



Fair Chance Act of 2019 (S.387/H.R.1076) Frequently Asked Questions

What is the federal Fair Chance Act?

The Fair Chance Act (S. 387/H.R. 1076) would help qualified workers with arrest and conviction records compete fairly for employment in federal agencies and with federal contractors. Like other “ban the box” laws that have been adopted around the country, the bill would delay the criminal background check until later in the hiring process. Specifically, it requires the employer to wait until after the conditional offer stage of the hiring process to conduct a criminal background check, which is consistent with current federal hiring policy and the policy of many employers.

Does the bill make any exceptions for safety sensitive positions?

Yes. The bill does not apply to federal agencies or federal contractors who are hiring for positions involving access to classified information, law enforcement or national security positions.

Does the bill prevent employers from conducting a criminal background check?

No. The bill does not prevent employers from seeking criminal history information to make the hiring decision, nor does it impose any specific standards or requirements on the employer that would regulate how hiring decisions are made. It only delays the criminal history inquiry until later in the hiring process to provide the applicants with a fair chance to first demonstrate their qualifications for the job.

How does the policy help workers, employers and communities?

Over 70 million adults in the U.S. have an arrest or conviction record that can show up on a routine criminal background check for employment. As a result, one in three adults in the U.S. often have serious challenges securing employment in order to provide for their families and communities. Indeed, the unemployment rate for formerly incarcerated people is exceptionally high (27%).ⁱ

Studies show that a criminal record reduces the likelihood of a callback by nearly 50 percent for men, and the callback rates for African American men and woman with records far surpass the rate for White Americans. Thus, the Fair Chance Act, combined with other criminal justice reform policies, will both remove barriers to employment for people with records and promote public safety in the communities hardest hit by unemployment. The bill also helps employers meet the substantial demand for qualified workers by removing the chilling effect that people with records face when criminal history information is requested at the application stage of the hiring process.

What federal lawmakers and national organizations are supporting the bill?

The bill has especially strong bi-partisan support from criminal justice reform leaders in Congress, including the Senate lead sponsors, Senators Cory Booker (D-NJ) and Ron Johnson (R-WI), and the lead sponsors in the House, Congressmen Elijah Cummings (D-MD) and Doug Collins (R-GA). The bill has also been embraced by organizations across the political spectrum, including conservative groups, such as the Justice Action Network, FreedomWorks, and R Street Institute, and progressive organizations, such as the ACLU, the Leadership Conference for Civil and Human Rights, JustLeadershipUSA, and the National Employment Law Project.

Does “ban the box” have support in the states and with employers?

Yes. Ban the box laws and policies have been adopted in 33 states and over 150 cities and counties across the U.S. and embraced by elected officials from across the political spectrum in states as diverse as California, Georgia, Illinois, Michigan, Oklahoma, Virginia, and Washington. Eleven states and over a dozen major cities have extended the policy to both public and private sector employers, covering roughly one-third of the nation’s workforce. Some of the nation’s largest employers, including Koch Industries, Facebook, Google, Starbucks, Target, Home Depot, and Walmart, have banned the box on their job applications.

Is there evidence that the policy improves the job prospects of people with records?

Yes. There are several studies documenting the significant positive impact on hiring of people with records in the public and private sector. For example, a 2019 study conducted by Daniel Shoag of Case Western University and Stan Veuger of the American Enterprise Institute found the policy increases employment in the nation’s highest crime neighborhoods by 4%, which are the neighborhoods with the highest concentrations of people with records.ⁱⁱ And another major study conducted by Professor Terry-Ann Craigie of Connecticut College found that ban the box policies increase public employment for people with criminal records by 30%.ⁱⁱⁱ These findings are consistent with data produced by Washington, D.C., Durham, North Carolina and other communities that have adopted ban the box policies.^{iv}

Is there evidence that the Office of Personnel Management (OPM) policy is working to increase hiring of people with records?

In 2016, OPM finalized regulations requiring most federal agencies to wait until the conditional offer stage of the hiring process to request criminal history information from a job candidate.^v This policy, which did not fully take effect until March 31, 2017, was already the recommended practice by OPM as expressed in prior regulations.^{vi} Thus, it was common practice for many federal employers to delay the criminal history inquiry until after the offer of employment.

In 2018, Congressman Gowdy requested that the GAO evaluate whether the OPM policy has had an impact on hiring of people with records, while recognizing that many challenges exist to collecting reliable data, which is often not retained, and controlling for hiring freezes and other federal hiring policies.^{vii} In addition, as indicated above, the policy was already in practice before the 2016 regulation took effect. Given these limitations, it is not likely that GAO is in position to provide a definitive determination of the impact of the 2016 OPM regulations on federal the hiring of people with records.

Is there evidence that the ban the box policies have a negative impact on hiring of people with records?

No. The study by Professor Jennifer Doleac of Texas A&M University, which is summarized in her testimony before the House Committee on Oversight and Reform, focuses heavily on evaluating the impact of ban the box on young African American men (ages 25-34) without a college degree, regardless of whether they have a record.^{viii} She finds that employers “statistically discriminate” against this specific group (reducing their employment by 5%) because they are making the assumption that they have a criminal record based on the fact that they are young African American men. If indeed the case, by “using race as a proxy for criminal history, that employer is patently violating federal civil rights law,” according to the Acting EEOC Chair, Victoria Lipnic (a Republican appointee).^{ix}

Other studies, including the Shoag/Veuger and Craigie studies cited above, find positive impacts of ban the box on workers with records and the neighborhoods they disproportionately reside in, regardless of race, and no negative impact on African American men. Finally, Shoag and Veuger raise serious questions about the conclusion Doleac draws from her own study. Calculations based on Doleac and Hansen's results for African American men of all ages suggest a slight increase in their employment. Any reduction in employment for subgroups is attributable to "job shifts away from demographic groups that are less likely to have criminal records, such as young people," thus "suggesting that pure racial discrimination is not what drives the worsening outcomes for younger black men."^x

What is the status of the Fair Chance Act in the Senate and the House of Representatives?

On February 13, 2019, the Fair Chance Act unanimously passed the Committee on Homeland Security and Government Affairs, which is chaired by the bill's co-sponsor, Senator Ron Johnson. On March 13, 2019, the House Committee on Oversight and Government Reform held a joint subcommittee hearing on the bill, and it is tentatively scheduled for mark-up on March 26th.

Endnotes

ⁱ Prison Policy Institute, "Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People" (July 2018). <https://www.prisonpolicy.org/reports/outofwork.html>

ⁱⁱ Daniel Shoag, Stan Veuger, "'Ban the Box' Measures Help High Crime Neighborhoods" (American Enterprise Institute Economics Working Paper 2016-08, Updated March 2019).

<http://www.aei.org/publication/banning-the-box-consequences-of-bans-on-criminal-record-screening-in-employment-applications/>

ⁱⁱⁱ Craigie, "Ban the Box, Convictions and Public Sector Employment" (SSRN: January 27, 2017) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906893.

^{iv} According to an analysis of the District of Columbia policy, the city hired 33% more people with records after the 2014 ban the box law took effect. Office of the D.C. Auditor, "The Impact of 'Ban the Box' in the District of Columbia," at page 16 (June 10, 2016). <http://dcauditor.org/report/the-impact-of-ban-the-box-in-the-district-of-columbia/>. And a study of the Durham, North Carolina policy documented that hiring of people with records increased seven-fold within four years after the law took effect. Southern Coalition for Social Justice, "The Benefits of Ban the Box: A Case Study of Durham, NC" (2014).

https://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper-2.pdf.

^v 5 CFR Sections 330.1300, 731.103 (<https://www.govinfo.gov/content/pkg/FR-2016-12-01/pdf/2016-28782.pdf>)

^{vi} According to the prior OPM regulation, "Because suitability issues may not arise until late in the application/appointment process, it is generally more practical and cost-effective to first ensure that the applicant is eligible for the position, deemed by OPM or a Delegated Examining Unit to be among the best qualified, and/or within reach of selection." 5 C.F.R. §731.103(d).

^{vii} Letter from Congressmen Trey Gowdy and Darrell Issa to Gene L. Dodaro, Comptroller General, U.S. Government Accountability Office (dated May 15, 2018).

^{viii} Testimony of Jennifer Doleac prepared for the U.S. House Committee on Oversight and Government Reform (March 11, 2019), at pages 10-11.

^{ix} In her testimony before the U.S. Civil Rights Commission on this specific issue, Chair Lipnic concluded, "Were such a charge brought to the Commission and found to be true, I would have no difficulty bring the full force of the law to bear on such a transgressor." Victoria A. Lipnic, Commissioner EEOC, Statement at Hearing before U.S. Commission on Civil Rights (December 7, 2012) at 43-47. See also, Emsellem, Avery, "Racial Profiling in Hiring: A Critique of New 'Ban the Box' Studies" (National Employment Law Project, April 2016). <https://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies/>.

^x Supra, footnote 1, at page 21.