

H. 228: Discrimination Against People with Criminal Records

I am here today about the general discrimination that occurs against people with criminal records in employment, housing, and benefits. While this Committee, doesn't address occupational licensing requirements, the significant barriers to securing a job have particularly severe consequences.

Employment is critical to help formerly incarcerated people gain economic stability after release and reduces the likelihood that they return to prison, promoting greater public safety to the benefit of everyone. But despite the overwhelming benefits of employment, people who have been to prison are largely shut out of the labor market.

In 2016, Governor Shumlin signed into law, H 261, the Ban the Box legislation that this Committee successfully spearheaded. It was a great start, but as soon as we got beyond the box, the discrimination kicked in.

It's now time to go beyond the box.

The Problems this Bill Addresses:

GENERAL DISCRIMINATION:

The long-term impact of a criminal record will keep many people from **obtaining employment, accessing housing, higher education, loans, and credit – even if they've paid their debt to society, turned their lives around, are qualified, and are unlikely to reoffend.**

EMPLOYMENT DISCRIMINATION:

The challenges faced by the individual and the family during incarceration do not end when the individual leaves prison. Every year, more than 600,000 Americans are released from federal and state prison and face the challenging task of re-integrating into society. Securing good employment is exceedingly difficult for the formerly incarcerated, as they have been out of the labor force for the period of their incarceration and, perhaps more importantly, have criminal records that may make them ineligible for some jobs and expose them to discrimination in hiring for others.

- Formerly incarcerated individuals face substantial obstacles to employment when they leave prison, from general discrimination in hiring, to occupational licensing requirements that exclude those with criminal records from specific professions.

- **More than two thirds of those incarcerated were employed before they were arrested and their incarceration, and/or involvement with the criminal justice system have significant economic implications for their families.**
- According to the Prison Policy Institute, one of the primary concerns for people being released from prison is finding a job. Formerly incarcerated people are almost five times more likely than the public to be unemployed, and many who are employed remain relegated to the most insecure jobs.
- Research has repeatedly found **that employers discriminate against those with criminal records, even if they claim not to.** Although employer's express willingness to hire people with criminal records
- Evidence shows that having a record reduces employer callback rates by 50%. What employers say appears to contradict what they do when it comes to hiring decisions.
- Research has shown the adverse impact that time in prison or a felony conviction can have on a person's employment prospects. In addition to the stigma attached to a criminal record, these impacts can include the erosion of basic job skills, disruption of formal education, and the loss of social networks that can improve job-finding prospects.
- It can be difficult for those with a criminal record of any kind to find employment. Many employers believe that once a person has been convicted of a crime, that person will always be unreliable.
- Those with felony convictions also face legal restrictions that lock them out of many government jobs and licensed professions.
- Research has also shown that formerly incarcerated people are more likely to be "active" in the labor market than the public.
 - Among 25–44-year-old formerly incarcerated people, 93.3% are either employed or actively looking for work, compared to 83.8% among their general population peers of similar ages.
- **The formerly incarcerated represent a significant proportion of the overall unemployed.**
 - **Unemployment among formerly incarcerated people is five times higher than among the public.**
- Unemployment among this population is a matter of public will, policy, and practice, not differences in aspirations.
 - **Among unemployed men between the ages of 25 and 54, more than one-third (34 percent) have been convicted of crimes.**
 - **A 2008 study by The Center for Economic Policy and Research found, "the population of people with felony convictions lowered the official employment rate among all men by as much as 1.7 percentage points."**
 - **The same study concluded that the United States "lost as many as 1.7 million workers due to employment barriers for people with criminal**

- records (such as limitations on government employment and professional licensing) —resulting in a staggering 0.9 percentage point reduction in the nation’s employment rate.”**
- Assuming a mid-range 12 percentage-point employment penalty for this population, recent research finds that there **was a 0.9 to 1.0 percentage-point reduction in the overall employment rate in 2014, equivalent to the loss of 1.7 to 1.9 million workers.**
 - **In terms of the cost to the economy, this suggests a loss of about \$78 to \$87 billion in annual GDP.**
 - **The Center for Economic Policy and Research** Used a nationally representative dataset, the first ever estimate of unemployment among the 5 million formerly incarcerated people living in the United States.
 - **One year following release, between 60 percent and 75 percent of formerly incarcerated people are still unemployed.**
 - **The unemployment rate for formerly incarcerated people is nearly five times higher than the unemployment rate for the general United States population,** and substantially higher than even the worst years of the Great Depression.
 - **These inequalities persist even when controlling for age. Among working-age individuals (25-44 in this dataset), the unemployment rate for formerly incarcerated people was 27.3%, compared with just 5.2% unemployment for their public peers.**
 - That such a large percentage of prime working-age formerly incarcerated people are without jobs but wish to work suggests structural factors — like discrimination — play an important role in shaping job attainment.
 - Given the significant size of this population, the ability for these individuals to attain economic success after they leave prison has tremendous implications for our economy and economic mobility.
 - Even employers in low-risk industries tend not to **hire** applicants with criminal records. This type of discrimination fails to account for the many people who learn from their mistakes.

Race and Gender:

- Data from the U.S. Dept. of Justice shows these high rates of incarceration affect people of color disproportionately:
 - **A third of black men and nearly a fifth of Latino men born in 2001 will go to prison in their lifetime.**
 - Compared to white men, **black men are six times more likely to be incarcerated, and Hispanic men are 2.5 times more likely to be incarcerated.**
- The impact of a criminal record on employment is compounded by racial bias for black job applicants.
 - **Research indicates that only 5 percent of black job applicants with criminal records receive callbacks – significantly less than the 17 percent of white job applicants with criminal records (and the percent of black applicants *without* a criminal record).**
- **The Center for Economic Policy and Research** analysis shows that formerly incarcerated people of color and women face the worst labor market disadvantages despite being more likely to be looking for jobs.
- Formerly incarcerated Black women in particular experience severe levels of unemployment, whereas white men experience the lowest.
 - Overall, working age “prison penalties” increase unemployment rates anywhere from 14 percentage points (for white men) to 37 percentage points (for Black women) when compared to their general population peers.
- Findings mirror prior research establishing that both race and gender shape the economic stability of criminalized people.
- The Brookings Institute Data showed:
 - About one third of all 30-year-old men who aren’t working are either in prison, in jail, or are unemployed ex-prisoners.
 - Of the 17 percent of men age 30 that have no earnings in 2012, about 3.5 percent were in prison or jail and another 3 percent are former prisoners without work—combined, they make up more than a third of all non-working men age 30.
 - Among men born to parents in the bottom half of the income distribution, the share of non-working men is closer to 50 percent. And these figures exclude any impairment to employment associated with having served time in jail (rather than prison) or from the 30 percent of felony convictions that do not result in incarceration.

- In short, the difficulties that many men face in the labor market, particularly low-income men seeking to move up the economic ladder, are closely related to their involvement in the criminal justice system.
- **Formerly incarcerated individuals who do secure jobs make less money than those without criminal records.**
- **Incarceration diminishes potential earnings for the incarcerated person, as well as the savings of his or her family members, leading to the lack of capital that can impact generations.**
 - Previously incarcerated individuals' hourly wages are, on average, 11% lower, and they realize 40% off annual earnings
- According to the **Brookings Institute**:
 - Ex-prisoners fare poorly in the labor market. In the first full calendar year after their release, **only 55 percent reported any earnings, with the median earnings being \$10,090.**
 - Of those with earnings, **4 percent earned less than \$500,**
 - **32 percent earned between \$500 and \$15,000,** and
 - **only 20 percent earned more than \$15,000.**

What the Research Shows about Hiring this Population:

- Exclusionary policies and practices are responsible for these labor market inequalities.
- Research shows that those with prior criminal justice system contact want to work and that hiring them can benefit both employers and the public.
- The evidence illustrates that broad stereotypes about people with criminal records have no real-world basis.
 - Research based on 1.3 million United States military enlistees **shows that those with criminal records were promoted more quickly and to higher ranks than other enlistees and had the same attrition rates due to poor performance as their peers without records.**
 - A study of job performance among call center employees found that individuals with criminal records had longer tenure and were less likely to quit than those without records.
 - One longitudinal study out of Johns Hopkins Hospital found that after “banning the box” on initial applications and **making hiring decisions based on merit and the relevance of prior convictions to jobs, hired applicants with criminal records exhibited a lower turnover rate than those with no records.**

Housing:

A new report from the National HIRE Network examines criminal record-based housing restrictions across the country and describes what is being done by a few jurisdictions and the federal government to put the brakes on the cycle of conviction, homelessness, and recidivism. The report finds that:

- There is a revolving door between prison and homelessness, which has been a well-documented feature of our criminal justice system.
- This occurs not only to those returning from prison, but also to people who have a conviction for a relatively minor offense.
- This happens in some instances to people who were only charged with an offense.
- The results in all these instances can easily mean a lifetime of housing insecurity, both for the individuals and their families.
- Although record-based housing restrictions are implemented by both private and public housing providers, it is public housing restrictions that pose the biggest risk to individuals with criminal records since their statistically lower income makes them more likely to rely on federal subsidies for housing. Attached to those subsidies are several federally mandated restrictions, including a permanent and automatic ban for anyone convicted of producing methamphetamine in public housing or of a sex offense requiring lifetime registration, and permissible eviction followed by a three-year bar (that may be reduced) for drug-related criminal activity.
- The report notes that the federal restrictions are just the beginning. **Federal law explicitly permits subsidized housing providers to reject applicants if a household member has engaged in criminal activity that is violent, drug-related, or that “would adversely affect the health, safety, or right to peaceful enjoyment of the premises” and that was committed within a “reasonable time” before applying. These restrictions provide enormous discretion to determine who gets in and who gets shut out.**

Proposal:

This bill proposes to prohibit discrimination in employment, housing, public accommodations, financial services, insurance, and social services that is based on an individual's criminal history or information related to an individual's contacts with the criminal justice system.

Recent Support Nationally from Business:

The Business Roundtable, which represents the CEOs of major U.S. companies, issued corporate and public policy recommendations to advance racial equity and justice in the wake of 2020's triple crises disproportionately impacting communities of color: pandemic, recession, and protests in response to police violence in March, 2021. Their policy recommendations related to their justice system report was developed with the assistance of the Collateral Consequences Resource Center, who provided general advice in connection with the Roundtable's consideration of second-chance policies.

- The Roundtable has committed to partnering on the creation of a business coalition to advance second chance hiring by employers.
- Coalition members will exchange best practices, learn from subject matter experts, and develop and deploy tools to improve second chance hiring, as part of a workforce diversity strategy.
- Passage of 'Ban the Box' legislation in all states, which would require removal of criminal records inquiries from employment applications.
- The Roundtable also supports reforms to state statutes that prohibit hiring or licensure of individuals who have been convicted of, or entered pretrial diversion for, certain crimes unrelated to public safety.

POLICIES TO CONSIDER:

Improving the wellbeing of formerly incarcerated people — and increasing equity in all communities. Convincing employers that people with criminal records are good workers is not enough, policy efforts are needed that address the underlying structural sources of inequality shaping the lives of criminalized people in Vermont.

- ✓ **Implement Anti-Discrimination Enforcement** If a candidate’s criminal record is not related to the responsibilities of the job, it should not be used to legally disqualify anyone.
- ✓ Require employers to formally state how a candidate’s criminal record would directly impact their ability to perform a specific job employee from negligent hiring.
- ✓ Prohibit employers and state licensing agencies from disqualifying a person based on a prior conviction rather than considering the relationship of the crime to the job, information pertaining to rehabilitation, and time elapsed since conviction.
- ✓ Invest in businesses that employ those with criminal records.
- ✓ State contracts should go to companies that either make an explicit effort to hire those with conviction records or that have structures in place to prevent discrimination against those with conviction records.
- ✓ Contracted companies that discriminate against those with conviction records should lose their contracts.

- ✓ **Ensure that those with conviction records are eligible for safety net programs.** While some people with conviction records have family or other support structures to help them get by until they find employment, many have no support upon release. Additionally, because many can only find low-wage employment, additional supports like subsidized housing are still necessary.
- ✓ When safety net programs exclude those with conviction records, it can make it impossible for those with records to even scrape by, let alone find any measure of financial security.
- ✓ Additionally, those who are eligible for benefits should be able to enroll prior to release.
- ✓ **Create a Vermont version of limitation on employer liability.** Employers will not be held liable for negligent hiring if they have made “a reasonable, good faith determination” that certain factors favored the hiring or retention of an applicant with a criminal record, including nature of the crime, duties of the position, time elapsed since conviction, information relating to rehabilitation and good character, and “the public policy that it is generally beneficial for persons with criminal records to obtain employment.

APPENDIX A: What Other Jurisdictions are Doing:

Feds and other States have addressed:

(From Collateral Consequences Resource Center [Many Roads](#) report)

Federal Government

Effective in 2021, federal agencies and contractors may not inquire into an applicant’s criminal history until after a conditional offer has been made.

The Equal Opportunity Employment Commission has interpreted Title VII of the Civil Rights Act of 1964 to bar employers from discriminating against individual based on their criminal history, absent justifying business necessity. At the same time, federal law also disqualifies individuals with certain convictions from employment in the banking and transportation sector, and in a wide variety of state-licensed jobs in healthcare and education.

Ban-the-box in federal employment: In December 2019, Congress passed the Fair Chance Act as part of the National Defense Authorization Act of 2020 ([S.1790](#)), amending Titles 2, 5 and 28 of the U.S. Code to prohibit employers in all three branches of the federal government, and private-sector federal contractors, from asking about job applicants’ arrest and conviction record until a conditional offer of employment has been extended, an approach that has become known as “ban the box”. The Act’s prohibition on pre-offer inquiries extends to records that have been “sealed or expunged pursuant to law,” and sealed records of juvenile adjudications.

Certain types of employment would be excepted, including employment that otherwise requires inquiry into criminal history, and employment in the military, in law enforcement, and in national security. The Director of OPM is permitted to designate additional exemptions, including positions that involve “interaction with minors, access to sensitive information, or managing financial transactions.” § 9202(B) and (C). The law contains provisions for complaint and appeal procedures, and for sanctions. It is effective two years after signing, in December 2021.

In addition to extending ban-the-box requirements to employment on federal contracts, including defense contracts, it would also prohibit agency procurement officials from asking persons seeking federal contracts and grants about their criminal history, until an “apparent award” has been made.

Post-offer, non-conviction records could continue to be the subject of inquiry by federal hiring and contracting authorities, as well as any records that have been sealed or expunged – but only if they are available to criminal justice agencies for

background checks. (The Fair Chance Act states that it does not authorize post-offer consideration of the broader set of records “sealed or expunged pursuant to law” or juvenile records that would be specifically barred from pre-offer inquiry under § 9201.) 5 U.S.C. § 9206.)

Federal laws regulating state and private employment.

1. EXTENSION OF PANDEMIC RELIEF TO PEOPLE WITH A CRIMINAL RECORD

CCRC has collected an extensive archive of materials relating to federal assistance to employers and small businesses during the pandemic, through the Paycheck Protection Program and EIDL, and to individuals through tax rebates. The National Employment Law Project has also published a fact sheet on how individuals with a criminal record are treated by federal pandemic recovery efforts. See Han Lu, *Radical Inequality, Records, and Recovery* (July 28, 2020), <https://www.nelp.org/publication/radical-inequality-records-recovery/>.

2. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

There is no general provision in federal law that prohibits consideration of a criminal conviction in connection with employment or licensure. The Equal Employment Opportunity Commission (EEOC) has taken the position that “an employer’s policy or practice of excluding individuals from employment based on their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity.” See EEOC Guidance No. N-915, February 4, 1987, Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq*

STATE INFORMATION

Employment Discrimination because of Criminal Convictions

The National Employment Law Project keeps a tally of new “ban-the-box” laws, and reported:

- In September 2020 that **36 states and more than 150 municipal and county ordinances now require public employers to consider applicants’ qualifications before their criminal histories,**
- **Fourteen have extended these limits to private employers.**
- **Until last year, there were only four states that had fully incorporated criminal record into their fair employment law as a prohibited basis of discrimination. These states (New York, Wisconsin, Hawaii, and California) provide that employers can only disqualify a person based on their record if it meets a specific standard, such as being related to the work in question or posing an unreasonable risk to public safety. Illinois has become the fifth state.**

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Hawaii: When Hawaii extended its Fair Employment Practices law to criminal records in 1998, it was the first state to identify and address a concern about threshold disqualification based on criminal background checks. In Hawaii, a conditional offer may be withdrawn only if a conviction within the most recent 10 years bears a “rational relationship to the duties and responsibilities of the position. Its four-part enforcement mechanism is still a model for other states:

- To prohibit application-stage inquiries about criminal history
- After inquiry is made, to prohibit consideration of non-convictions and certain other records that are categorically deemed “unrelated” to qualifications.
- To apply detailed standards to consideration of potentially relevant records, and
- To enforce these standards and procedures through the general fair employment law.

In 2020, **Hawaii** shortened the lookback period in which a person may be disqualified based on conviction under its fair employment law, to seven years for felonies and five years for misdemeanors, excluding periods of incarceration ([SB 2193](#)). Hawaii includes discrimination based on conviction record in its more general fair employment practices law, and under preexisting law it is an unlawful employment practice to inquire into arrest and conviction records before the employee receives a conditional offer of employment, and an employer could withdraw an offer only if a conviction within the previous 10 years (exclusive of any period of incarceration) “bears a rational relationship to the duties and responsibilities of the position.” Under this new law, 10-year period is reduced to 7 years for felonies and 5 years for misdemeanors.

California: Fair employment standards, including ban-the-box:

Ban-the-box: Effective January 1, 2018, a new fair employment law significantly limits discrimination against applicants for public and private employment based on their criminal history, repealing an earlier more limited “ban-the-box” law applicable to public employment only. See [Cal. Gov’t Code § 12952](#) (added by [AB-1008 \(2017\)](#)). The new law makes it an “unlawful employment practice” under the state’s Fair Employment and Housing Act (FEHA) for a covered employer to inquire about an applicant’s criminal history until after a conditional offer of employment is made. “Covered employers” are defined in Cal. Gov’t Code § 12952(d) to exclude employers with fewer than five employees, and those required by law to conduct background checks.

California’s Fair Employment and Housing Act (FEHA) extends criminal history protections to both public and most private employers, delays a background check until after an offer of conditional employment is made, and thereafter prohibits consideration of non-conviction records, as well as convictions that have been dismissed or set aside, pardoned, or been the subject of a judicial Certificate of Rehabilitation. In all cases,

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employers must conduct individualized assessments to determine whether a conviction has a “direct and adverse relationship with the specific duties of the job,” notify an applicant in the event of denial and of the record relied upon (though no further reasons need be given) and allow the applicant to respond. Violations constitute an “unlawful employment practice” that may lead to administrative enforcement by the Department of Fair Employment and Housing and ultimately to court. California bars inquiry until after a conditional offer has been made, prohibits consideration of non-conviction records and records that have been the subject of judicial relief, provides considerable procedural protections, and has the strongest standard for testing the relevance of a conviction (“direct and adverse relationship”).

The District of Columbia was the first in this century to enact what has come to be called a “fair chance” approach to hiring people with a criminal record, regulating public employment in 2010 and a few years later extending similar rules to private organizations employing more than 10 people. DC also enacted robust fair chance employment protections that apply to both public and many private employers, but its law stops short of authorizing individuals dissatisfied with action by the Office of Human Rights to go to court.

Public employers and private employers with more than ten employees may not ask about or consider criminal history until a conditional offer is made. Thereafter, they may not inquire into arrests or charges that are not pending and that did not result in a conviction and must consider specified criteria before disqualifying an applicant for employment or terminate an existing employee based on criminal record. An employer may withdraw a conditional offer of employment based on an applicant’s conviction history only for a “legitimate business reason” that is “reasonable” considering the seven factors outlined above. The law is enforced administratively through the Office of Human Rights, but lawsuits are specifically disallowed.

Under a law enacted in 2021, occupational and professional licenses in health and non-health-related fields may not be denied based on conviction of a crime unless it is “directly related” to the licensed occupation, as determined by a detailed set of standards. DC prohibits inquiry about a record until an applicant has been found otherwise qualified and then prohibits consideration of certain records (including non-conviction and sealed convictions) and provides procedural protections in the event of denial. The 2021 law also establishes a pre-application petition process for individuals with a record to determine their eligibility and requires the Mayor to report annually to the Council on each board’s record.

Limitation on employer liability: Under the Re-entry Facilitation Amendment Act of 2012, employers will not be held liable for negligent hiring if they have made “a reasonable, good faith determination” that certain factors favored the hiring or retention of an applicant with a criminal record, including nature of the crime, duties of the position, time elapsed since conviction, information relating to rehabilitation and good

character, and “the public policy that it is generally beneficial for persons with criminal records to obtain employment.” See D.C. B19-889 (2012).

Illinois amended its Human Rights Act in 2019 to prohibit employment discrimination based on “an arrest not leading to a conviction, a juvenile record, or criminal history record information ordered expunged, sealed, or impounded.” [S1480](#), has now taken the final step of incorporating criminal record fully into the law’s structure, which includes authorization to file a lawsuit in the event administrative enforcement is unsatisfactory. **A preliminary analysis of the new Illinois law indicates that it now offers more protection for more people with a criminal record in the employment context than any state in the Nation other than California.** The new Illinois law makes it unlawful for any employer, employment agency, or labor union to use a conviction record “as a basis to refuse to hire” or to take other employment related adverse action, unless “there is a substantial relationship between one or more of the previous criminal offenses and the employment sought or held” or “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.” [775 Ill. Comp. Stat. 5/2-103.1\(A\)](#). “Substantial relationship” is defined to mean “a consideration of whether the employment position offers the opportunity for the same or a similar offense to occur.” In deciding under subsection (A), the employer must consider a variety of factors including the length of time since conviction, the extent of the record, the nature and severity of the conviction itself and its relationship to the safety and security of others, the age of the employee at the time of the offense, and evidence of “rehabilitation efforts.” 5/2-103.1(B). If the employer reaches a preliminary determination of disqualification or other adverse action, the employer must give written notice and an opportunity for respond, and in the event of a final determination an explanation of the reasons.” 5/2-103.1(C).

The new Illinois law compares well with the laws in the four other states that incorporate criminal record into their fair employment law. Although the Illinois “substantial relationship” standard is not as protective as **New York’s** “direct relationship” standard, Illinois law elaborates the standard with the same public safety emphasis and offers more procedural protections in the form of reasons and an opportunity for reconsideration. Also, unlike New York, it prohibits any consideration of non-conviction records and sealed or expunged convictions. **Hawaii** has a weaker “rational relationship” standard and also excludes a large number of employments, although it bars inquiry into criminal record until after a conditional offer has been made and thereafter prohibits any consideration of non-conviction records, as well as any conviction more than seven years in the past for felonies and five years for misdemeanors (as reduced in 2020). **Wisconsin’s** law is the weakest of the five: it applies a “substantial relationship” standard but does not elaborate it, and it offers no procedural protections to applicants or existing employees other than administrative enforcement of this substantive standard.

Colorado, Connecticut, and Nevada have recently prohibited some employers from considering certain criminal records, but those prohibitions are not fully integrated into a

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broader nondiscrimination law. Other states are still catching up, with many stalled at the “ban the box” stage.

Connecticut: The Connecticut Fair Employment Practices Act prohibits discrimination against a person based upon their criminal record by the state or any of its agencies. Conn. Gen. Stat. §§ 46a-80(a), (c). With limited exceptions relating to law enforcement and certain mortgage-related licenses, public employers and state licensing agencies may not disqualify a person “solely because of “a prior conviction but must consider: 1) the nature of crime and its relationship to the job; 2) information pertaining to rehabilitation; and 3) time elapsed since conviction. A person who has been granted a “provisional pardon” or “certificate of rehabilitation” (see Section II supra) is presumed to be rehabilitated. “If an application is denied based on a conviction for which the applicant has received a provisional pardon or certificate of rehabilitation, the state or any of its agencies, as the case may be, shall provide a written statement to the applicant of its reasons for such denial.” Conn. Gen. Stat. §§ 46a-80(a), (c). The public policy reflected in these provisions is that “the public is best protected when criminal offenders are rehabilitated and returned to society prepared to take their places as productive citizens and that the ability of returned offenders to find meaningful employment is directly related to their normal functioning in the community.” Conn. Gen. Stat. § 46a-79. If a conviction of a crime is used as a basis for rejection of an applicant, “such rejection shall be in writing and specifically state the evidence presented and reasons for rejection.” A copy of such rejection shall be sent by registered mail to the applicant. § 46a-80(d).

Massachusetts: Bans blanketed employer discrimination: Criminal records are not good proxies for employability Massachusetts prohibits consideration of non-convictions and some misdemeanors. Additionally, because of racially disproportionate incarceration rates, organizations who discriminate against people with criminal records may also be contributing to racial discrimination and are therefore subject to litigation under Title VII of the Civil Rights Act of 1964.

“Race, religious creed, color, national origin, ancestry, sex, gender identity, sexual orientation, disability, genetic information, age 40 and above, pregnancy, criminal record, lie-detector test, victim of sex offense or domestic violence.”

New York prohibits all employers from denying employment based on a criminal record unless there is a direct relationship between the offense and the job, or unless hiring the person would create an unreasonable risk to property or safety.

“Age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, domestic violence victim status, pregnancy, sealed arrest or conviction record, retaliation, medical marijuana* (starting July 1, 2015).

In 2020, 6 states expanded access to employment for people with criminal records. Two states (**New Hampshire** and **Virginia**) enacted a ban-the-box law applicable to public employment, while **North Carolina**'s governor issued a broad executive order that not only prohibited public employers from making application-stage inquiries, but also established standards for considering criminal record thereafter. **Maryland**'s legislature overrode a governor's veto to apply application-stage limits on inquiry to private employers with more than 15 employees.

At the end of 2020, there are still only four states (**California**, **Hawaii**, **New York**, and **Wisconsin**) that include discrimination based on criminal record as part of their general fair employment scheme, and all but California's law were enacted many years ago. **Colorado**, **Connecticut**, and **Nevada** have, like **Illinois**, more recently prohibited some employers from considering certain criminal records, but those prohibitions are not fully integrated into a broader nondiscrimination law.

However, as noted in our [Many Roads](#) report, "Few of these laws include the kind of robust post-inquiry standards that make the 2020 North Carolina Executive Order described below stand out."

North Carolina's governor issued an executive order ([EO 158](#)), which directs all state agencies to remove questions about criminal record from employment application forms, and to defer inquiries until "the completion of the initial job interview." The order further prohibits agencies from considering the following: (i) expunged or pardoned convictions, (ii) charges or convictions that do not relate to the underlying employment matter, (iii) arrests not resulting in a conviction, or (iv) charges resulting in dismissal or not guilty. State employment decisions "shall not be based on the criminal history of an individual unless that criminal history is demonstrably job-related and consistent with business necessity associated with the position, or if state or federal law prohibits hiring an individual convicted of certain crimes for a particular position."

Nevada prohibits discrimination in public employment only and permits inquiry into criminal record after the first interview, it categorically prohibits consideration not only of non-conviction and sealed records, but also of misdemeanors that did not carry a prison sentence. Nevada law provides that failure to comply with its procedures is an unlawful employment practice and authorizes complaints to be filed with the Nevada Equal Rights Commission.

Maryland enacted a ban-the-box law applicable to private employers with more than 15 employees, overriding Governor Hogan's veto. The law prohibits inquiry into an applicant's criminal record until the first interview; and authorizes civil penalties. Certain employment is excepted. The law specifically does not preclude local jurisdictions from imposed stricter standards ([HB 994](#)). Md. Code Lab. & Empl. § 3-1403.

New Hampshire prohibited an application-stage inquiry into criminal record in public employment prior to the initial interview, "unless the public employer is required to screen applications for specific criminal convictions because it is prohibited from hiring

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those with such convictions under state or federal law” ([HB 253](#)). N.H. Rev. Stat. Ann. § 275:37-c(II).

Utah removed an absolute barrier based on certain convictions for employment with vulnerable populations, if the applicant will be serving only adults whose only impairment is a mental health diagnosis. In addition, certain convictions cannot be disqualifying after 10 conviction-free years for felonies, and three years for misdemeanors ([HB 436](#)).

Virginia prohibited inquiry into criminal record by public employers prior to interview. Excepts law enforcement employment and certain other sensitive employments ([HB 757](#)). Va. Code Ann. §§ 2.2-2812.1, 15.2-1505.3. Virginia added crimes to the list for which an exception is available for employment with a substance abuse or mental health program at community services boards and private providers of behavioral health services licensed by the Department of Behavioral Health and Developmental Services. This law also allows the Department to hire individuals convicted of various crimes at a state facility if the Department determines the individual has been rehabilitated successfully and is not a risk to those receiving services ([HB 1540](#)). Virginia also decriminalizes marijuana possession, restricted public access to records relating to past arrests, charges, or convictions for this offense, prohibited employers and educational institutions from inquiring about them, and prohibited state and local officials from requiring an applicant for a license, permit, registration, or governmental service to disclose information about them ([SB 2 / HB 972](#)). Va. Code Ann. §§ 18.2-250.1; 19.2-389.3.

APPENDIX B: Links to Reports and Sources:

The National Employment Law Project has published a summary of the law's provisions and a set of FAQs. <https://www.nelp.org/publication/faq-fair-chance-to-compete-for-jobs-act-of-2019/>.

https://jobgap2013.files.wordpress.com/2016/02/ajs_job_after_jail_report_final_pdf.pdf

https://irle.berkeley.edu/files/2020/05/Harding_Jara-Cerda-Elster-brief.pdf

https://cdn.americanprogress.org/content/uploads/2017/07/26130154/FairChanceHiring-report.pdf?_ga=2.254472264.1997938109.1616099277-150329980.161609927

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Rep. Barbara Rachelson

March 2021

Recent litigation under Title VII is described *in* Love, Roberts, and Logan, *Collateral Consequences of Criminal Convictions: Law, Policy & Practice* at §§ 6:1 through 6:13 (2018-2019). See also Michelle Natividad Rodriguez & Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, National Employment Law Project (2011), at 9-12, available at http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1; see also NELP, Civil Rights and Consumer Protection Litigation Docket, available at <http://www.nelp.org/page/-/SCLP/2011/CivilRightsConsumerProtectionLitigationDocket.pdf?nocdn=1>.

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<http://www.nap.edu/catalog/18613/the-growth-of-incarceration-in-the-united-states-exploring-causes>. ⁶ The Sentencing Project. “Americans with Criminal