

The Fair Chance Act and Ban the Box Legislation: All Federal and State Laws

Over the past decade, few trends in background checks have been more notable than the wave of ban the box legislation. Thirty-five states and 150 cities, counties, and local jurisdictions throughout the United States have adopted ban the box laws and ordinances. These measures, which mandate the removal of criminal history-related questions from job application materials, are often intended to give ex-offenders a better chance at job consideration and employment.

In late 2019, the ban the box movement hit a new milestone with the passage of the federal Fair Chance Act. This law marks the second significant federal ban the box policy, and it could signal an even bigger swell of momentum behind the ban the box trend. In this white paper, we explain all current ban the box laws and provide the key details that employers need to know to remain compliant.

What is ban the box?

Ban the box laws or “fair chance” laws are policies that mandate the removal of the “Have you ever been convicted of a crime?” question (and any variations of that question) from job applications. Often, this question appears on applications with checkbox “Yes” or “No” answers as options, leading to the nickname ban the box.

In addition to adjusting the questions that employers can ask on job applications, ban the box laws also restrict hiring managers from asking questions about criminal history in job interviews. Often, these policies go one step further by requiring employers to delay their background checks until after they have made a conditional offer of employment.

Ban the box policies and stipulations vary significantly from one law to the next. Some laws, for instance, allow employers to conduct background checks before making a job offer. While ban the box laws vary, the goal of these laws is always the same: to encourage employers to consider all applicants based on their qualifications first.

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The argument of ban the box proponents is that the stigma of criminal history often results in ex-offenders not getting a fair chance at employment. By delaying the point in the hiring process at which criminal history enters the conversation, ban the box legislation gives job seekers with criminal records a chance to prove their skills, qualifications, and job fitness without bias or preconceived notions about their criminal history ending their chances of being hired..

The Fair Chance Act and the Federal Rise of Ban the Box

The Fair Chance Act is a federal law that bans the box for federal offices and contractors. Signed into law on December 20, 2019 by President Donald Trump as part of the National Defense Authorization Act for Fiscal Year 2020, the legislation bars all branches and offices of the federal government (executive, judicial, and legislative) from requesting criminal history before making a conditional job offer.

The biggest change within the Fair Chance Act is that it limits federal contractors in their ability to request criminal history or run background checks before making a conditional offer. Past federal ban the box actions, outlined below, banned the box for jobs with federal offices and branches. Until now, those policies did not extend to private sector organizations that perform contract work for the federal government.

Ban the box for contractors applies to some (but not all) of the positions that these companies fill. For federal contractors, the Fair Chance Act only applies to positions that fall under the scope of federal contracts.

If an employee is hired specifically for work associated with a government contract, the federal contractor must follow ban the box protocol for that position. The new law does not apply to jobs that do not fall under the scope of federal contracts. If a federal contractor is filling jobs for private sector projects, that contractor doesn't need to abide by ban the box protocols unless there are other laws in its state, city, or county of operation that ban the box for private employers.

The Fair Chance Act is the second major piece of ban the box legislation passed at the federal level. In 2015, former President Barack Obama issued an executive order banning the box for federal government jobs. Obama's executive order did not apply to federal contractors or private sector employers.

There are no federal ban the box laws that apply to employers that operate exclusively in the private sector. This fact could change with future legislation, but for now, private employers only need to follow local ban the box laws.

An introduction to ban the box at the state level

The ban the box trend began more than two decades ago at the state level. In July of 1998, Hawaii became the first state in the country to adopt ban the box legislation. The law set the template for the fair chance employment movement as we know it today. Applying to both public and private sector employers, the law made it illegal for employers in Hawaii to ask about a candidate's criminal history until after making a conditional offer of employment.

Since the passing of Hawaii's revolutionary 1998 law, 35 other states have adopted statewide ban the box laws or policies.

States currently fall into four basic categories regarding ban the box laws: states that ban the box for public agencies or offices, states that ban the box for government contractors, states that ban the box for private employers, and states that do not ban the box. Note that states can fall into multiple categories.

1. States that ban the box for public agencies, offices, etc.

The most common ban the box law at the state level applies to public employers. The following states have banned the box for public jobs:

- Arizona
- California
- Colorado
- Connecticut
- Delaware
- Georgia
- Hawaii
- Illinois
- Indiana
- Kansas
- Kentucky
- Louisiana
- Maine
- Maryland
- Massachusetts
- Michigan
- Minnesota
- Missouri
- Nebraska
- Nevada
- New Jersey
- New Mexico
- New York
- North Dakota
- Ohio
- Oklahoma
- Oregon
- Pennsylvania
- Rhode Island
- Tennessee
- Utah
- Vermont
- Virginia
- Washington
- Wisconsin

Exceptions to these laws vary from state to state. In some cases, state or federal laws prohibit individuals with specific criminal convictions from holding certain government jobs. For these jobs, employers can ask about criminal history earlier in the hiring process. For instance, Louisiana's ban the box law does not extend to any Department of Corrections jobs or any positions with county sheriff's offices.

2. States that ban the box for government contractors

Twelve states currently ban the box for government contractors along with Washington, D.C.:

- Colorado
- Connecticut
- Hawaii
- Illinois
- Massachusetts
- Minnesota
- New Jersey
- New Mexico
- Oregon
- Rhode Island
- Vermont
- Washington

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These laws work similarly to the new federal Fair Chance Act but apply to contractors working with state government agencies. If a private sector business were contracted by the Minnesota Department of Transportation, for example, that company would be required to ban the box for any positions related to that contract.

3. *States that ban the box for private employers*

Thirteen states and Washington, D.C. currently extend their ban the box laws to include private employers:

- California
- Colorado
- Connecticut
- Hawaii
- Illinois
- Massachusetts
- Minnesota
- New Jersey
- New Mexico
- Oregon
- Rhode Island
- Vermont
- Washington

The laws don't apply to all private employers. In some cases, there may be language in the laws that exempts smaller companies from compliance. The most notable example is in California, where a 2017 law banned the box for all public and private employers with limited exceptions, including for company size. The law only applies to employers with at least five employees. A California-based startup with two personnel preparing to hire a third employee, for example, would not need to comply with the state's ban the box legislation.

States with no ban the box legislation

The fourth category represents states that currently have no statewide policies for ban the box or fair chance employment. There are 15 states that fall into this category:

- Alabama
- Alaska
- Arkansas
- Florida
- Idaho
- Iowa
- Mississippi
- Montana
- New Hampshire
- North Carolina
- South Carolina
- South Dakota
- Texas
- West Virginia
- Wyoming

Local laws

Federal and state laws do not reflect the full extent of the fair chance employment movement. Many localities—including cities, counties, and towns—have ban the box with laws or ordinance of their own. Several of them,

including New York City, Los Angeles, Chicago, Philadelphia, San Francisco, and Seattle, extend ban the box policies to private employers.

Based on these local policies, three-quarters of the United States population now lives in a ban the box jurisdiction, according to the National Employment Law Project. The fact that several of the most populated cities in the country have adopted ban the box even when their home states have not has contributed substantially to the spread of these policies.

What employers need to do

It is crucial for employers to comply with ban the box policies if they are required to do so under federal, state, or local law. Many current laws include fines and other penalties for employers that fail to comply. In Baltimore, Maryland—a major city that bans the box for private employers and public agencies—the law makes it a misdemeanor offence for an employer to violate the ban the box law. Failure to comply with ban the box laws could also result in civil lawsuits from job candidates affected by unlawful inquiries about their criminal history.

Ban the box laws are an essential piece of modern hiring law, and they aren't going away. The fair chance hiring movement is likely to expand further, affecting more and more employers as it does so.

Employers must understand ban the box legislation and take steps to remain compliant to the letter of the law. Here are a few key steps that all employers should take to protect themselves from potentially costly legally violations:

- Review current laws. Review laws on the federal, state, and local level to determine whether your organization is subject to them. Use our Learning Center and Blog as starting points.
- Realize that laws are always shifting. In 2019, three states—Maine, New Mexico, and North Dakota—passed new ban the box laws. New local ordinances emerge monthly. Just because you aren't impacted by ban the box right now doesn't mean that you won't be in the future. Employers need to be vigilant and stay aware of potential shifts in their legal responsibility.
- Keep running background checks. The most common misconception about ban the box laws is that they ban the use of criminal background checks in employment. In truth, there is no ban the box legislation that bars employers from learning about a candidate's background. You may be required to delay your background checks until after making a job offer, but you will still be permitted to conduct those checks—and to rescind your job offer if the information that you discover on the background check makes doing so necessary.

Even within fair chance hiring, background checks are a vital means to protect businesses from liability and risk—as long as they remain compliant.

Conclusion

The ban the box trend has gained so much momentum that it is likely to be a future factor for all employment. Additional states, counties, and cities will pass new policies for ban the box in 2020 and beyond. The arrival of the Fair Chance Act at the federal level indicates widescale support for this legislation and the possibility of a future federal law banning the box for all private employers. The rapid growth of the fair chance employment trend

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makes it essential for all employers to understand what ban the box means and how they need to change their policies to become or remain compliant.

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