hurdles in the form of state-government preemption measures. **Arkansas** and **Tennessee** have enacted laws limiting the ability of local governments to pass laws protecting additional classes of individuals—in this case those with a conviction history—from employment discrimination.<sup>17</sup> **Indiana** and **Mississippi** have enacted legislation prohibiting localities from passing their own ban-the-box laws.<sup>18</sup>

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

## POLICY ISSUES

Here are some key principles for crafting an effective fair-chance policy, including ban-the-box reform.<sup>19</sup>

**Avoid stigmatizing language** such as “ex-offenders” or “ex-felons.” Use terms that recognize individuals with past convictions as “people,” such as “people with records.”<sup>20</sup>

**Background checks may be unnecessary for many positions** because most jobs do not entail safety risks. Even if a background check is legally mandated for a position, exempting the position from the majority of these best practices is unnecessary. **If a background check is required, consider only those convictions with a direct relationship to job duties and consider the length of time since the offense.** Avoid consideration of records of arrest not followed by a valid conviction as well as sealed, expunged, or old offenses.

**Remove conviction inquiries from the job application and delay inquiries until after a conditional offer.**<sup>21</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-dis-

closure of this information as a misguided “truth test.” **Inform the job applicant if he or she is rejected because of his or her record.** Notify the applicant in writing of the specific job-related conviction in the report and provide a copy of the conviction history report.

**Ensure the applicant has the right and sufficient time to submit evidence of rehabilitation or mitigating circumstances** before making 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 both government contractors and private employers. Localities that have done so include New York City, Austin, Buffalo, Kansas City, and San Francisco, among others. Several of these cities have required private employers to perform background checks for only some positions, only after a conditional offer, and give applicants various rights regarding appeals, complaints, and notices of denial.<sup>23</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 job-seekers 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>24</sup>

## LANDSCAPE AND RESOURCES

For more information, visit the **National Employment Law Project’s** fair-chance-hiring campaign page.<sup>25</sup> Two resources are the “Ban the Box State and Local Guide,”<sup>26</sup> which documents policies across the country, and the “Fair Chance – Ban the Box Toolkit,”<sup>27</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>28</sup>

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*Co-authored by the National Employment Law Project*

