



California's new Ban the Box law

A step forward in battling racial inequality in the workplace

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On January 1, 2018, California's new and improved "Ban the Box" legislation came into effect, prohibiting employers with over five employees from considering criminal conviction history until after a conditional offer of employment has been made, and imposing new notice and disclosure requirements if this information is obtained and utilized in the hiring decision.

At first glance, this may seem like an overly restrictive encumbrance on employers' ability to hire reliable and trustworthy candidates. After all,

considering all the *bad* reasons not to hire someone (e.g., based on race, religion, national origin, gender, sexual orientation, etc.), a criminal history seems like a pretty *good* one. However, upon closer inspection, there is a compelling rationale for the passage of this progressive new bill (AB 1008).

Negative impact on blacks and Hispanics

"Ban the Box" refers to an international campaign generally aimed at persuading employers to remove the check box from their hiring applications which asks whether applicants have a criminal record so that employers will consider a job candidate's qualifications first –

without the stigma of a conviction or arrest record. Approximately one in three adults in the United States has an arrest or conviction in their past, according to the National Employment Law Project (NELP).¹

Traditionally, any type of criminal history makes finding a job much more difficult, as arrests and convictions show up on standard background checks and questions about criminal history have typically been fair game in employment applications. However, if you are black or Hispanic, you are significantly more likely to have your employment prospects negatively affected by a criminal record, as blacks and Hispanics make up a much higher percentage of those with a



criminal history than whites. In fact, just recently on April 5, 2018, Target agreed to a \$3.7 million settlement over a discrimination lawsuit in which job applicants as well as the NAACP Legal Defense Fund sued the large retail chain, alleging that Target's use of criminal background checks discriminated against black and Hispanic applicants. The lawsuit alleged that the company's practice of automatically rejecting people who have been convicted of crimes has a disproportionate effect on blacks and Hispanics, due to their higher rates of incarceration. As part of the settlement, Target agreed to have experts weigh in on the company's current guidelines, presumably to evaluate the impact its hiring policies have on minority applicants.

In "The Color of Justice: Racial and Ethnic Disparity in State Prisons,"² author Ashley Nellis, Ph.D., cites United States Department of Justice data to demonstrate that incarceration rates per 100,000 by race show that within that number, 201 white Californians are incarcerated at any one time, compared to 385 Hispanic Californians, and 1,767 black Californians. Nationally, blacks are incarcerated at a rate that is a staggering 5.1 times that of whites, and Hispanics "are held in state prisons at an average rate of 378 per 100,000, producing a disparity ratio of 1.4:1 compared to whites."

In California, approximately one out of every 22 black males is incarcerated, and the numbers cited above do not even take into account those being held in federal prisons, which Nellis states "would generally increase the number of people by approximately 50 percent."

Nellis points to a number of factors that have led to the huge racial disparity in state prisons. One has to do with the rise of harsher laws relating to drug offenses that began in the 1970s. Shockingly, blacks "are nearly four times as likely as whites to be arrested for drug offenses and 2.5 times as likely to be arrested for drug possession... despite the evidence that whites and blacks use drugs at roughly the same rate." Moreover,

from 1995 to 2005, "African Americans comprised approximately 13 percent of drug users but 36 percent of drug arrests and 46 percent of those convicted for drug offenses." Blacks and Hispanics are also more likely to be held in jail prior to trial, due to the inability to afford to pay bail as a result of income inequality, which in turn leads to longer prison terms (statistically those who are detained pre-trial are more likely to be convicted and subject to longer sentences).

Implicit bias

Implicit bias as well as structural disadvantages also play key roles in leading to more convictions for blacks and Hispanics. Nellis cites Cassia Spohn's analysis of 40 states' sentencing processes which found that "black and Hispanic offenders – particularly those who are young, male, and unemployed – are more likely than their white counterparts to be sentenced to prison than similarly situated white offenders." Since the available data all points to blacks and Hispanics being incarcerated at a higher rate than whites due to nothing more than the color of their skin, questions on employment applications related to criminal history just perpetuate racial inequality. Banning the box helps reduce the disproportionately negative effect the criminal justice system already has on black and Hispanic Californians.

Post-incarceration employment reduces recidivism rates

Another benefit to banning the box is a reduction in post-incarceration recidivism rates. According to NELP, a 2011 study of those previously incarcerated found that employment "was the single most important influence on decreasing recidivism, and that two years after release, nearly twice as many employed people with records had avoided another brush with the law than their unemployed counterparts."³ Another study cited by NELP found that "a one percent drop in the unemployment rate causes a two percent decline in burglary, a 1.5 percent

decrease in larceny, and a one percent decrease in auto theft." If post-incarceration employment can have such a big effect on recidivism rates, then banning the box should have a positive effect on all Californians. However, children of those convicted may benefit the most.

Since nearly half of all children in the United States have a parent with a conviction history,⁴ the impact of this bill on children and families could be significant. Studies have shown that when the father in a family is released from incarceration, the family's income is reduced by 15 percent, since the family has to support the additional member who often has difficulty finding work after having been in jail.

When the family members of men who had previously been incarcerated were interviewed, it was found that 83 percent had provided the recently released family member with financial support. Half of those that provided financial support said that doing so had created a financial challenge for them and 30 percent said it was a "financial hardship."⁵

It is clear that getting someone back to work after being incarcerated has a positive effect on the individual and their family, which in turn has a positive effect on California as a whole, reducing the unemployment rate and the need for social services for those family members. However, without Ban the Box legislation, finding a job post-incarceration can be extremely difficult, if not impossible for many.

Earlier laws protecting job applicants

Prior to the new Ban the Box legislation that went into effect this year, California (and several of its municipalities on their own⁶) had already attempted to regulate what employers were allowed to consider with respect to the criminal and credit histories of applicants in order to allow job candidates with a criminal history or bad credit a fair and equal chance at employment.



For example, California Labor Code section 432.7 already stated that in making hiring decisions, private employers could not rely on “an arrest or detention that did not result in conviction” or a conviction that was “judicially dismissed or ordered sealed pursuant to law.”⁷ In fact, California courts have long recognized a public policy interest in protecting applicants and employees from the stigma associated with an arrest record. As early as 1979, the court held that the California constitution’s privacy protections prevented state officials from disseminating arrest records to public employers where the arrest did not result in a conviction.⁸

Previously, the Labor Code only prevented *public* employers from asking applicants about their criminal history prior to determining that the applicant met the minimum qualifications, but this code section has now been replaced and expanded by AB 1008 to also apply to *private* employers, as discussed further below.⁹

Additionally, California law already prevented employers (with the exception of retail pharmacies¹⁰) from asking about marijuana-related convictions that were more than two years old.¹¹ Companies may ask about all convictions, but must specifically inform applicants that marijuana convictions more than two years old need not be disclosed.¹² Retail pharmacies are exempted from this provision due to the federal Combat Methamphetamine Epidemic Act (CMEA), which specifically allows pharmacies to inquire as to marijuana convictions despite state laws stating otherwise.¹³

Since January 1, 2012, employers have also been generally prohibited from obtaining or using a consumer credit report for employment purposes, except if the employee is applying for:

- (1) A managerial position.
- (2) A position in the state Department of Justice.
- (3) That of a sworn peace officer or other law enforcement position.
- (4) A position for which the information contained in the report is required by law to be disclosed or obtained.

(5) A position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information of any one person:

- (A) Bank or credit card account information.
- (B) Social security number.
- (C) Date of birth.

(6) A position in which the person is, or would be, any of the following:

- (A) A named signatory on the bank or credit card account of the employer.
- (B) Authorized to transfer money on behalf of the employer.
- (C) Authorized to enter into financial contracts on behalf of the employer.¹⁴

While previously existing California laws provided some protections for job applicants with criminal histories and poor credit, they still left many people vulnerable at the hiring stage and arguably perpetuated the pattern of disparate racial impact, concerns about which led to the recent expansions in the law.

New 2018 additional protections

AB 1008 was introduced by Assembly Member Kevin McCarty and nicknamed the “Scarlet Letter Act.” It was signed by Governor Jerry Brown on October 14, 2017 and went into effect on January 1, 2018. The bill itself provides a compelling justification and history of the recent “Ban the Box” legislation and explains why the California legislature was motivated to make this most recent change, as follows:

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) In 2013, the State of California passed historic legislation to reduce barriers to employment for people with conviction histories, and to decrease unemployment in communities with concentrated numbers of people with conviction histories, recognizing that these barriers are matters of statewide concern. The Ban the Box law passed in

2013 applied to state agencies, all cities and counties, including charter cities and charter counties, and special districts.

(b) In 2015, President Obama directed all federal agencies to “Ban the Box” and refrain from asking applicants about their convictions on the initial job application.

(c) Nationwide, 29 states and over 150 cities and counties have adopted a “Ban the Box” law, and over 300 companies have signed the White House Fair Chance hiring pledge.

(d) Nine states and 15 major cities, including Los Angeles and San Francisco, have adopted fair chance hiring laws that cover both public and private sector employers.

Over 20 percent of the United States population now lives in a state or locality that prohibits private employers from inquiring into an applicant’s record at the start of the hiring process.

(e) Since 2013, when Assembly Bill 218 was signed into law, five states have adopted fair chance hiring laws that cover private employers, Connecticut, Illinois, New Jersey, Oregon, and Vermont, as well as several major cities, including Baltimore, New York City, Philadelphia, and Austin, Texas.

(f) Roughly seven million Californians, or nearly one in three adults, have an arrest or conviction record that can significantly undermine their efforts to obtain gainful employment.

(g) Experts have found that employment is essential to helping formerly incarcerated people support themselves and their families, that a job develops prosocial behavior, strengthens community ties, enhances self-esteem, and improves mental health, all of which reduce recidivism. These effects are strengthened the longer the person holds the job, and especially when it pays more than minimum wage.

(h) Experts have found that people with conviction records have lower rates of turnover and higher rates of promotion on the job and that the personal contact with potential employees can reduce the negative stigma of a conviction by approximately 15 percent.

Prior to AB 1008, existing law had prohibited state and local agencies from



asking about criminal history at the initial application stage. This year, however, AB 1008 has expanded that prohibition broadly to all employers in California with five or more employees, with a few exceptions.¹⁵

AB 1008 operated to repeal section 432.9 of the Labor Code (applying only to state and local agencies), and instead amended the Fair Employment and Housing Act (FEHA) by adding section 12952 to the Government Code to make it an unlawful employment practice under FEHA for an employer with five or more employees to:

(1) include on any application for employment any question that seeks the disclosure of an applicant's conviction history;

(2) inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer; and

(3) consider, distribute, or disseminate information about any of the following while conducting a conviction history background check in connection with any application for employment:

(a) arrest not followed by conviction [subject to certain exceptions in Labor Code 432.7(a)(1) and (f)];

(b) referral to or participation in a pre-trial or post-trial diversion program;

(c) convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law.

(Cal. Gov. Code, § 12952(a))

Getting a foot in the door

This change to the law should help thousands of job applicants to get their foot in the door, as it prohibits any consideration of criminal history until *after* a conditional offer has been made.

Moreover, once an offer has been made and a criminal background check is then permitted, the employer cannot simply rescind the offer because of that criminal history. AB 1008 imposes an additional requirement on an employer

to conduct an individualized assessment about whether a job applicant's conviction history would negatively impact that candidate's ability to perform his or her job duties. AB 1008 requires that the employer assess the following in making its decision:

- the nature and gravity of the offense and conduct.

- the time that has passed since the offense or conduct and completion of the sentence.

- the nature of the job held or sought.

(Cal. Gov. Code, § 12952(c)(1)(A)(i)-(iii))

If the employer ultimately decides to deny employment to the applicant based on its assessment, then it must provide the applicant with written notification of the decision. The employer's written notice to the rejected applicant must include:

- Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
- A copy of the conviction history report, if any;

- An explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

(Cal. Gov. Code, § 12952(c)(2)(A-C))

If the job applicant decides to dispute the conviction history and notifies the employer in writing of the same, the employer must provide at least five additional days to the applicant to do so and must consider any additional evidence or documents the applicant provides before making the final employment decision. If the employer goes through this process and still wants to deny employment based on the criminal history, then it must notify the applicant of this in writing,

include notification about any existing procedure the employer has in place to challenge the decision, as well as informing the job applicant about the right to file a complaint with the Department of Fair Employment and Housing.

No "reasonableness requirement"

It should be noted that there is no "reasonableness" requirement imposed on the employer with respect to the basis for its decision, so the new law might still permit some arbitrary and unfair denials of employment. The hope is that the individualized assessment requirement – along with the notification and "appeal" process for denied applicants – will at least make employers take pause and actually consider the details of the offense and the likely impact on the job when they would otherwise make a snap decision about job candidates with criminal histories. The law endeavors to create a productive dialogue between prospective employers and job applicants that revolves around the candidate's merits and not just their past indiscretions. By expanding FEHA, the new law also creates a new protected class with better enforcement mechanisms and access to damages (including the right to seek compensatory damages, attorneys' fees, and costs) for aggrieved job applicants who have suffered a violation of the Ban the Box regulations.

Conclusion

While "Banning the Box" in and of itself is unlikely to lead to job equality for blacks and Hispanics, since there are many factors that lead to the racial disparities in job placement other than just past criminal history, it is certainly a positive step forward. Criminal history or not, this legislation promises to benefit all Californians by lowering unemployment, reducing the need for social services, dropping recidivism rates, and creating a more equal playing field in



the employment arena for those from all racial backgrounds. Hopefully its success will lead to other states taking notice and enacting similar laws.

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Endnotes

¹ <http://www.nelp.org/publication/research-supports-fair-chance-policies/>

² <https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/>

³ <http://www.nelp.org/content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>

⁴ *Id.*

⁵ Rebecca L. Naser and Christy A. Visher, "Family Members' Experiences with Incarceration and Reentry," *Western Criminology Review* 7(2), 2006: 20-31.

⁶ E.g., the San Francisco and Fair Chance Ordinance and the Los Angeles Fair Chance Initiative for Hiring Ordinance

⁷ Lab. Code, § 432.7(a)

⁸ *Central Valley Chapter of 7th Step Foundation, Inc. v. Younger* (1979) 95 Cal.App.3d 212.

⁹ Lab. Code, § 432.9

¹⁰ 21 USC § 830(e)(1)(G); *Rankin v. Longs Drug Stores Calif., Inc.* (2009) 169 Cal.App.4th 1246

¹¹ Lab. Code, § 432.8;

¹² *Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436

¹³ *Rankin v. Longs Drug Stores California, Inc.* (2009) 169 Cal.App.4th 1246.

¹⁴ Civ. Code, § 1785.3(c); Lab. Code, § 1024.5(a)

¹⁵ The new law does not apply to: 1) positions that are being sought with a state or local agency required to conduct a conviction history background check, 2) positions being sought with a criminal justice agency as defined in Penal Code section 13101; 3) a Farm Labor Contractor as defined in Labor Code section 1685; or 4) an employer that is required by state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. (Cal. Gov. Code, § 12952(d)(1-4)).