

North Carolina Also Bans-The-Box

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Today, most Americans live in a jurisdiction that has enacted a “ban-the-box” law (also known as a “fair chance” law). Ban-the-box laws restrict employers from inquiring about an applicant’s criminal background at various stages of the hiring process. The purpose of these laws are to enable an ex-offender to display his or her qualifications in the hiring process before he or she must disclose a criminal record. In fact, the origin of the laws’ colloquial name is the “box” that initial job applicants must check if they have a prior conviction. These laws benefit an estimated [70 million people](#) in the United States (or almost one in three U.S. adults) who have prior arrests or convictions.

Currently, there is no federal ban-the-box law generally applicable to private sector employers. However, on December 20, 2019, President Trump signed into law the Fair Chance Act (also known as the Fair Chance to Compete for Jobs Act of 2019) which prohibits federal agencies and government contractors from inquiring about an applicant’s criminal history before making a conditional employment offer, unless a specified exception applies. The law includes exceptions for law enforcement and national security positions that require access to classified information, and where an employer is legally obligated to conduct a criminal background check before making a conditional employment offer.

Many states and localities have enacted ban-the-box laws, including the following: California (statewide and local); Colorado (statewide); Connecticut (statewide); District of Columbia (districtwide); Hawaii (statewide); Illinois (statewide and local); Iowa (local only); Maryland (statewide and local); Massachusetts (statewide); Minnesota (statewide); Missouri (local only); New Jersey (statewide); New Mexico (statewide); New York (local only); Oregon (statewide and local); Pennsylvania (local only); Rhode Island (statewide); Texas (local only); Vermont (statewide); Virginia (statewide); and Washington (statewide and local).

On November 1, 2020, North Carolina will join the list. In August, Governor Roy Cooper signed [Executive Order 158](#) to implement fair chance and “ban the box” policies at state agencies to increase job opportunities for ex-offenders. Governor Cooper’s new release estimated that Executive Order 158 will affect more than 1.7 million people in North Carolina who have a criminal record and may face barriers to employment because of that record.

Despite this era of hyper-partisanship, legislatures across the country continue to pass these fair chance laws. There is no evidence the trend is slowing. These laws will likely continue to increase as they have bipartisan appeal. In 2019, President Trump signed Fair Chance Act into law. Further, [Joe Biden’s Plan for Strengthening America’s Commitment to Justice](#) intends to expand on the Obama-Biden Administration’s “ban the box” policy by encouraging further adoption of these policies at the state and local level.

While these laws all prohibit asking about criminal history on an employment application, the laws vary in detail. For example, depending on the jurisdiction, employers may seek criminal history information at different times, but always after the initial hiring application. Like the federal Fair Chance Act, these local laws also provide various exceptions. There is also substantial variation in the following key provisions:

- Prohibited conduct, including conduct prohibited before the employer makes a conditional offer of employment.
- Permitted conduct, including the circumstances under which an employer can ask about or use information about an applicant's criminal history.
- The specified process for taking an adverse action, if any, which may include:
 - the factors an employer must consider before denying employment based on an applicant's criminal history;
 - notice requirements when making an adverse decision; and
 - the process for an applicant to challenge an employer's denial of employment.
- Any notice, posting, and recordkeeping requirements.

Most clients will have to comply with one or several of these laws. Employers should confirm the specific requirements in the jurisdictions where they operate, recruit, or employ workers and review the EEOC Guidance on [Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964](#). Non-compliance can be costly, but is avoidable with information and counseling. Further, in this summer of racial reckoning, clients may be interested in revamping their applications (and application processes) to comply with these laws as a measurable action to combat racial profiling in communities of color. Please reach out with specific questions about the fair chance laws.