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BAN THE BOX: BREAKING BARRIERS TO EMPLOYMENT IN THE PRIVATE SECTOR

INTRODUCTION

Discrimination in the workplace is normally thought of as affecting individuals of different race, religion, or sexual orientation; however, one of the most common and long-lasting types of workplace discrimination is based on an applicant’s criminal history. Many individuals convicted of a crime are forced to be followed with a criminal record for the rest of their lives. Criminal records affect the everyday lives of ex-offenders by preventing them from receiving government funding for education, public housing, and most relevant to this paper, limiting the types of jobs that are available to them. The lack of employment opportunities for ex-offenders creates very high recidivism rates. Studies have shown that ex-offenders who were able to secure employment and remain employed “had a 16% recidivism rate compared to a 52.3% recidivism rate” for all other ex-offenders. In order to lower the high recidivism rates across the United States, drastic changes to the laws covering employment discrimination must be made to ensure that ex-offenders will be provided with ample job opportunities.


2. See id.

3. Margaret Colgate Love, Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code, 30 FORDHAM URB. L.J. 1705, 1716-17 (2003). As a result of having a criminal record, ex-offenders lose many civil rights. Id. The official government position in the past has been that “criminals were to be labeled and segregated for the protection of society,” which led to new sanctions and disqualifications on both state and federal levels creating “changes in a criminal offender’s legal status.” Id. These subtle discriminations quickly began to multiply resulting in an exclusion of a wide range of social welfare benefits for individuals with a criminal conviction. Id.

4. Recidivism, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining recidivism as “[a] tendency to relapse into a habit of criminal activity or behavior”).


6. Id.
opportunities. In an effort to decrease discrimination, many programs have worked towards the goal of encouraging employers to evaluate candidates based on their qualifications rather than their criminal history. One movement in particular is called Ban the Box. Ban the Box was created to help eliminate discrimination in hiring practices. The box being referred to is the box on applications regarding criminal backgrounds, which generally refers to a criminal conviction. Many states, including New York, have already implemented Ban the Box practices for public sector jobs. The Ban the Box movement is based off the hiring practices mandated by the Fair Chance Act of 2015, which is discussed in Section I of this note. This note proposes a three-part solution to reduce workplace discrimination against ex-offenders across New York State.

Section I discusses the history of mass incarceration as well as the creation of the Fair Chance Act. This section will delve into the significantly high rates of incarceration across the United States. It will further examine how mass incarceration rates directly correlate to unemployment rates. Finally, this section will discuss how New York City regulates hiring practices through its Fair Chance Act.

Section II analyzes the implementation of Ban the Box policies across various cities in New York State. This section examines the policies implemented in cities including: Buffalo, Rochester, Syracuse, and New York City. This section further analyzes the strengths and weaknesses of the Ban the Box policy.

8. See Craigie, supra note 1.
9. Id.
10. Id.
12. Id.
13. See discussion infra Section I.
14. See discussion infra Section IV.
15. See discussion infra Section I.
16. See discussion infra Section I.
17. See discussion infra Section I.
18. See discussion infra Section I.
19. See discussion infra Section II.
20. See discussion infra Section II.
21. See discussion infra Section II.
Section III examines the implementation of the Ban the Box policies in private companies.\textsuperscript{22} It analyzes various states that have extended their Ban the Box policies from public sector employers to include private employers.\textsuperscript{23} Furthermore, this section examines the steps that large private companies have taken to further eliminate barriers to gainful employment for ex-offenders, such as the taking the Fair Business Pledge.\textsuperscript{24} Finally, this section examines how private companies, such as Pepsi, have amended former hiring policies in order to ensure that every potential applicant receives a fair and unbiased opportunity when applying for employment opportunities with their company.\textsuperscript{25}

Section IV examines the three-part solution.\textsuperscript{26} First, New York should follow the examples of other states, such as California, in their implementation of their Ban the Box practices to cover both public and private employers.\textsuperscript{27} New York State should create a state-wide law that will require all employers to use fair-chance hiring practices, as defined in the Fair Chance Act, when evaluating job applicants.\textsuperscript{28} Second, New York State should create a program where hiring managers of large private companies could volunteer at their local Career and Employment program locations across the state.\textsuperscript{29} Since these career and employment programs work to increase the job-readiness of ex-offenders through career planning, free tutoring, and assistance with resumes along with other support; hiring managers would be able to witness first-hand how valuable ex-offenders could be as employees.\textsuperscript{30} Third, New York State should provide private employers with a tax credit for not only offering job opportunities to ex-offenders but for volunteering at their local

\textsuperscript{22} See discussion infra Section III.
\textsuperscript{23} See discussion infra Section III.
\textsuperscript{24} See discussion infra Section III.
\textsuperscript{25} See discussion infra Section III.
\textsuperscript{26} See discussion infra Section IV.
\textsuperscript{27} Rodriguez, supra note 11.
\textsuperscript{28} Id.
\textsuperscript{29} NYS Career Center Events & Recruitments, N.Y. DEPT. OF LAB., https://www.labor.ny.gov/workforenypartners/career-center-events.shtm (last visited Oct. 15, 2019). The Career and Employment programs, which are funded by the Department of Labor, offer a variety of classes, workshops, job fairs, and job clubs. Id. The workshops offered cover topics including how to create resumes and cover letters, interviewing skills, and basic computer skills. Id. These programs also include career counseling as well as job recruitment services in order to ensure that ex-offenders are not only gaining the workplace skills needed, but that they are being provided with job opportunities in which they can display these skills. Id.
community career centers as well. This tax credit will be awarded to companies that provide employment opportunities to individuals who constantly face difficulties in their search for gainful employment, such as ex-offenders. The combination of this three-part solution will create more job-ready applicants and allow employers to evaluate applicants based on their qualifications rather than their criminal history, thus resulting in a decrease in workplace discrimination against ex-offenders.

I. HISTORY

A. Mass Incarceration in the United States

"The United States accounts for 5 percent of the world’s population, and 25 percent of its inmates." As more individuals enter the criminal justice system inevitably we have more individuals with a criminal record. Every year, over “600,000 inmates are released from [both] federal and state prisons [combined, while] another 11.4 million individuals cycle through local jails,” spending small amounts of time in and out of jail. An estimated “70 million Americans have some sort of criminal record” equating to “almost one in three Americans of working age.” Criminal records generally disqualify individuals from being a fully integrated member of society due to difficulty finding employment. Culture has decided having served their sentences is no longer a sufficient enough punishment for ex-offenders to repay their debt to society. Criminal convictions continue to punish ex-offenders every


32. Id.

33. See generally Craigie, supra note 1 (explaining that Ban the Box is merely a starting point to eliminating discrimination based on criminal history and that more needs to be done to ensure that employers are evaluating candidates based on their qualifications).


35. See id.

36. Id.

37. Id.

38. Id.

day following their sentence.40 “So long as employers can deny [ex-offenders] employment because of their criminal history, any sentence is effectively a life sentence they must continue serving long after their debt to society has been paid.”41 Studies have shown that ex-offenders who were unsuccessful in finding steady employment upon release are more likely to recidivate, thus creating a more dangerous society.42

B. Unemployment Rates Among Ex-offenders

Individuals who have been formerly incarcerated have an unemployment rate over 27 percent, which is the highest unemployment rate in the United States “during any historical period, including the Great Depression.”43 “Formerly incarcerated Black women in particular experience severe levels of unemployment, whereas white men experience the lowest.”44 The unemployment rate of ex-offenders is significantly higher in comparison to those of the general population.45 Women and African Americans seeking gainful employment suffer the most as a result of the unemployment gap between the general public and ex-offenders.46 “Overall, we see working-age ‘prison penalties’47 that increase unemployment rates anywhere from [28 percentage points (for Black men)] to 37 percentage points (for Black women) when compared to their general population peers.”48 If the unemployment rates of formerly incarcerated individuals were reflected by the general population, it would certainly be the cause of great public concern.49 “[A] large percentage of prime working-age former incarcerated people . . . without jobs [have the desire to work, which] suggests [that] structural factors – like discrimination – play an important role in shaping job

40. Id.
41. Flake, supra note 7.
42. Dunne, supra note 39.
44. Id.
45. Id.
46. Id.
47. Id. (defining “prison penalties” as “the unemployment gap between the general public and formerly incarcerated people” and explaining that “a wealth of data suggests that going to prison does negatively affect labor market outcomes”).
48. Id.
49. Id.
50. Id. (defining “prime working-age” in this study as individuals between the ages of “25-44” years old).
attainment. When formerly incarcerated individuals are able to secure employment, they generally receive positions with the lowest pay. Brookings Institution analyzed IRS data and found that, “the majority of employed people recently released from prison receive an income that puts them well below the poverty line.” “Almost all employed formerly incarcerated white men (the group most likely to be employed) work in full-time positions, whereas Black women (the group least likely to be employed) are overrepresented in part-time and occasional jobs.”

Criminal records are not the only factor in unemployment rates amongst ex-offenders. Race and gender also play a large role in who obtains gainful employment amongst ex-offenders. Data suggests that although Black women are more likely to have full-time employment than their white or Hispanic counterpart, Black women who have been incarcerated in the past have low rates of full-time employment “illustrat[ing] that [both] gender and race operate together in the context of reentry [back into society].” Ex-offenders have a desire to work. The unemployment rate within the ex-offender population is a reflection of “public will, policy, and practice – not differences in aspirations.”

C. The Fair Chance Act

The Fair Chance Act, in New York City, deems it an “unlawful discriminatory practice” if an employer were to “declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person’s arrest or criminal conviction.” Furthermore, it is unlawful for an employer to represent that any position is not available based on a person’s arrest or criminal conviction when it is in fact available to such person. Finally, an employer may not “make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the

51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id.
57. Id.
58. Id.
59. Id.
61. See id. § 8-107 11-a(2).
process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment."62

By the language of this statute, it is apparent that the legislature wanted to provide a fair chance at employment for individuals with a criminal record.63 The elimination of the possibility for employers to require disclosure of a criminal record on applications themselves, as seen in the first part of this statute, will decrease the likelihood that individuals with criminal records will be discouraged when filling out job applications ultimately resulting in them not applying for employment opportunities all together.64 The fact that employers are prohibited from withholding positions from applicants who are otherwise qualified for them despite their criminal history, as seen in the second part of this statute, increases the likelihood that ex-offenders will receive higher positions of employment with greater pay as opposed to the generally low-paying positions many ex-offenders are offered.65 Finally, and most importantly, the fact that employers are prohibited from asking about an applicant’s criminal history until after a conditional offer has been made, as seen in the third part of this statute, significantly increases the likelihood that an ex-offender will obtain gainful employment because it allows for employers to evaluate the job applicant’s qualifications without being biased against an applicant with a previous criminal conviction.66

"Any inquiry" as described by this statute refers to any question asked of the applicant either in writing or in any other form or any search of public records that is administered for the sole purpose of figuring out whether an applicant has a criminal history.67 "Any statement" means a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant’s criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check."68 A "conditional offer of employment," for purposes of The Fair Chance Act, is defined as "an offer to be placed in the temporary firm’s general candidate pool."69 An applicant is not required to answer any questions regarding his/her criminal background before a

62. Id. § 8-107 11-a(3).
63. Id. § 8-107 11-a.
64. See id. § 8-107 11-a(1).
65. See Couloute & Kopf, supra note 43.
66. Craigie, supra note 1.
67. ADMIN. § 8-107 11-a(3).
68. Id.
69. Id.
conditional offer has been made, any refusal to answer such question shall not disqualify an applicant from employment.\textsuperscript{70} Once an employer extends a “conditional offer of employment,” they may look into a job applicant’s criminal history.\textsuperscript{71} Prior to taking “any adverse employment action” such as withdrawal of the previous conditional offer made to the applicant, the employer must first provide “a written copy of the inquiry to the applicant in a manner to be determined by the commission.”\textsuperscript{72} Once adverse action\textsuperscript{73} is taken, an article 23(a) analysis\textsuperscript{74} is done by the employer.\textsuperscript{75} Once the analysis is complete, employers must provide applicants with a written copy of their determination, which includes “the basis for an adverse action” as well as the employer’s “reasons for taking any adverse action against [the] applicant.”\textsuperscript{76}

No application may be denied due to an applicant’s criminal record unless there is a direct relationship between the criminal offense and the type of employment sought by the individual or if “the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.”\textsuperscript{77} The statute recognizes the importance of the distinction between the criminal offense committed by the applicant and the type of employment being sought.\textsuperscript{78} In order to increase the applicant’s opportunity for employment, employers should not make a determination based on the applicant having a criminal record unless the criminal offense would tie directly to the type of employment that the applicant is seeking.\textsuperscript{79} Employers have the right to reject applicants when there is a direct relationship to the type of employment in order to avoid a foreseeable risk.\textsuperscript{80}

\textsuperscript{70} Id. § 8-107 11-a(3)(d).
\textsuperscript{71} Id. § 8-107 11-a(3)(b).
\textsuperscript{72} Id. § 8-107 11-a(3)(b)(i).
\textsuperscript{73} Adverse Action, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining adverse action as “[a] decision or event that unfavorably affects a person, entity, or association” and stating that “[c]ommon examples of adverse actions include a decrease in one’s pay by an employer or a denial of credit by a lender”).
\textsuperscript{74} See generally N.Y. CORRECT. LAW § 753 (McKinney 2014) (explaining the necessary steps for an article 23(a) analysis).
\textsuperscript{75} ADMIN. § 8-107 11-a(3)(b)(ii).
\textsuperscript{76} Id.
\textsuperscript{77} CORRECT. § 752(2); see also id. § 750(3) (defining direct relationship to mean “that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question”).
\textsuperscript{78} CORRECT. § 750.
\textsuperscript{79} Id. § 752.
\textsuperscript{80} Id.
Once adverse action is taken as a result of an applicant's criminal history, the employer is statutorily obligated to provide the applicant with a written inquiry and hold the position open, allowing the applicant time to provide a response. 81 This act does not apply to certain types of employment opportunities in which hiring an applicant would create an unreasonable risk to the employer, including those offered at "the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, and the district attorneys' offices." 82

Before finding that an applicant is not suitable for placement, an employer must first consider eight distinct factors. 83 First, employers should remember that "[t]he public policy of [the] state ... [is] to encourage the licensure and employment of persons previously convicted of one or more criminal offenses." 84 It is important for employers who are making hiring decisions to comply with the state’s goals of reducing the unemployment rate for formerly incarcerated individuals by providing them with employment opportunities. 85 Second, "[t]he specific duties and responsibilities necessarily related to the license or employment sought." 86 The employer must consider the job functions of the employment being sought by the ex-offender. 87 Third, the employer must consider "[t]he bearing, if any, the criminal offense ... will have on his fitness or ability to perform one or more such duties or responsibilities." 88 Employers must consider the criminal activity committed by the applicant, in order to determine whether it will ultimately affect his/her ability to complete functions of the job for which the applicant is seeking employment. 89 Fourth, the employer must consider "[t]he time which has elapsed since the occurrence of the criminal offense." 90 It is extremely important for employers to determine when the applicant engaged in criminal activity for many reasons. 91 It is essential to evaluate the

81. ADMIN. § 8-107 11-a(3)(b)(iii) (defining "a reasonable time to respond" given by the employer as being "no less than three business days").
82. Id. § 8-107 11-a(3)(f)(1).
83. CORRECT. § 753(1).
84. Id. § 753(1)(a).
85. Id.
86. Id. § 753(1)(b).
87. Id.
88. Id. § 753(1)(c).
89. Id.
90. Id. § 753(1)(d).
91. See id.
individual’s behavior in the time since the criminal activity occurred. The evaluation of the individual’s behavior, such as whether the individual has steered clear of trouble with the law since the criminal act occurred, should be considered in order to determine the likelihood that he/she will engage in further criminal acts. Fifth, the employer must consider “[t]he age of the person at the time of [the] occurrence of the criminal offense.” It is crucial to understand the age and mental state of the individual at the time that the criminal act was committed. Often times younger individuals lack proper judgement, which could lead to unlawful behavior. Sixth, the employer must consider “[t]he seriousness of the offense.” The existence of a criminal record should be weighed against the seriousness of the actual offense committed. A criminal conviction for a misdemeanor should not play the same role in an employer’s hiring decision as a felony. Seventh, the employer must consider “[a]ny information produced by the person . . . in regard to his rehabilitation and good conduct.” When making hiring decisions, employers must not only look at the conviction itself, but should analyze documentation provided by the applicant which shows the applicant’s rehabilitation since such offense occurred. If employers fail to examine evidence of rehabilitation, qualified individuals will be denied employment opportunities. Finally, “[t]he legitimate interest of the public agency or private employer in protecting . . . the safety and welfare of . . . the general public” must be considered by the employer. Employers should not provide an applicant with an employment opportunity if they truly believe that it could result in endangering the public at large. The safety of the community is more important than combatting unemployment rates. Simply because an individual is not qualified for a specific position does not eliminate the ability for the individual to find employment elsewhere.

D. The Proposed New York State Fair Chance Act 2019 Bill

On February 5, 2019, New York State proposed a new legislative bill to amend the state’s current Fair Chance Act, which was enacted in 2015,

92. See id.
93. Id. § 753(1)(e).
95. CORRECT. § 753(1)(f).
96. Id. § 753(1)(g).
98. CORRECT. § 753(1)(h).
as well as the correction law. This proposed bill will provide even greater protection for individuals with a criminal history in their search for employment opportunities. The first major change that would occur regards the timing of when the criminal conviction occurred. This change would expand protection to individuals who receive a criminal conviction while already employed. If the individual received a criminal conviction while already employed at a particular place, they would be provided with the same analysis of factors under Article 23(a) as would an individual seeking employment with the same employer. The next change that would occur would provide job applicants with seven business days to respond to an adverse action taken by an employer as opposed to the three business days allowed currently. This extension would benefit job applicants by allowing them extra time in order to compile a response for the potential employer. Job applicants are currently only allowed three business days to gather any records, letters of referrals, or proof of rehabilitation to dispute the denial of employment while the employer is obligated to keep the job offer open. The additional four business days will allow job applicants a better opportunity to obtain a more detailed letter or perhaps letters from previous employers that would require a longer turn over period.

This new bill proposes adding language allowing job applicants to “voluntarily disclose[e] information pertaining to his or her criminal history.” Although disclosure of this information is voluntary, employers may begin to take advantage of this voluntary disclosure and suggest that job applicants are free to provide any information on their own accord. This suggestion by employers can result in an individual feeling intimidated into voluntarily providing information about his/her criminal history, which could influence the potential employers hiring decision.

Most relevant to this paper, the new bill will change the definition of a private employer to include “employ[ing] four or more persons” as

100. Id.
101. Id.
102. Id.
103. See CORRECT. § 753.
104. N.Y. A.B. 4868.
105. Id.
107. N.Y. A.B. 4868.
opposed to the ten or more employees required previously.108 This change would be the most significant because it will open the doors for ex-offenders to be able to seek employment with a multitude of employers who have previously evaded fair chance hiring mandates as a result of having less than ten employees.109 Another change in language proposed covers the definition of employment.110 The bill proposes that the existing statutory language of "membership in any law enforcement agency" be changed to include only "police officer or a peace officer."111 This change is intended to limit the scope of employment opportunities within law enforcement that are denied to ex-offenders; however, the statutory language defining a "police or a peace officer" still covers a wide range of law enforcement jobs.112

The bill proposes an extension in applicability to include not only individuals who have been previously convicted of a crime but also those who are currently being charged with a crime.113 This extension will significantly improve the number of employment opportunities that will be provided for individuals who have had encounters with the law even if it did not amount to a criminal conviction.114 Without this extension, a job applicant who might have had a brush with the law, that is making its way through the judicial system as he/she is seeking employment, would be forced to disclose that information during a job interview, even if it ultimately did not result in a criminal conviction.115 It is likely that this disclosure could lead the employer to form a bias against the job applicant resulting in discriminatory hiring practices.116 Including the prohibition of inquiries made by employers regarding an applicant’s current criminal charges ensures that fair chance hiring practices take place for every employment opportunity.117

This new bill requires fulfillment of both subsections under Section 752 of the correction law, as opposed to the existing either/or

108. Id.
109. See N.Y. CORRECT. LAW § 750(2) (McKinney 2014).
110. N.Y. A.B. 4868; see also id. § 750(5) (defining employment).
111. N.Y. A.B. 4868.
112. Id.; see also N.Y. CRIM. PROC. LAW § 2.10 (McKinney 2018).
113. N.Y. A.B. 4868.
114. See generally Couloute & Kopf, supra note 43 (explaining that employers are very likely to discriminate against an applicant with a criminal record, reducing callback rates by fifty percent).
115. See generally N.Y. A.B. 4868 (proposing to expand protection to applicants who are charged with a crime).
116. See Rodriguez, supra note 11 (explaining that employers stop considering an applicant after the applicant discloses a prior criminal conviction).
117. Id.
requirement. Section 752 of the correction law includes two distinct exceptions allowing adverse action against a job applicant with a criminal record. This proposal requires that both of these exceptions be fulfilled in order for an employer to be able to deny an applicant employment as a result of his/her criminal record. This change will ensure that before employers withhold employment opportunities to job applicants, they not only find “a direct relationship” between an individual’s criminal record and the type of employment sought but also that the awarding of employment “would involve an unreasonable risk to ... the general public.”

This new bill creates an additional subdivision for section 753 of the correction law, which explains when “a presumption of rehabilitation” exists. A “presumption of rehabilitation” exists when an individual convicted of a felony has gone ten years from the date of conviction or jail release and when an individual convicted of a misdemeanor has gone five years from the date of conviction or jail release without receiving an additional criminal conviction. The determination between whether to use the date of conviction or the date of jail release in the calculation of years is decided by using the later date.

E. Equal Employment Opportunity Commission’s Enforcement of Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 protects against employment practices that are facially neutral yet have “a disparate impact on the basis of race, color, religion, sex, or national origin.” The Equal Employment Opportunity Commission (hereinafter “EEOC”) issued a 2012 Enforcement Guidance (hereinafter “Guidance”) as part of their efforts to eradicate unlawful discrimination practices in “employment screening, for hiring or retention, by entities covered by

118. N.Y. A.B. 4868.
119. N.Y. CORRECT. LAW § 752 (McKinney 2014).
120. N.Y. A.B. 4868.
121. Id.; see also CORRECT. § 752.
122. N.Y. A.B. 4868; see also CORRECT. § 753(2).
123. N.Y. A.B. 4868.
124. Id.
125. Disparate Impact, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining disparate impact as “[t]he adverse effect of a facially neutral practice (esp. an employment practice) that nonetheless discriminates against persons because of their race, sex, national origin, age, or disability and that is not justified by business necessity”).
Title VII.” The 2012 Guidance examines the differences between arrest and conviction records and states that while a conviction record will likely suffice as evidence of criminal activity, an arrest alone is not indicative of criminal conduct. Since a criminal record is not included in the protections afforded under Title VII, the determination of whether “a covered employer’s reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin.”

Federal courts have held that although employers utilize race-neutral policies in their decision to employ individuals with criminal records, they can still be found to be in violation of Title VII. In Texas v. EEOC, Texas questioned whether the EEOC had the authority to issue its 2012 Guidance on the use of criminal records in hiring as well as to issue “right-to-sue” letters for individuals who are impacted by employment discrimination. This case also involves Texas’ request to the federal court that employers be granted the authority as an employer to unconditionally refute employment of prospective applicants based on their prior criminal conviction. The respondent in Texas v. EEOC was Beverly Harrison, a 61-year-old woman who had lived in Dallas, Texas for her entire life. Ms. Harrison sought employment with the Dallas County Schools for a school crossing guard position. Ms. Harrison was

127. Id.
128. Id. at 1.
129. Id. at 6.
130. See Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971) (holding that the Civil Rights Act of 1964 prohibits an employer "from requiring a high school education or passing of a standardized general intelligence test as a condition of employment" when the test is unrelated to the job performance as it creates a discriminatory practice).
131. Filing a Lawsuit, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/employees/lawsuit.cfm (last visited Oct. 15, 2019). If an individual plans to file a lawsuit under federal law alleging discrimination on the basis of race, color, religion, sex, age, disability, or retaliation, they must first file a charge with the EEOC. Id. Once the charge is filed and an investigation on the matter is closed, the EEOC will provide a “Notice of Right to Sue.” Id. Once a Notice of Right to Sue is obtained, suit must be filed within ninety days. Id. “In most cases, the EEOC can file a lawsuit to enforce the law only after it investigates and makes a finding that there is reasonable cause to believe that discrimination has occurred.” Id. The EEOC must also be unsuccessful in the resolution of the incident through conciliation before deciding to litigate. Id. Before opting to litigate, “the EEOC considers factors such as the strength of the evidence, the issues in the case, and the wider impact the lawsuit could have on the EEOC’s efforts to combat workplace discrimination.” Id.
133. Id.
134. Id.
135. Id.
terminated only a week after she began this new position, due to a prior criminal conviction.\textsuperscript{136} Ms. Harrison received this criminal conviction as a young 19-year-old woman, nearly 40 years prior to the incident in question.\textsuperscript{137} This conviction was set aside by the court and dismissed two years later after Ms. Harrison completed probation.\textsuperscript{138} Prior to Ms. Harrison’s application to become a crossing guard, she had worked for 28 years in various other offices for the City of Dallas, such as the Marshal’s Office.\textsuperscript{139} Ms. Harrison also worked in a school cafeteria in the Dallas Independent School District prior to applying for the crossing guard position.\textsuperscript{140}

This case is important because it clearly demonstrates how futile it is to allow a hiring ban of individuals with criminal records, especially when they have the requisite experience and qualifications for the particular job at hand.\textsuperscript{141} The Court in \textit{Texas v. EEOC} held that “a categorical denial of employment opportunities to all job applicants convicted of a prior felony paints with too broad a brush and denies meaningful opportunities of employment to many who could benefit greatly from such employment in certain positions.”\textsuperscript{142} The court concluded that denying every individual with a criminal record a fair chance at employment opportunities would be too over-inclusive and would result in individuals being excluded from employment opportunities for which they were otherwise qualified.\textsuperscript{143}

Private employers have also suffered suits for the use of discriminatory hiring practices in their respective place of employment.\textsuperscript{144} In \textit{Equal Employment Opportunity Commission v. DolGenCorp LLC}, the EEOC initiated a suit against Dollar General “alleging disparate impact discrimination” as a result of Dollar General’s discriminatory use of criminal background checks in their hiring and firing determinations.\textsuperscript{145} The EEOC brought a lawsuit against Dollar General under Title VII of the Civil Rights Act of 1964.\textsuperscript{146} Under Dollar General’s hiring process, an

\begin{itemize}
  \item[136.] Id.
  \item[137.] Id.
  \item[138.] Id.
  \item[139.] Id.
  \item[140.] Id.
  \item[141.] See id.
  \item[143.] Id.
  \item[144.] See id.
  \item[146.] Id.
\end{itemize}
applicant, even if provided with a job offer, will only be hired if they pass a criminal background check conducted by an outside party.147 The EEOC complaint alleges that Dollar General’s use of criminal convictions in their hiring is discriminatory because the applicant’s conviction “is not job-related [nor] consistent with business necessity.”148 Furthermore, as a result of the practices used in the hiring determination, if an applicant ultimately did not pass a background check, they were not afforded any “individualized assessment.”149 These assessments are meant to be used in order to determine whether the applicant was disqualified for a reason that was “job-related and consistent with a business necessity.”150 Dollar General’s practices had the greatest effect on black applicants creating a “gross disparity in job opportunities.”151 Dollar General’s practice of conducting criminal background checks on job applicants is used across the nation in over 13,000 of their stores and goes back fifteen years.152

In 2004, after being terminated for having a felony conviction on her record, plaintiff Regina Fields-Herring brought a charge with the EEOC against her employer Dollar General for workplace discrimination.153 Ms. Fields-Herring, a black woman, also believed that she had been discriminated against as a result of her race, which qualifies as a Title VII violation.154 As a result of this investigation, the EEOC had found “reasonable cause to believe that, through the application of its background check policy, [Dollar General] discriminated against a class of employees . . . because of their race, Black, in that they were not hired and/or considered for employment, in violation of Title VII.”155

In May of 2017, The Fortune Society156 filed an EEOC charge against Macy’s, Inc. (hereinafter “Macy’s”), alleging that the retailer violated local and federal laws by using discrimination in their hiring

147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
154. Id.
155. Id.
156. Discrimination charge filed by The Fortune Society against Macy’s in background check dispute, THE FORTUNE SOCY, https://fortunesociety.org/media_center/discrimination-charge-filed-fatune-society-macys-background-check-dispute/ (last visited Oct. 15, 2019) ("Founded in 1967, Fortune is a nonprofit community-based organization with a mission to support the successful community reentry of individuals involved with the criminal justice system. Through an array of critical programming, Fortune provides much needed reentry-related services – including job training and placement services – to approximately 6,500 people each year.").
practices. The charge alleges that Macy’s rejected job applicants as well as terminated current employees merely as a result of their criminal histories, even though there was absolutely no connection to the employment that was being sought, resulting in a violation of Title VII of the Civil Rights Act of 1964. Ossai Miazad, a partner at Outten & Golden stated, “[w]hen employers use criminal history to make hiring decisions, they must comply with the law and ensure that the rights of job applicants are protected.” Ms. Miazad stated that Macy’s “screening process is overbroad in three ways.” The first reason includes the fact that Macy’s required any perspective applicant to provide the company with criminal violations which span across a lengthy time frame. The second reason includes the fact that the definitions of the types of violations that the company requires an applicant to divulge are too vague. The final reason includes the fact that Macy’s does not appropriately evaluate “mitigating circumstances” as part of its background checks, preventing them from taking an ex-offenders rehabilitation into account when making their hiring determinations.

Ms. Miazad stated that Macy’s denied applicants referred to them by The Fortune Society despite the fact that any criminal history that an applicant had transpired when the applicant was much younger in age. Ms. Miazad found that Macy’s over-inclusive hiring policy “has a disparate impact on black, Latino, and male job seekers.” The Fortune Society claims that Macy’s used the existence of a criminal conviction in an applicant’s history as a basis for rejection of such applicant, which led to Fortune’s decision to file their claim in support of the individuals who have suffered under these discriminatory hiring practices.

Through this charge, The Fortune Society requests that the EEOC investigate Macy’s “on a class wide basis.” On April 2, 2019, the

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157. Id.
158. Id.
159. Id. ("Fortune is represented by attorneys Ossai Miazad, Cheryl-Lyn Bentley, and Christopher McNerney of Outten & Golden.").
160. Id.
162. Id.
163. Id.
164. Id.
165. Id.
166. Id.
167. Discrimination charge filed by The Fortune Society against Macy’s in background check dispute, supra note 156.
168. Id.
EEOC issued the Fortune Society a Notice of Right to Sue.  

This allowed The Fortune Society to file a class action complaint in the United States District Court for the Southern District of New York on June 26, 2019. The complaint alleges that Macy’s violated Title VII of the Civil Rights Act of 1964, the New York City Human Rights Law, and the N.Y.C. Administrative Code §§ 8-101 et seq. The Fortune Society, through this lawsuit, “seeks equal opportunity for its participants to compete for jobs, lateral positions, and promotions at Macy’s without facing the discriminatory barriers of Macy’s invalid and unreliable criminal history screening policies and practices.”

In Boatwright v. N.Y.S. Office of Mental Retardation & Developmental Disabilities, 52-year-old Michael Boatwright was temporarily hired and then terminated as a result of a 21-year prior conviction, which he had already disclosed to his employer. Although Mr. Boatwright previously held a position as a classroom aide in the New York City Department of Education, he decided to seek employment with United Cerebral Palsy (hereinafter “UPC”), in order to expand his experience and increase his financial means. Despite the fact that Mr. Boatwright was convicted of a Class E felony for attempted possession of a weapon in the third degree, he only received five years of probation and was discharged early as a result of his cooperation and good conduct. Aimed at facilitating gainful employment despite the existence of a criminal record, Mr. Boatwright received “a certificate of Good Conduct, and a Certificate of Relief from Disabilities from the State of New York.” Although his rehabilitation was evident, when his fingerprints came back in connection with the criminal history he previously disclosed, Mr. Boatwright was terminated.

169. Class Action Complaint at 3, The Fortune Society, Inc. et al v. Macy’s, Inc., No. 1:19-cv-05961 (S.D.N.Y. filed June 26, 2019) (stating that the Fortune Society exhausted its administrative requirements under Title VII by filing a charge of discrimination with the EEOC); see also Filing a Lawsuit, supra note 131 (explaining the necessary requirements to be met before a notice of right to sue is issued).


171. Id.

172. Id. at 2.


174. Id. (explaining that The United Cerebral Palsy “functions under the auspices of the New York State Office of Mental Retardation and Developmental Disabilities”).

175. Id.

176. Id.

177. Id.

178. Id. at *2.
Although a felony conviction is not something that should be taken lightly under any circumstances, Mr. Boatwright’s rejection suggests to the court that “there is no such thing as rehabilitation, or overcoming a conviction, and that the notion that one with a conviction can benefit from this state’s public policy of affording jobs to the once-convicted is illusory.” Mr. Boatwright’s situation would fit perfectly under an application of the New York State law, which was enacted in order “to establish reasonable procedures to preventing unfair discrimination against former criminal offenses in regard to licenses and employment.” UPC was already aware of Mr. Boatwright’s conviction and decided to hire him anyway. Mr. Boatwright’s conviction stemmed back several decades and he has not had another encounter with the law since. His conviction did not include the use of either violence or a weapon. Most importantly, the conviction has absolutely no relation to the type of employment he was seeking. As further proof of his rehabilitation, Mr. Boatwright engages in various community activities such as attending church, taking classes at La Guardia Community College, and working with young adolescents in both NYC’s Park Department Summer Youth Program as well as the Department of Education. Mr. Boatwright is a “middle-aged” man, who was convicted “of the lowest felony.” Despite these clear factors favoring rehabilitation, Mr. Boatwright was nevertheless denied employment. The court held that “the agency abused its discretion and acted in an arbitrary and capricious manner” in Mr. Boatwright’s termination and was forced to “revisit the application.”

In Matter of Dempsey v. New York City Department of Education, Mr. Luther Dempsey sought a certificate from the New York City Department of Education (hereinafter “DOE”) to become a school bus driver. In his application, he informed the DOE that he had previously been employed as a driver for a private bus company, which transported...
pre-school age children to and from school for two years.\textsuperscript{191} Mr. Dempsey disclosed in his application that he had a criminal record, as a result of multiple prior convictions.\textsuperscript{192} In 1990, Mr. Dempsey had been convicted of "criminal possession of a controlled substance in the fifth degree and attempted criminal sale of a controlled substance in the third degree," both of which qualify as felony charges.\textsuperscript{193} In 1993, at forty-one years-old, Mr. Dempsey was convicted of "three theft-related misdemeanors."\textsuperscript{194} Mr. Dempsey attributes his criminal history to drug addiction.\textsuperscript{195} By taking part in a drug treatment program, Mr. Dempsey was able to combat his drug addiction in the mid-1990s.\textsuperscript{196} The DOE denied Mr. Dempsey's application for the necessary certification to become a school bus driver.\textsuperscript{197} The DOE provided the bus company that employed Mr. Dempsey with a letter stating that he had been denied approval based on a previous conviction "of an offense that render[ed] [him] unsuitable to perform duties associated with the transportation of school age children."\textsuperscript{198} Without the ability to obtain certification as a school bus driver, Mr. Dempsey's employer had discharged him from his current position.\textsuperscript{199} After denial of his application, Mr. Dempsey was provided with the opportunity to review the information used by the DOE to make their decisions as well as present documentation to explain or disprove the provided information.\textsuperscript{200} Mr. Dempsey was denied certification by the DOE again, regardless of his submission of multiple letters from previous employers, all of which described him as a dependable and accountable employee.\textsuperscript{201} Mr. Dempsey then filed suit against the DOE claiming that the denial of his certification application "was arbitrary and capricious."\textsuperscript{202} Mr. Dempsey also relied on the fact that he received a "certificate of relief from disabilities" for his felony charges as proof of rehabilitation in accordance with Correction Law § 753(2).\textsuperscript{203}
The Correction Law § 753(2) merely creates a “presumption of rehabilitation” and although it should be considered, rehabilitation is only one of eight factors to be taken into consideration in order to be found in compliance with Correction Law § 753(1). Of the eight factors set forth in Correction Law § 753(1), the court found that both the “age of the person at the time of occurrence of the criminal offense” and “the seriousness of the offense or offenses” to be most applicable in Mr. Dempsey’s case. Through these factors, the DOE is afforded the opportunity to place a greater emphasis on Mr. Dempsey’s prior criminal conviction than the evidence displaying his rehabilitation. The DOE based their denial on Mr. Dempsey’s lack of proper judgement stating that “such a serious error in judgement could [have] possibly [been] excused [if it had been] the result of a youthful indiscretion;” however, since he was of a mature age, this lack of judgment played a much greater role in their consideration of factors. The Appellate Court held that the DOE’s denial of Mr. Dempsey’s application for certification as a school bus driver was not arbitrary and capricious, as he “had two felony convictions [for possession and attempted sale of drugs], as well as multiple misdemeanor convictions,” and he was of mature age at the time of his most recent offenses. Ultimately, the court agreed with the DOE in finding that since Mr. Dempsey was forty-one years-old at the time of his last criminal conviction, he was no longer at “an age at which an individual’s moral values are typically still developing.” The court also found that since Mr. Dempsey was applying for a certification that would allow for him to have control over young pre-school aged children without being monitored in any way, his prior felony and misdemeanor convictions should be weighed heavily. For all of the aforementioned reasons, the court found that the DOE’s denial of Mr. Dempsey’s certification, regardless of his “certificate of relief from disabilities,” was not “arbitrary and capricious.”

204.  Id. at 486.
205.  See N.Y. CORRECT. LAW §§ 753(1)(a-h) (McKinney 2014).
207.  Dempsey, 33 N.E.3d at 490; see also CORRECT. § 753(1).
208.  Dempsey, 33 N.E.3d at 489.
209.  Id. at 488-89.
210.  Id. at 492.
211.  Id.
212.  Id.
213.  Id. at 487.
II. BAN THE BOX

A. New York State

Ban the Box policies have been embraced across the United States in various different jurisdictions. These policies prevent any inquiry regarding the criminal history of a job applicant until a conditional offer has been made, as described by the Fair Chance Act. Although public sector employers were the first ones to implement Ban the Box laws in their hiring practices, these policies are now included in private workplaces in various states spanning across the United States. "Three-fourths of the U.S. population live in a jurisdiction with some form of ban-the-box or fair-chance policy." Representing nearly every region of the country, a total of 35 states have adopted statewide laws or policies banning the box including California, New York, Pennsylvania, and Virginia. Twelve states, the District of Columbia and thirty-one cities and counties "extend their fair-chance hiring policies to government contractors."

When asked about Ban the Box practices, Governor Andrew Cuomo stated that "New York is a state of opportunity, where individuals from all backgrounds and circumstances are given a fair chance to pursue their goals." Governor Cuomo also added that these Ban the Box practices create "a fairer and safer New York." Although no state-wide statute has been adopted in New York State, major cities across the state have adopted some form of Ban the Box restrictions on employers.

In Buffalo, NY, any employer with fifteen employees or more is prohibited from asking applicants about a criminal conviction during the application process. "The application process shall begin when the

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215. Id.
216. Id.
217. Id.
218. Id.
219. Id.
220. Rodriguez, supra note 11.
221. Id.
223. BUFFALO, NY, CODE art. 5, §§ 154-26, 154-27 (2013); see also A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 7.
applicant inquires about the employment sought and shall end when an employer has accepted an employment application. After the completion of the application process and prior to a conditional offer being made, inquiries and background checks are permissible.

In Rochester, NY, all employers, both private and public, with four or more employees are prohibited from asking applicants about a criminal conviction "during the application process" and prior to the initial interview. The employer need not wait until a conditional offer is made to inquire about a criminal history, they have the ability to do so after an initial employee interview.

In New York City, "employers with at least four employees" must follow the regulations set forth in the Fair Chance Act, eliminating all criminal history inquiries prior to a conditional job offer. In Syracuse, NY, the Ban the Box practices are applicable only to city vendors and they are "expected to adhere to the [employment] practices of [New York] City."

B. Weaknesses of Ban the Box Practices

Ban the Box practices may be harming some groups that the very laws were designed to help protect. Many opponents of the Ban the Box movement believe these practices lead to statistical discrimination. Statistical discrimination is described as "the phenomenon of a decision-maker using observable characteristics of individuals as a proxy for

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224. BUFFALO, NY, CODE § 154-27.
225. Id. § 154-25; see also A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 7.
226. ROCHESTER, NY, CODE ch. 63, art. 2, § 63-14 (2014); see also A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 10.
227. ROCHESTER, NY, CODE § 63-14; see also A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 10.
228. A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 8.
229. Id.; see also SYRACUSE, NY, CODE ch. 53, art. 1, § 53-4 (2014); see also A Guide to Ban the Box laws at State and County, and City Levels, supra note 222, at 14.
230. See Phil Hernandez, Ban-The-Box "Statistical Discrimination" Studies Draw the Wrong Conclusions, NAT'L EMP. L. PROJECT (Aug. 29, 2017), https://www.nelp.org/blog/ban-the-box-statistical-discrimination-studies-draw-the-wrong-conclusions/ ("Here's the basic idea: when an employer has limited information about a job applicant, the 'rational' employer will rely on easily identifiable traits - like race, gender, and age - to make generalizations about the applicant and predict how that person would perform as an employee.").
231. Id.
unobservable, but outcome-relevant characteristics." Statistical discrimination models reveal that decision makers are misinformed about an individual’s capabilities, work ethic, and likely involvement in unlawful activity. This misinformation can lead to group statistics being used as “proxies of these unobserved characteristics.” Supporters of Ban the Box policies often believe that the lack of negative information provided regarding the job applicants will lead employers to assume that an applicant is clear of any criminal involvement; however, most often, that is not the case. In fact, employers generally rely on “easily identifiable traits—like race, gender, and age” to form conclusions regarding the applicant’s performance abilities as an employee. If African American’s are unable to indicate to employers through a job application that they have never had any encounter with the law, it is likely to be inferred by employers that they have. Studies have shown that “white applicants receive more interviews and job offers than black applicants, even when the candidates have no criminal history and are identical in every other respect.” Another study has found that African American’s without a criminal record who apply for jobs received significantly less callbacks from employers than white applicants with a criminal record. When potential employers are not allowed the opportunity to inquire whether an applicant has a criminal record, they regularly use the color of their skin to make assumptions on criminality. Ban the Box has actually decreased the likelihood that young African American men with low-level skills would be employed by 5.1 percent along with a 2.9 percent decrease amongst Hispanic men with low-level skills.

Another argument against the Ban the Box movement focuses on the idea that the policy does not do anything to address ex-offenders’ abilities

Other examples include “college admission officers, health care providers, [and] law enforcement officers.” Id.

233. Id.
234. Id.
235. Id.
238. Id.
239. Id.
240. Id.
241. Id.
242. Doleac & Hansen, supra note 236, at 5.
to perform in an employment setting.\textsuperscript{243} An applicant’s criminal history is heavily “correlated with lack of job-readiness.”\textsuperscript{244} In an attempt to guess which candidates might be ex-offenders, employers use all other information provided in a job application in order to determine which candidate should be avoided when selecting interviews.\textsuperscript{245} It is extremely difficult for a thirty year-old high school drop-out with a large gap in his résumé spanning a number of years to receive employment.\textsuperscript{246} These are some of the main and most obvious factors employers look for as indicators of whether the applicant has a criminal history.\textsuperscript{247} Employers are generally “willing to give a guy a break, but hiring a former inmate seems like too much of a risk;” therefore, employers try to find ways to avoid hiring them while still complying with the law.\textsuperscript{248} Although employers are able to deny applicants after the interview process, interviewing applicants is still financially burdensome and time consuming.\textsuperscript{249} Employers would prefer to not waste their time and money interviewing job applicants with a criminal record since they know that they are likely to reject them once proof of a criminal record comes to light.\textsuperscript{250} Since it is most probable that young black and Hispanic males will fall into the category of being recently incarcerated, many employers avoid even interviewing them.\textsuperscript{251} This decreases the likelihood for black and Hispanic men without criminal records to receive employment opportunities, since employers are constantly concerned about whether an applicant has a criminal record but are prohibited from asking as a result of the Ban the Box practices.\textsuperscript{252} Studies have shown that before Ban the Box policies were implemented, “white applicants were called back slightly more often than black applicants.”\textsuperscript{253} Whereas after the implementation of the Ban the Box practices, “white applicants were
called back six times more often than black applicants were.”254 These policies actually helped white ex-offenders because employers assumed that white applicants were unlikely to have criminal histories.255

C. Strengths of Ban the Box Practices

Individuals with a criminal record are not the sole beneficiaries of Fair-Chance policies.256 These policies are beneficial “for families, local communities, and the overall economy.”257 Ban the Box does not control an employer’s ability to hire; however, by deferring a criminal background check or any inquiries regarding a criminal history, it allows employers to evaluate a candidate by their qualifications before being potentially biased by a criminal history.258 By increasing the number of jobs available for individuals with criminal records, Ban the Box polices are accomplishing the goal that they were created for.259 Examples of these accomplishments can be seen across various states.260 As a result of Washington, D.C.’s adoption of Ban the Box employment practices, “employment of people with records jumped by 33 percent.”261 One study found that these policies “increased employment by about 4 percent for older black men without a college degree, and black women with a college degree.”262

Employers are the ones who benefit the most from fair hiring policies, such as Ban the Box.263 Statistics show that “employees with criminal backgrounds are 1 to 1.5 percent more productive on the job than people without criminal records.”264 Pamela Paulk, Vice President of Human Resources for the John Hopkins Health Resource Center, reviewed about 500 of their employees’ employment files and found that the employees with a criminal record “had significantly higher retention rates” when compared to employees without a criminal record.265 The

254. Id.
255. Id.
256. Avery, supra note 214.
257. Id.
260. Id.
261. Id.
262. Id.
263. Atkinson & Lockwood, supra note 5.
264. Id.
265. Id.
CEO of Red Restaurant Group, Richard Friedlander, described the individuals with a criminal record employed by his company as “model employees [that are] frequently the most dedicated and conscientious.”

The founder of a telecommunications company based out of Denver, Colorado stated that out of all of his employees, the ones with criminal records ended up being the best “because they usually have a desire to create a better life for themselves . . . [and] are often highly motivated.”

A restaurant executive in both Ohio and Florida stated that “a lot of doors are often shut to [ex-offenders as a result of their criminal history] so, when someone gives them an opportunity, they make the most of it.”

In this executive’s experience, “people with criminal records are often model employees.”

III. PRIVATE EMPLOYERS BAN THE BOX

“Thirteen states including California, Colorado, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington” along with eighteen different cities and counties have “mandated the removal of conviction history questions from job applications for private employers.” This change from the standard Ban the Box policies, which only mandate public sector employers to participate, promotes embracement of the employment of ex-offenders as “an important step toward ensuring that people with records have a fair chance to work.”

A. Fair Chance Business Pledge

In April of 2016, President Barack Obama launched the Fair Chance Business Pledge. In an attempt to “improve their communities by eliminating barriers for those with a criminal record and creating a pathway for a second chance,” private sector companies such as American Airlines, The Coca-Cola Company, PepsiCo, The John Hopkins Hospital

266. Id.
267. Rodriguez & Leasure, supra note 258.
268. Id.
269. Id.
270. Avery, supra note 214.
271. Id.
272. FACT SHEET: White House Launches the Fair Chance Business Pledge, supra note 34.
and Health System, Facebook, Starbucks, and Uber have implemented the Fair Chance Business Pledge in their respective workplaces.\footnote{273}

By signing this pledge, companies are “voicing strong support for economic opportunity for all” and displaying that they are committed to do whatever is necessary in order to increase the likelihood that ex-offenders are afforded a second chance in their search for employment.\footnote{274} These private companies have voluntarily signed onto this pledge in order to support the necessary reforms crucial to creating this “pathway for a second chance.”\footnote{275} The Coca-Cola company stated that they joined this pledge because they “recognize that creating a pathway for a second chance is an important first step in creating successful, sustained re-entry into mainstream society.”\footnote{276}

In addition to taking the Fair Chance Business Pledge, companies can make further guarantees to ensure that they will provide significant opportunities to combat any obstacle preventing an ex-offender’s successful reentry.\footnote{277} Eliminating workplace barriers is the most important step that businesses can take in order to ensure that all potential job applicants are afforded a fair chance in hiring determinations.\footnote{278} In order to ensure that fair decisions are being made regarding an applicant’s criminal record, companies can implement a training session on fair hiring practices for their human resources staff.\footnote{279} Companies may also ensure that ample opportunities for “internships and job training” are made readily available to ex-offenders as well as host “a Fair Chance and Opportunity Job Fair.”\footnote{280}

Pepsi claims that they have “a long history of promoting equal opportunity” and “have zero tolerance for discrimination of any kind.”\footnote{281} However, prior to taking the Fair Chance Business Pledge, Pepsi was required to pay 3.13 million dollars in a class action suit and make major policy changes to resolve an EEOC finding that the company’s former use of criminal background checks discriminated based on race in violation of

\footnotesize{\begin{itemize}
\item \footnote{273. Id.}
\item \footnote{274. Id.}
\item \footnote{275. Id.}
\item \footnote{276. Id.}
\item \footnote{278. Id.}
\item \footnote{279. Id.}
\item \footnote{280. Id.}
\item \footnote{281. \textit{FACT SHEET: White House Launches the Fair Chance Business Pledge}, supra note 34.}
\end{itemize}}

https://scholarlycommons.law.hofstra.edu/hlelj/vol37/iss1/7
Title VII of the Civil Rights Act of 1964. Through its investigation, the EEOC concluded that over “300 African Americans” faced unfavorable outcomes as a result of Pepsi's application of a background check policy, which excluded African American job applicants from receiving employment on a permanent basis. Pepsi's past policy prevented “job applicants who had been arrested [and were now] pending prosecution” from being permanently hired regardless of whether a conviction for the offense had actually occurred. This past Pepsi policy also failed to afford any protection for individuals “who had been arrested or convicted of certain minor offenses,” as they too were denied opportunities for permanent employment. Since this denial by Pepsi of permanent employment opportunities was found to be based on arrest or conviction records that were irrelevant to the type of employment sought and limited an applicant’s ability to obtain gainful employment based on their “race or ethnicity,” it was deemed unlawful under Title VII of the Civil Rights Act of 1964.

As a result of the EEOC’s investigation, Pepsi implemented “a new criminal background check policy.” Pepsi not only offered pecuniary relief to the individuals adversely affected by their prior background check policy but also provided job offers for the individuals who were still interested in the position and deemed qualified for it. Going forward, Pepsi will regularly provide the EEOC with “reports on its hiring practices under its new criminal background check policy” as well as “conduct Title VII training for its hiring personnel and all of its managers.” Through Pepsi’s work with the EEOC, the victims of this workplace discrimination were afforded “significant financial relief” and offered the employment opportunities that had once been denied to them. Most importantly, this work “eradicated an unlawful barrier for future applicants.”

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283. Id.
284. Id.
285. Id.
286. Id.
287. Id.
288. Id.
289. Id.
290. Id.
291. Id.
IV. SOLUTION

A. New York State-wide Statute

The best way for the Ban the Box movement to achieve its intended goals is for New York State legislature to adopt a uniform Ban the Box statute.\(^\text{292}\) In accordance with New York City’s Fair Chance Act, this uniform Ban the Box statute will find that it is an “unlawful discriminatory practice” for an employer to “declare, print or circulate ... any solicitation ... which expresses, directly or indirectly, any limitation, or specification in employment based on a person’s arrest or criminal conviction.”\(^\text{293}\) Furthermore, it will find that is unlawful for an employer to represent that any position is not available based on a person’s arrest or criminal conviction when it is in fact available to such person.\(^\text{294}\) Finally, it will find that an employer may not “make any inquiry or statement related to [a] pending arrest or criminal conviction record of any person who is in the process of applying for employment ... until after such employer ... has extended a conditional offer of employment.”\(^\text{295}\) Only “[a]fter extending an applicant a conditional offer of employment” may the employer inquire about the applicant’s conviction.\(^\text{296}\)

This statute would be implemented in both public and private employment agencies.\(^\text{297}\) Modeled after Title VII of the Civil Rights Act of 1964, this law should apply to all employers with fifteen or more employees.\(^\text{298}\) This statute should be carried out by following the requirements set forth in the Fair Chance Act.\(^\text{299}\) This law will guarantee that employment opportunities for applicants with a criminal record will be equally available in public and private settings. These offerings will also increase job opportunities for the unemployed.

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292. See generally Christina O’Connell, Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination, 83 FORDHAM L. REV. 2801, 2832 (2015) (finding that an adoption of a uniform Ban the Box statute is the best way to achieve its intended goal).


294. Id. § 11-a(2).

295. Id. § 11-a(3).

296. Id. § 11-a(3)(b).

297. Id. § 11-a.

298. See Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2019) (defining an employer as “a person engaged in an industry affecting commerce who has fifteen or more employees”).

299. See ADMIN. § 11-a.
B. Volunteer Program Opportunities

Unemployment for ex-offenders is "highest within the first two years of release" from prison.\(^{300}\) This suggests that it is imperative to provide "pre- and post-release" employment opportunities in order to better facilitate an ex-offender's ability to successfully "integrate back into society" as well as reduce the likelihood that ex-offenders will reengage in criminal activity.\(^{301}\) The transition from being incarcerated to integrating back into society is replete with challenges, which include: finding housing, obtaining support for addiction or mental-health issues, and most importantly, acquiring gainful employment.\(^{302}\)

Ex-offenders are "an at-risk population," they are "at risk of recidivism [as well as] at risk of poverty" and are in need of support and devotion.\(^{303}\) Ex-offenders need to be shown that there is an alternative lifestyle to the one that likely resulted in their incarceration.\(^{304}\) Without assistance, "about 52 percent of ex-offenders return to prison."\(^{305}\)

For these reasons, New York has created Career Centers across the state through federal funding from the United States Department of Labor.\(^{306}\) These "Career Centers offer a variety of classes, workshops, job fairs, [and] job clubs including virtual career fairs and virtual workshops."\(^{307}\) Workshops are offered to cover a variety of employment related topics such as creating resumes and cover letters, basic computer skills, basic concepts in Microsoft Office applications, interviewing skills, and effective job searching.\(^{308}\) Job clubs hold discussions in "a group setting," including sessions on networking, salary negotiations, managing stress, finances and budgeting, and practice interviewing.\(^{309}\) The center also offers hiring services for various employers that list job openings with the New York State Department of Labor.\(^{310}\) Individuals in search of employment can visit a local Career Center in order to find out details regarding job fairs hosted in their area.\(^{311}\) Most importantly, these centers

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300. Couloute & Kopf, supra note 43.
301. Id.
302. See id.
304. Id.
305. Id.
306. NYS Career Center Events & Recruitments, supra note 29.
307. Id.
309. Id.
310. See NYS Career Center Events & Recruitments, supra note 29.
311. See id.
offer career counseling in which counselors get to know individuals on a more personal level and serve as a guide who is readily available to assist ex-offenders in their search for gainful employment.\textsuperscript{312}

As seen in Iowa’s Quad-Cities Safer Foundation’s Advancing Careers and Employment program (hereinafter “ACE”), assistance in finding employment for ex-offenders has resulted in reduced recidivism rates across the state.\textsuperscript{313} This program, which is funded by the federal government, served more than seventy citizens, including twenty-two of whom are “currently seeking occupational training.”\textsuperscript{314} The program attempts to place citizens in the areas of employment that require workers with a particular skill set, such as culinary arts and construction.\textsuperscript{315} In an effort to “close the employment gap,” ACE provides training programs through its partnership with local community colleges other groups.\textsuperscript{316} Sue Davison, director of the Safer Foundation’s ACE program, stated that the community is seeing “a shift in employers, when it comes to the bias employers have demonstrated in past years.”\textsuperscript{317}

This note proposes the establishment of a program where hiring managers of private companies volunteer their time to work in local career centers in order to increase the job-readiness of ex-offenders.\textsuperscript{318} It is important for private employers to get involved in local career centers because there are many individuals in New York State and across the country that need to “reintegrate back into society.”\textsuperscript{319} The reintegration of ex-offenders is a benefit for the community as a whole.\textsuperscript{320} If employers help ex-offenders, then these formerly incarcerated individuals can become “contributing tax payers instead of tax liabilities.”\textsuperscript{321} By participating in these programs, employers can help increase the job-readiness of ex-offenders, thus resulting in better candidates for their selection.\textsuperscript{322} Exposure to these career centers can also reduce the stigma that ex-offenders are a liability.\textsuperscript{323} This exposure will do so by showing hiring managers that these formerly incarcerated individuals are dedicated

\begin{thebibliography}{99}
\bibitem{312} New York State Career Centers, supra note 308.
\bibitem{313} Ritter, supra note 30.
\bibitem{314} Id.
\bibitem{315} Id.
\bibitem{316} Id.
\bibitem{317} Id.
\bibitem{318} See generally id. (explaining the implementation of similar local career centers).
\bibitem{319} Id.
\bibitem{320} Id.
\bibitem{321} Id.
\bibitem{322} Id.
\bibitem{323} See id.
\end{thebibliography}
and loyal potential employees who are eager to prove themselves and make better choices for their future.\textsuperscript{324} If as a community, we can help to get these individuals employed, they will have a sense of purpose because “what you do for a living is so tied with your identity.”\textsuperscript{325}

C. Tax Credit

In an effort to increase the likelihood of private employers volunteering in local career centers, New York State should implement a tax credit for employers who hire people with criminal records as well as partake in their local centers.\textsuperscript{326} Some employers are offered “insurance and tax incentives” for hiring individuals with a criminal record in order to offset the “risks of loss” employers may face.\textsuperscript{327} Employers are more likely to comply with policy movements, such as Ban the Box, when they receive a first-hand benefit similar to a tax credit.\textsuperscript{328} The amount awarded by the tax credit would be contingent on the number of ex-offenders that a company hires.\textsuperscript{329} There will be a minimum number of job opportunities awarded to ex-offenders, which all employers will have to fulfill in order to be eligible to receive the credit.\textsuperscript{330} As a further stride to increase the availability of job opportunities for ex-offenders, under the implementation of this tax credit, private companies would receive a higher tax break if they exceed the minimum requirement of employment opportunities provided to ex-offenders.\textsuperscript{331} Such a tax credit already exists on a federal level through the Work Opportunity Tax Credit program.\textsuperscript{332}

\textsuperscript{324} Id.
\textsuperscript{325} Id.
\textsuperscript{326} See generally Work Opportunity Tax Credit, supra note 31 (noting that a federal tax credit is available to employers who hire individuals from certain target groups).
\textsuperscript{327} Couloute & Kopf, supra note 43.
\textsuperscript{328} See id. (“Increasing the availability of such [tax benefits] would provide hesitant employers with added financial security.”).
\textsuperscript{329} See generally Alisiana Peters, What is the Work Opportunity Tax Credit (WOTC) and How Does it Benefit Employers?, HIRINGTHING, https://www.hiringthing.com/what-is-the-work-opportunity-tax-credit-wotc-and-how-does-it-benefit-employers/ (last visited Oct. 15, 2019) (stating that employers can claim up to 9,600 dollars for each employee under the WOTC program).
\textsuperscript{330} See generally Job Creation Tax Credits – 50 State Table, NAT’L CONF. OF ST. LEGISLATURES, http://www.ncsl.org/research/financial-services-and-commerce/job-creation-tax-credits.aspx (last visited Oct. 15, 2019) (noting that tax credits in various states require a minimum number of jobs to be offered to a target group for the employer to receive the tax credit).
\textsuperscript{331} See generally id. (noting that in some states the amount of tax credit a company receives is dependent on the number of jobs created).
The Work Opportunity Tax Credit program is administered by both the United States Department of Labor and the Department of Treasury, through the Internal Revenue Service.333 This program provides employers who hire "individuals from certain target groups who have consistently faced significant barriers to employment" with a tax credit.334 Among the ten335 groups targeted by the Work Opportunity Tax Credit program, are qualified ex-felons.336 A "qualified ex-felon" is defined as "a person hired within a year of [b]eing convicted of a felony or [b]eing released from prison from the felony."337

In order to claim the Work Opportunity Tax Credit, employers must first "obtain certification that an individual is a member of the targeted group."338 In order to certify that an individual is a member of a targeted group "employers [must] use [a] form to pre-screen and to make a written request to their state workforce agency."339 Once obtained, "[t]he credit is limited to the amount of the business income tax liability or social security tax owed."340 "A taxable business may apply the credit against its business income tax liability."341 Tax-exempt organizations are limited in the application of their credit to the "amount of employer social security tax owed on wages paid to all employees for the period the credit is claimed."342

The Work Opportunity Tax Credit program appears to have a "noticeable, positive impact on the short-term employment outcomes of disadvantaged groups."343 However, there is "no evidence [that] the WOTC [has] a positive impact on either employment rates or wages for

333. Id.
335. Work Opportunity Tax Credit, IRS https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit (last updated July 29, 2019). The Work Opportunity Tax Credit program target groups include: 1) Qualified IV-A Recipient; 2) Qualified Veteran; 3) Ex-Felon; 4) Designated Community Resident; 5) Vocational Rehabilitation Referral; 6) Summer Youth Employee; 7) Supplemental Nutrition Assistance Program (SNAP) Recipient; 8) Supplemental Security Income (SSI) Recipient; 9) Long-Term Family Assistance Recipient; and 10) Qualified Long-Term Unemployment Recipient. Id.
336. Id.
337. Id.
338. Id.
340. Work Opportunity Tax Credit, supra note 335.
341. Id.
342. Id.
targeted groups in the long term.”344 In fact, it can be argued that “the costs of the WOTC might outweigh its benefits.”345 One main potential issue with the WOTC is employers fraudulently trying to inflate “the total amount of tax credits they receive,” which can occur through either displacement or churning.346 Displacement may occur when “employers fire non-qualified employees in order to hire qualified employees” while churning occurs when “employers fire qualified employees who are no longer eligible ... to hire ‘fresh’ qualified employees.”347 However, a study by the Government Accountability Office, directly contradicts this argument finding that “93 percent of survey firms thought that displacement and churning were not cost-effective.”348 Although the WOTC provides more short-term benefits for employees, it has been found to “increase[] employment rates among eligible groups by around 12.6 percentage points.”349

Through programs such as the Work Opportunity Tax Credit program, private employers would be able to receive a tax credit for providing employment to ex-felons.350 An ex-felon’s wages can be offset by up to $2,4000 under the Work Opportunity Tax Credit.351 The opportunity to gain added financial security would significantly increase the likelihood that private employers will engage with and volunteer in their local centers, thus decreasing unemployment rates amongst ex-offenders.352

CONCLUSION

The lack of employment opportunities for individuals with a criminal record has become a severe problem in our society.353 The lack of gainful employment opportunities for ex-offenders increases the likelihood of recidivism.354 Movements, such as Ban the Box, provide job applicants a

344. Id.
345. Id.
346. Id.
347. Id.
348. Id.
349. Qian, supra note 343.
350. Work Opportunity Tax Credit Fact Sheet, supra note 332.
352. See Couloute & Kopf, supra note 43.
353. See generally Dunne, supra note 39 (stating that keeping the box on employment applications can make the community less safe).
354. Id.
fair chance at employment by removing the criminal conviction history question from job applications and delaying background checks until later in the hiring process.\textsuperscript{355} By doing this, these policies allow employers to evaluate job applicants without the attached bias of a criminal record.\textsuperscript{356}

Although beneficial for the employment of ex-offenders, Ban the Box laws create a problem when they are not uniform.\textsuperscript{357} Various cities across New York State have different requirements, if any at all, when it comes to Ban the Box policies.\textsuperscript{358} The differing standards across New York State make it more difficult for employers to comply with the law, thus leaving many ex-felons in jurisdictions that do not prohibit employers from discriminating against them.\textsuperscript{359} New York should follow other states such as California, who have recognized the strength of a uniform Ban the Box law, in order to ensure employment opportunities in the public and private sector.\textsuperscript{360} Furthermore, New York should encourage private employers to volunteer at their local career centers in order to provide them with the opportunity to see first-hand how valuable, hard-working, and determined many ex-offenders are.\textsuperscript{361} As displayed through many studies, lack of gainful employment is closely related to an ex-offender’s likelihood to engage in criminal activity.\textsuperscript{362} Thus, it is imperative for employers to understand the importance of providing job opportunities for ex-offenders in order to decrease the overall recidivism rates across New York State.\textsuperscript{363} Finally, New York should implement incentives for private employers in order to increase their role in breaking down barriers preventing ex-offenders from receiving gainful employment.\textsuperscript{364} The combination of this three-part solution will create more job-ready applicants and allow employers to evaluate applicants based on their

\textsuperscript{355} See N.Y.C. ADMIN. CODE § 8-107 11-a.
\textsuperscript{356} Id.
\textsuperscript{357} Robert S. Nichols & Amber K. Dodds, The Case for Ban-the-Box Laws, 16 STRATEGIC H.R. REV. 279, 279 (2017) ("A uniform standard for ban-the-box requirements applicable throughout the USA would allow for the intended public policy interests to be effectively served without causing employers to face the significant costs associated with a patchwork of standards across different states and localities.").
\textsuperscript{358} See id.
\textsuperscript{359} Id.
\textsuperscript{360} See Dodge, supra note 144; see also Craigie, supra note 1.
\textsuperscript{361} See Ritter, supra note 30.
\textsuperscript{362} Dunne, supra note 39.
\textsuperscript{363} See id.; see also Ritter, supra note 30.
\textsuperscript{364} See generally Work Opportunity Tax Credit, supra note 31 (explaining the benefits of a federal tax credit).
qualifications rather than their criminal history, thus resulting in a decrease in workplace discrimination against ex-offenders.365

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HOFSRA LABOR & EMPLOYMENT LAW JOURNAL

Volume 37, No. 2
Spring 2020

Hempstead, New York 11549
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Published two times per year by the Hofstra Labor & Employment Law Journal. The current subscription rate is twenty-five dollars per volume. Subscription renewals will be automatic unless notice to the contrary is received. All communications concerning subscriptions should be addressed to: Business Administrator, Hofstra Labor & Employment Law Journal, Hofstra University School of Law, 121 Hofstra University, Hempstead, New York 11549. Back issues can be obtained by contacting William S. Hein & Co. Inc., 2350 North Forest Road, Getzville, New York 14068, 800-828-7571, or in PDF format through HeinOnline (http://heinonline.org).

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