



Expanding Access to Public Employment for People with Criminal Records

Background

With more than 21 million U.S. workers employed by federal, state, or local governments,¹ public employment provides an accessible entry point to a variety of careers. Public sector jobs have historically offered better compensation than private sector jobs in occupations that do not require significant educational attainment;² higher levels of job security during difficult economic times;³ increased opportunities for career growth; and competitive health and retirement benefits.⁴ With one in five Black workers employed in the public sector, these jobs have also been critical to closing the racial wealth gap.⁵ And as the public sector faces mass retirement of an aging workforce, workers to fill those jobs will continue to be in high demand.⁶

For people with criminal histories, public sector employment can provide an important pathway toward long-term economic mobility. This is not just because of the characteristics of the jobs themselves, but because states, localities, and the federal government have broad incentives—traditionally lacking in the private sector—to implement policies that encourage hiring people with criminal histories. Moreover, that authority generally extends to the millions more workers employed by public sector vendors, contractors, and grantees whose hiring policies are subject to public regulation.⁷

While many jurisdictions have exercised their broad authority to increase access to public jobs for workers with criminal histories, few have maximized the opportunity. This brief explores how jurisdictions can leverage existing models and national best practices to create pathways to public employment for the many qualified workers with criminal histories whose employment opportunities have been limited.

Fair Chance Policy Innovations and Opportunities

The practice of prohibiting an employer from asking about applicant criminal history on an application or before an initial interview, often referred to as “banning the box,” is probably the most high-profile public hiring policy to have taken root in recent years. Thirty-seven states, the District of Columbia, the federal government, and 11 of the largest 15 cities in the United States have adopted some form of ban-the-box policies to date.⁸

Ban-the-box policies have been shown to be effective at increasing call-back and hiring rates for workers with criminal records.⁹ However, absent additional policy supports, they can only put a small dent in hiring disparities because they do not address how employers can use criminal history, only when it can be obtained. As public employers look to expand fair chance hiring, ban-the-box policies may be best viewed as an essential foundation upon which to build a far more comprehensive public hiring policy.

Comprehensive Fair Chance Hiring Policies in the Public Sector

Ban-the-box policies were largely born out of the U.S. Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act, which has provided a model framework for how employers should consider criminal history in the hiring process since its issuance in 2012.¹⁰ But the guidance goes far beyond banning the box and provides a robust, detailed framework for fair consideration of applicant criminal history. The following additional key principles in the EEOC guidance have served as touchstones of comprehensive fair chance policies:¹¹

- No conviction should be automatically disqualifying.
- Conviction-based denial is only appropriate when there is a direct relationship between the specific job at issue and the unique nature of an applicant's criminal conduct.
- Workers should be assessed based on a consistent set of factors, including (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and/or completion of the sentence; (3) the nature of the job held or sought; and (4) evidence of rehabilitation.
- Workers should have a chance to explain their current and past circumstances, including challenging the accuracy of any criminal history report before a conviction-based denial is issued.

Despite the general influence of the guidance, the public hiring policies of only 12 states and the District of Columbia incorporate these key principles to a large degree. Partial adoption of the EEOC principles is not uncommon, though, and may offer a strong foundation for building more robust policies.

- Twenty-one states require employers to consider whether there is a direct relationship between the crime or conviction and the specific duties of the position but fail to provide any guidance on how that relationship should be consistently evaluated.
- Three states do not require a direct relationship assessment but do provide applicants with the opportunity to explain the circumstances of the conviction and relevant demonstrations of rehabilitation.¹²
- No state currently imposes a direct relationship standard that does not also have a ban-the-box policy in place.

At the municipal level, 8 of the 15 largest U.S. cities substantially incorporate the EEOC standards into their policies, while 2 incorporate only direct relationship requirements.

Apart from banning the box, federal law governing public hiring fails to broadly incorporate any of the key principles of the federally issued EEOC guidance.

What positions are covered by “statewide” fair chance hiring policies?

The fact that a state has implemented a fair chance hiring policy does not necessarily mean that all public sector jobs in the state are covered.

In many states, the policy extends only to positions in the state’s executive branch because the policy was established by executive order of the governor, who generally has unilateral authority over the executive branch but not the judiciary or legislative branch. States with policies that affect all positions in state government—including positions in the legislative branch and judiciary—are, by necessity, the result of legislative acts.

Policies put in place by legislation may also extend beyond state positions to cover positions in cities, counties, and other localities, assuming the legislation so provides. This means it is possible for workers to be covered by multiple policies in a single state. For example, a city government position can be covered by a statewide statutory policy in addition to the city’s own policy.¹³

Further, coverage does not depend on where a public sector job takes place but on the government entity that is the employer. For example, the federal ban-the-box policy does not affect positions with U.S. state governments, and state ban-the-box policies do not affect positions with the federal government—even federal positions that exist within states with such policies.

Beyond the EEOC Guidance

Advancements in public fair chance hiring policies have not been limited to the four corners of the EEOC guidance, and there is still substantial room for innovation beyond the guidance’s basic principles. Some of these policies include the following:

- Broadly limiting the age of convictions that can be considered
- Broadly limiting the categories of offenses that can be considered
- Creating robust appeals and reconsideration procedures that are specific to criminal history-based denials
- Explicitly prohibiting consideration of arrests not followed by conviction, juvenile adjudications, and pardoned/sealed/expunged convictions and records

Other innovations include smaller changes to employer practices that can often be implemented without adopting major policy reforms. These include increasing transparency about when and how criminal history will be considered (including what criminal history may be disqualifying) by providing such information on applications and job postings. Another innovation involves actively partnering with organizations that serve reentering populations, particularly those that provide training in relevant areas, to identify and cultivate candidates for employment.

Private Sector Fair Chance Hiring Practices

As the hiring innovations established by public employers have found success, they have slowly grown in scope and even into the private sector where they impact a far greater pool of employers and applicants.

One innovative way that fair chance policies have touched private employers is by leveraging the ability of governments to influence the practices of employers with whom they contract. For example, the federal ban-the-box law that took effect in 2021 requires federal civil and defense contractors and grantees to delay inquiries about criminal history as a term of compliance with their federal procurement and grant agreements.¹⁴ As a result, the law covers millions more jobs than it would have if it had been limited only to federal employees. (Nearly 7 million workers are employed by federal contractors and grantees, compared to 2.2 million employed directly by the federal government.)¹⁵ Although states have not generally flexed their contracting muscle in the same way, the District of Columbia and more than 35 municipalities, including 5 of the largest 15 U.S. cities, have similarly extended their fair chance public hiring policies.¹⁶

There are also signs that state and local governments have become increasingly comfortable directly regulating how private employers handle applicant criminal history, regardless of whether the employer does business with the state or locality. Fifteen states and 5 of the 15 largest U.S. cities have imposed statutory ban-the-box policies that apply to private employers, and 18 states have gone further and subjected private employers to more comprehensive hiring policies. Most of those reforms have occurred in recent years, though, and the relatively low levels of adoption likely indicate an opportunity to expand rather than an unwillingness among other states to consider broader policies.¹⁷

Some public employers are also beginning to recognize recent trends in the nature and makeup of the workforce and expand coverage beyond traditional “employees” to cover independent contractors and gig workers. In 2021, New York City and Philadelphia amended their policies, which govern both public and private employment, to grant workers in those non-traditional roles the same protections as full-time employees and applicants.¹⁸

Fair Chance Licensing as a Model

The statutory codes of many of the 38 states that lack comprehensive fair chance public hiring policies already contain models for reform in the form of laws that broadly limit when and how state occupational and professional licensing boards can consider criminal history. Nearly all the fair chance licensing laws that have been adopted by the vast majority of states incorporate major principles of the EEOC guidance—and, often, additional policies that go far beyond the guidance—and can be readily adapted and expanded to accommodate public hiring practices.¹⁹ In fact, some states, like Colorado and Connecticut, regulate public hiring and licensing of people with criminal histories under a single statute that applies identical standards, obligations, and prohibitions to both.²⁰

Policy Priorities

States seeking to expand access to public sector jobs for workers with criminal histories should consider the following policy priorities:

- Delay employer inquiries into criminal history until the later stages of the hiring process (i.e., ban-the-box policies).
- Implement comprehensive fair chance hiring policies that, at a minimum, incorporate the key principles of the EEOC guidance. States with comprehensive fair chance licensing policies should consider those licensing policies as models.
- Where appropriate, prohibit consideration of convictions that are broadly irrelevant to job qualifications or safety like non-conviction records and convictions for older and less serious offenses.
- Explore smaller reforms to hiring practices that increase transparency about how criminal history is considered and strategies for public employers to directly reach out to workers with criminal histories to inform them of opportunities and identify likely candidates for hiring.
- Expand the coverage of fair chance hiring policies by including state contractors and political subdivisions of the state (cities, counties, and other municipalities).
- Ensure that non-traditional workers, including gig workers, part-time workers, and independent contractors, are covered by existing policies.

Adoption and Features of State Fair Chance Public Hiring Policies

The following table identifies the extent to which each state has implemented significant fair chance hiring policies. These data are current through all legislation enacted in 2021.

States	Public Ban the Box	Direct Relationship Requirement	Individualized Consideration and Guidance	Significant Additional Protections (limits on considering older convictions; less serious offenses; or non-conviction disposition)	Political Subdivision Coverage	Direct Private Sector Coverage	Contractor/ Vendor Coverage
Alabama	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Alaska	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Arizona	✓	✓	⊘	⊘	⊘	⊘	⊘
Arkansas	⊘	⊘	⊘	⊘	⊘	⊘	⊘
California	✓	✓	✓	Limits on considering non-conviction records	✓	✓	✓
Colorado	✓	✓	✓	Limits on considering lower-level offenses and non-conviction records		✓	✓
Connecticut	✓	✓	⊘	⊘	✓	✓	⊘
Delaware	✓	✓	✓	⊘	✓	⊘	⊘
Florida	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Georgia	✓	⊘	⊘	⊘	⊘	⊘	⊘
Hawaii	✓	✓	✓	Limits on considering older offenses	✓	✓	⊘

States	Public Ban the Box	Direct Relationship Requirement	Individualized Consideration and Guidance	Significant Additional Protections (limits on considering older convictions; less serious offenses; or non-conviction disposition)	Political Subdivision Coverage	Direct Private Sector Coverage	Contractor/ Vendor Coverage
Idaho	⊘	⊘	⊘	✓	⊘	⊘	⊘
Illinois	✓	✓	✓	Limits on considering lower-level offenses and non-conviction records	⊘	✓	✓
Indiana*	✓	⊘	⊘	⊘	⊘	⊘	✓
Iowa	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Kansas*	✓	✓	⊘	⊘	⊘	⊘	⊘
Kentucky*	✓	✓	✓	⊘	⊘	⊘	⊘
Louisiana	✓	✓	✓	Limits on considering non-conviction records	⊘	⊘	✓
Maine	✓	⊘	⊘	⊘	⊘	✓	✓
Maryland	✓	⊘	⊘	⊘	⊘	✓	⊘
Massachusetts	✓	⊘	⊘	Limits on considering older offenses, lower-level offenses, and non-conviction records	✓	✓	✓
Michigan	✓	⊘	⊘	Limits on considering non-conviction records	⊘	⊘	✓

States	Public Ban the Box	Direct Relationship Requirement	Individualized Consideration and Guidance	Significant Additional Protections (limits on considering older convictions; less serious offenses; or non-conviction disposition)	Political Subdivision Coverage	Direct Private Sector Coverage	Contractor/ Vendor Coverage
Minnesota	✓	✓	✓	Limits on considering lower-level offenses and non-conviction records	✓	✓	✓
Mississippi	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Missouri	✓	⊘	⊘	⊘	⊘	⊘	⊘
Montana	⊘	⊘	⊘	⊘	⊘	⊘	✓
Nebraska	✓	⊘	⊘	⊘	✓	⊘	✓
Nevada	✓	✓	✓	⊘	✓	⊘	⊘
New Hampshire	✓	⊘	⊘	⊘	⊘	⊘	✓
New Jersey	✓	⊘	⊘	⊘	✓	✓	✓
New Mexico	✓	✓	⊘	Limits on considering older offenses and lower-level offenses	✓	✓	⊘
New York	✓	✓	✓	Limits on considering non-conviction records	⊘	⊘	✓
North Carolina	✓	✓	⊘	⊘	⊘	⊘	⊘
North Dakota	✓	⊘	⊘	⊘	✓	⊘	⊘
Ohio	✓	✓	✓	⊘	✓	⊘	✓

States	Public Ban the Box	Direct Relationship Requirement	Individualized Consideration and Guidance	Significant Additional Protections (limits on considering older convictions; less serious offenses; or non-conviction disposition)	Political Subdivision Coverage	Direct Private Sector Coverage	Contractor/ Vendor Coverage
Oklahoma	✓	⊘	⊘	⊘	⊘	⊘	✓
Oregon	✓	⊘	⊘	⊘	✓	✓	⊘
Pennsylvania	✓	✓	⊘	⊘	✓	⊘	⊘
Rhode Island	✓	⊘	⊘	⊘	✓	✓	⊘
South Carolina	⊘	⊘	⊘	⊘	⊘	⊘	⊘
South Dakota	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Tennessee	✓	✓	✓	⊘	⊘	⊘	⊘
Texas	⊘	⊘	⊘	⊘	⊘	⊘	⊘
Utah	✓	⊘	⊘	⊘	✓	⊘	⊘
Vermont	✓	⊘	⊘	⊘	✓	✓	⊘
Virginia	✓	✓	⊘	⊘	✓	⊘	✓
Washington	✓	✓	⊘	Limits on considering older offenses and lower-level offenses	✓	✓	⊘
West Virginia	⊘	⊘	⊘	⊘	⊘	⊘	⊘

States	Public Ban the Box	Direct Relationship Requirement	Individualized Consideration and Guidance	Significant Additional Protections (limits on considering older convictions; less serious offenses; or non-conviction disposition)	Political Subdivision Coverage	Direct Private Sector Coverage	Contractor/ Vendor Coverage
Wisconsin	✓	✓	⊘	Limits on considering non-conviction records	⊘	⊘	✓
Wyoming	⊘	⊘	⊘	⊘	⊘	⊘	⊘

*Policy imposed by executive order and only covers employees of state executive branch.

Fair Chance Hiring Policies in 15 Most Populated U.S. Cities

The following table identifies the extent to which the most populated U.S. cities have implemented significant citywide fair chance hiring policies. These data are current through October 2022.

Top 15 Largest U.S. Cities	Public Ban the Box	Individualized Consideration and Guidance	Direct Private Sector Coverage	Contractor/Vendor Coverage
New York	✓	✓	✓	✓
Los Angeles	✓	✓	✓	✓
Chicago	✓	✓	✓	✓
Houston	⊘	⊘	⊘	⊘
Phoenix	✓	✓	⊘	⊘
Philadelphia	✓	✓	✓	✓
San Antonio	✓	✓	⊘	⊘
San Diego	✓	⊘	⊘	⊘
Dallas	⊘	⊘	⊘	⊘
San Jose	✓	⊘	⊘	⊘
Austin	✓	✓	✓	✓
Jacksonville	✓	✓	⊘	⊘
Fort Worth	⊘	⊘	⊘	⊘
Columbus	⊘	⊘	⊘	⊘
Charlotte	✓	⊘	⊘	⊘

Endnotes

- ¹ May 2021 National Occupational Employment and Wage Estimates by ownership - Federal, state, and local government, including government-owned schools and hospitals and the U.S. Postal Service," U.S. Bureau of Labor Statistics, accessed October 1, 2022, <https://www.bls.gov/oes/current/999001.htm>.
- ² Christos A. Makridis, "(Why) Is There a Public/Private Pay Gap?" *Journal of Government and Economics* 1 (Spring 2021), <https://www.sciencedirect.com/science/article/pii/S2667319321000021>.
- ³ Jason L. Kopelman and Harvey S. Rosen, "Are Public Sector Jobs Recession-Proof? Were They Ever?" National Bureau of Economic Research, November 2014, accessed October 18, 2022, <https://www.nber.org/papers/w20692>.
- ⁴ See, e.g., "Employee Benefits," Go Government, accessed October 1, 2022, <https://gogovernment.org/all-about-government-jobs/employee-benefits/>.
- ⁵ Michael Madowitz, Anne Price, and Christian E. Weller, Public Work Provides Economic Security for Black Families and Communities, (Center for American Progress, 2020), <https://www.americanprogress.org/article/public-work-provides-economic-security-black-families-communities/>.
- ⁶ Mark Miller, "A Pandemic Problem for Older Workers: Will They Have to Retire Sooner?" *The New York Times*, June 26, 2020, accessed October 18, 2022, <https://www.nytimes.com/2020/06/26/business/retirement-coronavirus.html>.
- ⁷ Paul C. Light, "The true size of government is nearing a record high," Brookings, October 7, 2020, accessed October 18, 2022, <https://www.brookings.edu/blog/fixgov/2020/10/07/the-true-size-of-government-is-nearing-a-record-high/>. Nearly 7 million workers are employed by federal contractors and grantees in addition to the 2.2 million that are employed directly by the federal government.
- ⁸ Ban-the-box implementation at the federal, state, and local levels is tracked across the country in a periodically updated report by the National Employment Law Project. See Beth Avery and Han Lu, National Employment Law Project, "Ban the Box: U.S. Cities Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions" (October 2021), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.
- ⁹ See, e.g., Amanda Agan and Sonja Starr, "Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment," *The Quarterly Journal of Economics* 133, no. 1 (2018): <https://doi.org/10.1093/qje/qjx028>; Jennifer L. Doleac and Benjamin Hansen, "The Unintended Consequences of 'Ban the Box': Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden," *Journal of Labor Economics* 38, no. 2 (2020): <https://www.journals.uchicago.edu/doi/full/10.1086/705880?af=R&mobileUi=0>; Terry-Ann Craigie, "Ban the Box, Convictions, and Public Employment," *Economic Inquiry* 58, no. 1 (2019): <https://onlinelibrary.wiley.com/doi/abs/10.1111/ecin.12837>; Daniel Shoag and Stan Veuger, "No Woman No Crime: Ban the Box, Employment, and Upskilling," HKS Faculty Research Working Paper Series RWP16-015, May 2016, https://scholar.harvard.edu/files/shoag/files/no_woman_no_crime.pdf. However, some of those same studies also suggest that ban-the-box policies may have the unintended side effect of increasing disparities in call-backs for all women and Black men without criminal histories. But see, Maurice Emsellem and Beth Avery, National Employment Law Project, Racial Profiling in Hiring: A Critique of New "Ban the Box" Studies (August 2016), <https://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies/> (arguing that such outcomes are the result of existing patterns of racial stereotyping and discrimination that are exposed by ban-the-box policies, not caused by them).
- ¹⁰ Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, U.S. Equal Opportunity Commission Enforcement Guidance No. 915.002 (April 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>.
- ¹¹ Although the EEOC guidance is meant to directly address indirect racial discrimination that can arise from over-broad criminal history-based exclusions, the principles and policies the guidance promotes are based on ensuring fair and consistent consideration of *all* applicants and employees. Although the enforceability of the guidance under Title VII of the federal Civil Rights Act has come into question in recent years (see Lisa Nagele-Piazza, "Texas Wins Challenge to EEOC Guidance on Criminal Background Checks," *Society for Human Resource Management*, August 8, 2019, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/texas-wins-challenge-to-eeoc-guidance-on-criminal-background-checks.aspx>), its influence as a model for unquestionably enforceable state and local fair chance hiring policies has persisted unabated.
- ¹² Georgia, Maine, and Missouri.
- ¹³ To the extent that there are conflicts between state and local policies that affect a single position, the issue is usually one of enforcement, not coverage. For example, an applicant for a position subject to both a citywide comprehensive hiring policy and a statewide ban-the-box policy would receive the benefit of both policies; but, if either policy is violated, it would be up to the entity that imposes the policy to enforce it (the state for ban-the-box violations and the city for violations of the comprehensive policy).
- ¹⁴ See Fair Chance Act, Pub. L. 116-92 § 1123, <https://www.govinfo.gov/content/pkg/PLAW-116publ92/pdf/PLAW-116publ92.pdf>.
- ¹⁵ Light, "The true size of government is nearing a record high."
- ¹⁶ See Beth Avery and Han Lu, National Employment Law Project, Ban the Box: U.S. Cities Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions (October 2021), <http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/>.
- ¹⁷ *Ibid.*

¹⁸ New York City Administrative Code § 8-102 (2022); Philadelphia Code § 9-3502 (2022).

¹⁹ See generally "Fair Chance Licensing Project: States Expand Access to In-Demand Jobs," The Council of State Governments Justice Center, <https://csgjusticecenter.org/projects/fair-chance-licensing/>.

²⁰ See Colo. Rev. Stat. § 24-5-101, Conn. Gen. Stat. § 46a-80.



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