

Ban the Box

POLICY SNAPSHOT

BY MICHAEL HARTMAN

Introduction

“Ban the box” policies arose from a belief that employers should consider a job candidate’s qualifications first—without the stigma of a conviction or arrest record. Many ban the box policies provide applicants a fair chance at employment by removing conviction and arrest history questions from job applications and delaying background checks until later in the hiring process.

Hawaii was the first state to pass ban the box policies in 1998. The state implemented these policies spurred by the belief that people with criminal records have trouble finding jobs, and lack of employment made re-offending much more likely. In 2014, [research on the effect of Hawaii’s ban the box law](#) showed that, “by mollifying the social stigma attached to a criminal record during the hiring process, Hawaii’s ‘ban the box’ law proved to be extremely successful in attenuating repeat felony offending.”

Hawaii’s law permits employers to inquire into conviction records for prospective employees only after a conditional offer of employment. After that, employers may only withdrawal an offer because of a conviction record that bears a rational relationship to the duties and responsibilities of the position. Hawaii provided exceptions permitted or required under state or federal law. Hawaii has recently updated its law; however, the basic formulation is unchanged.

In September 2020, Hawaii’s law was slightly amended to limit the convictions that can be used under the rational relationship portion of the law. The amendment changed the convictions considered under the rational relationship test from all convictions in the most recent 10 years to felony convictions that occurred in the past five years and misdemeanor convictions that occurred in the past three years.

Since Hawaii’s 1998 enactment, 26 other states and Washington have enacted ban the box policies, but each state’s policy is unique. For example, Hawaii’s policy affects all employers, as opposed to only public employers. Only 12 states and Washington, D.C., apply such laws to private employers. The remainder focus primarily on public employers with some variations.

In 2020, New Hampshire became the latest state to pass a ban the box policy. [House Bill 253](#) prohibits public employers from inquiring about or conducting a criminal background check on prospective employees before an interview, unless required by state or federal law.

Federal Ban the Box Policies

On Dec. 17, 2019, Congress passed the [National Defense Authorization Act \(NDAA\)](#) for fiscal year 2020, which was subsequently signed by the president. As part of the NDAA, the government enacted the Fair Chance to Compete for Jobs Act of 2019, also known as the Fair Chance Act, which prohibits federal agencies and contractors from requesting criminal background



information from job applicants prior to extending an offer, with a few exceptions. The Fair Chance Act will go into effect December 2021.

According to [The Society for Human Resources Management](#), many ban the box policies incorporate federal [Guidance on the Use of Arrest and Conviction Records in Employment Decisions](#) because the use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964.

Efficacy of Ban the Box Policies

With over 20 years of implementation, a growing body of research has looked at the efficacy of ban the box policies. The report, "[Research Supports Fair-Chance Policies](#)" by The National Employment Law Project, shares data on the success of fair chance policies, including ban the box. Findings from the report include:

- In Washington, D.C., the number of applicants with records increased both numerically and as a percentage of all hires after the fair chance hiring law took effect. After the law, there was a 33% increase in the number of applicants with records hired, which resulted in 21% of all new hires in the district being people with records.
- In Durham County, N.C., the number of applicants with criminal records recommended for hire has nearly tripled in the two years since its ban the box policy passed, with the resulting number of hires increasing from 35 to 97. On average, 96.8% of those with records recommended for hire ultimately get the job.

The National Employment Law Project has also published "[Best Practices and Model Policies: Creating a Fair Chance Policy](#)," which provides model policies that can even be implemented at the local level.

In 2016, The Harvard Kennedy School [Working Paper No. 16-015](#) showed that "these bans increased employment of residents in high-crime neighborhoods by as much as 4%. These increases are particularly large in the public sector." The paper concluded that this type of legislation, "appears to have been successful if judged on the basis of its proclaimed proximate objective: making it easier for individuals with criminal records to find and retain employment." It also noted that, "employers respond to 'ban the box' measures by raising experience requirements. A perhaps unintended consequence of this is that women, who are less likely to be convicted of crimes, see their employment opportunities reduced."

Questions Remain on 'Ban the Box'

Some recent research does not support ban the box policies. In a 2018 study from Texas A&M University and the University of Oregon, "[The Unintended Consequences of Ban the Box: Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden](#)," the researchers found that employment rates dropped by 5.1% for Black men ages 25 to 34 without a college degree and by 2.9% for Hispanic men in that same age group. The researchers believe the decrease in employment in these two groups is strong evidence that employers are using statistical discrimination as a stand-in for the criminal history question on applications. Their theory suggests employers are associating young, low-skilled Black and Hispanic men with having a criminal history due to the groups' higher incarceration rates. Thus, employers are less likely to hire Black and Hispanic males because those demographics are more likely to include people with criminal backgrounds. This suggests that Black and Hispanic men without criminal records are being disadvantaged by ban the box laws.

As [policy experts across the country debate ban the box](#), at least one state, Michigan, has taken the step of prohibiting such legislation on the local level. [Michigan SB 353 \(2018\)](#) prohibits local governments from adopting or enforcing legislation that regulates information an employer or potential employer must request, require or exclude on an employment application or as part of the interview process. For more information, see the table below for the key findings of recent studies.

Studies on Ban the Box Policies

Study	Employers Covered	Main results
<u>Agan and Starr (2017)</u>	Private	<ul style="list-style-type: none"> • After ban the box went into effect, callback rates increased for Black applicants with records from 8% to 10.3% but decreased for Black applicants without records from 13.4% to 10.3%. • Ban the box increased racial gap in callback rates. Before ban the box, white applicants received about 7% more callbacks than similar Black applicants, but ban the box increased this gap by 45%.
<u>Craigie (2019)</u>	Public	<ul style="list-style-type: none"> • Ban the box policies raise the probability of public employment for those with convictions by 4 percentage points (30%). • Probability of public employment increases over time by 3.8-5.3 percentage points. • No findings of statistical discrimination in public sector against low-skilled minority males in response to ban the box policies.
<u>Doleac and Hansen (2018)</u>	Both	<ul style="list-style-type: none"> • Young, low-skilled (24-34, no college degree) Black men are 3.4 percentage points (5.1%) less likely to be employed after ban the box. • Older, low-skilled (25-64, no college degree) Black men are significantly more likely (2.8 percentage points, or 4.3% more likely) to be employed after ban the box. • Highly educated Black women (25-34, college degree) are more likely (3.2 percentage points, or 3.9% more likely) to be employed after ban the box.
<u>Flake (2019)</u>	Private	<ul style="list-style-type: none"> • Cross-regional analysis of callback rates in Chicago, a city that has ban the box for public and private employment, and Dallas, a city that does not have ban the box, found that an applicant was 27% more likely to receive a callback in Chicago than in Dallas. • Black applicant's callback rate was 7.6% lower in Chicago and 13.7% lower in Dallas than the white applicant's rate.
<u>Jackson and Zhao (2017)</u>	Both	<ul style="list-style-type: none"> • Ban the box reduced employment for people with criminal records by 5%.
<u>Rose (2018)</u>	Both	<ul style="list-style-type: none"> • Seattle's ban the box policy had no effect on employment for people with criminal records, positive or negative.
<u>Shoag and Veuger (2016)</u>	Both	<ul style="list-style-type: none"> • Ban the box increases employment of residents in high crime neighborhoods by 4% (driven largely by public sector hiring). • From 2009 to 2013, the share of full-time public-sector employees who are Black men in MA, MN, and NM increased by 7.1% (6.2%, 8.1% and 11.2% respectively), relative to a national decline in this share over the same time frame. • Likelihood of employment for Black women decrease 2% after ban the box.

Recent Enactments

Below is a summary of recent ban the box enactments. As a general trend, recent enactments in states which already have some form of ban the box have focused on expanding their policies, particularly when it comes to private employment or educational institutions. States that are newer to ban the box policies tend to begin with public employers before expanding to private employers or educational institutions. As mentioned above, Michigan is the only recent enactment which expressly prohibits local authority to enact ban the box policies.

2019 & 2020 ENACTMENTS

Colorado – HB 1025

Prohibits employers with less than 11 employees (all employers after Sept. 1, 2021) from stating in an advertisement for a position that a person with a criminal history may not apply. Also prohibits an employer from inquiring or requiring disclosure of an applicant's criminal history on an initial written or electronic application form.

Colorado – SB 170

Prohibits state institutions of higher education from inquiring into or requiring disclosure of an applicant's criminal history or disciplinary history at another academic institution on any form of application for admission.

New Hampshire – HB 253

Prohibits a public employer from inquiring about or conducting a criminal background check on a prospective employee prior to an interview, unless required by state or federal law.

North Dakota – HB 1282

A public employer may not inquire into or consider the criminal record or criminal history of an applicant for public employment until the applicant has been selected for an interview by the employer. Does not apply to the department of corrections and rehabilitation or to a public employer that has a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process.

2017 & 2018 ENACTMENTS

California – AB 1008

Repeals former law enacted under CA AB 218 (2013). AB 1008 expands on the former law by expanding employee protections and moving coding to the Fair Employment and Housing Act.

Michigan – SB 353

Prohibits local governments from adopting or enforcing local legislation that regulates information an employer or potential employer must request, require, or exclude on an employment application or as part of the interview process.

Nevada – AB 384

Provides that the criminal history of an applicant or other qualified person under consideration for a position in the unclassified or classified service of the state may be considered only after the applicant has been certified by the Administrator of the Division of Human Resource Management of the Department of Administration or after a conditional offer of employment has been made to the applicant.

Utah – HB 156

Provides that a public employer may not require an applicant to disclose a past criminal conviction before an initial interview for employment; and provides exemptions for certain public employers.

Washington – HB 1298

Prohibits employers from asking about arrests or convictions before an applicant is determined otherwise qualified for a position.

Additional Resources

- [National Employment Law Project](#)
- [SHRM](#)
- [Urban Institute Policy Debates](#)
- [NOLO](#)
- [Collateral Consequences Resource Center: The Many Roads to Reintegration](#)

NCSL's Criminal Justice Program is in Denver at 303-364-7700, or cj-info@ncsl.org.

*Statutes and bills may be edited or summarized; full text can be retrieved through:
<http://www.ncsl.org/aboutus/ncslservice/state-legislative-websites-directory.aspx>*

Information is provided for representative purposes; this may not be a complete list or analysis.

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