

Challenges with Ban the Box

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The Bureau of Justice Statistics reports if current trends continue, one in 15 adults and one in three African-American males will be imprisoned during their lifetime. A woman is eight times more likely to be incarcerated now than she was in the 1980s. As of today, one in 99 adults are imprisoned and one in 32 adults are on probation or parole. If an employer has a policy to exclude applicants who have a felony conviction, they are significantly limiting the number of qualified applicants. The ban the box campaign was created to remove this barrier at the application phase by asking employers to omit a check box regarding criminal records, while still allowing for criminal history to be considered prior to the job offer.

There are now 25 states and over 150 communities with ban the box laws or policies.¹ On November 2, 2015, President Barack Obama signed an executive order to ban the box for executive branch jobs in the federal government. In Missouri, Gov. Jay Nixon signed an executive order banning the box for jobs in state government on April 11, 2016. There are three cities in Missouri with ban the box policies.² Kansas

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¹ Lisa Nagele-Piazza, "Do Ban-the-Box Laws Work?" Society for Human Resource Management, January 12, 2017, accessed May 17, 2017, <https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/do-ban-the-box-laws-work.aspx>.

² Michelle N. Rodriguez and Beth Averay, "Ban the Box Fair Chance Guide: U.S. Cities, Counties and States Adopt Fair Hiring Policies to Advance Employment Opportunities for People with Past Convictions," National Employment Law Project, May 2017, accessed May 17, 2017, <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

City was the first when a city ordinance was passed on April 4, 2014, banning the box for jobs with the city government. Columbia passed a city ordinance December 1, 2014, banning the box for city government jobs and restricting private employers from inquiring about criminal histories in job applications. St. Louis implemented a policy on October 14, 2014, banning the box for jobs with the city government. Jackson County implemented an executive order to ban the box for county government jobs on November 6, 2016.

Implementation of these policies, laws, and executive orders seems to have gone smoothly, although it may be too early to determine the impacts and each has differences. Kansas City was the first to implement the policy. The ordinance states,

The City shall not use or access the following criminal records in relation to a background check conducted for employment purposes: records of arrests not followed by a valid conviction; convictions which have been, pursuant to law, annulled or expunged, pleas of guilty without conviction; and misdemeanor convictions where no jail sentence can be imposed. For purposes of this ordinance a violation for which a person received a suspended imposition of sentence is not a conviction.³

Successful implementation in Kansas City was referenced in passage of the ban the box initiatives in other Missouri communities and at the state level.

³ Kansas City Missouri City Council, Committee Substitute for Ordinance No. 130230, accessed May 22, 2017, <http://cityclerk.kcmo.org/LiveWeb/Documents/Document.aspx?q=1GacLjTrkbEm5w7Q4Gkqs0iiWBOxpocrHGz7K3fKFISiKhsZgTW19Gm1gDUhKnyXav8uFpITFG1E8iYaxIOtog%3D%3D>.

Columbia is the only location in which private employers are required to ban the box. Scott Dean, chairman of the Columbia Human Rights Commission, the agency responsible for enforcement of the city's ordinance, said in a *News Tribune* article, "I think it's run very smoothly."⁴ According to Dean, both supporters and the opposition were vocal prior to the ordinance passing. However, there were only three complaints filed by applicants with that commission in 2015. The commission determined one of the businesses was exempt, another was required to update its online application, and the third was a large corporation unaware of the ordinance due to being headquartered outside of the Columbia area. "Our goal was going to be mediation. We knew that there may be businesses that didn't find out. Our goal was not to litigate them. Our goal was to explain to them what the changes were and help them get into compliance," Dean said.⁵

In St. Louis, Mayor Francis Slay implemented a policy to ban the box rather than a law being passed and encouraged employers to join the city in implementing such policies. The city actually ended its practice of automatically disqualifying applicants for city government jobs due to a felony in March 2013. However, applicants may have thought they were not selected due to the box noting the criminal conviction. When he announced the new policy to ban the box, Mayor Slay said, "We believe in fairness, but for people who do not agree with us on that, I hope to convince them that a good job stabilizes families, reduces crime and makes our neighborhoods stronger and safer. I hope private employers consider joining us."⁶

⁴ Rebecca Martin, "Ban the Box: Would Dropping Criminal History From Job Applications Reduce Recidivism?" *News Tribune*, April 28, 2016, accessed May 22, 2017, <http://www.newstribune.com/news/news/story/2016/apr/28/ban-box-would-dropping-criminal-history-job-applic/621637/>.

⁵ Ibid.

⁶ St. Louis mayor's office, "City of St. Louis Bans the 'Box' on Job Applications," October 14, 2014, accessed May 22, 2017, [https://www.stlouis-](https://www.stlouis-mo.gov/government/departments/mayor/news/ban-the-box.cfm)

[mo.gov/government/departments/mayor/news/ban-the-box.cfm](https://www.stlouis-mo.gov/government/departments/mayor/news/ban-the-box.cfm).
In Jackson County, the executive order signed by County Executive Frank White removes the box from the application, but does not prevent managers of county government agencies from performing a background check or asking about the applicant's criminal history in a job interview. White was quoted by the *Kansas City Star* at the signing, saying, "I strongly believe that everyone deserves the opportunity to be heard and to advocate for themselves. My action today ensures that all job applicants will be given such an opportunity without sacrificing the safety and security of any Jackson County resident."⁷

In Missouri, the executive order signed by Gov. Jay Nixon directed all departments, agencies, boards and commissions in the state's executive branch to remove questions regarding criminal history from the initial job application. When signing the order, Governor Nixon stated, "The action I'm taking today will ensure that state government continues to be a model for increasing economic opportunity, improving public safety, and strengthening communities. This is about fairness. Giving folks a fair chance to redeem their lives, support their families and make a contribution to their communities is a value we share as Missourians and as Americans."⁸

If ban the box is not signed into law, then the executive order or policy can be cancelled when leadership changes. Making sure that newly elected officials are informed of the benefits of such a policy may be necessary to maintain the progress. The challenges may exist at the local, state and federal levels when there is a change in mayor, governor, or president. Members of city or county councils and state and federal members of the legislature also may

[mo.gov/government/departments/mayor/news/ban-the-box.cfm](http://www.kansascity.com/news/politics-government/article113137963.html).

⁷ Mike Hendricks, "Jackson County Job Applicants No Longer Required to Disclose Criminal History," *Kansas City Star*, November 7, 2016, accessed May 22, 2017, <http://www.kansascity.com/news/politics-government/article113137963.html>.

⁸ Rodriguez and Averay, "Ban the Box Fair Chance Guide."

need to be informed if laws or ordinances are proposed. The courts may also be involved if cases are filed regarding Equal Employment Opportunity Commission complaints or other discrimination lawsuits.

Laws and policies that may change at so many levels of government can be very challenging for employers when the regulation requires private employers to ban the box. Knowing the current laws in different cities and states is important for employers, especially for those who operate in national markets. The state of California bans the box for public employers. However, in San Francisco private employers with more than 20 staff are restricted from asking about criminal history at the application stage. In January 2017, Los Angeles implemented ban the box for private employers with more than 10 staff. The National Employment Law Project published a Fair Chance Guide that lists cities, counties, states and private companies that have adopted ban the box.⁹ There are 15 cities and counties that include private employers in their ban the box laws: Austin, Baltimore, Buffalo, Chicago, District of Columbia, Los Angeles, New York City, Philadelphia, San Francisco, Seattle, Columbia, MO; Portland, OR; Rochester, NY; Prince George County, MD; and Montgomery County, MD. Nine states include private employers in their ban the box legislation: Connecticut, Hawaii, Illinois, Maine, Minnesota, New Jersey, Oregon, Rhode Island, and Vermont.

Some private companies decided to ban the box as a private business decision. Wal-Mart banned the box in 2010. Since that time other companies have banned the box including but not limited to Home Depot, Koch Industries, and Target. Improvements in the criminal history reporting process is a challenge that must be addressed in effective implementation of a policy to ban the box. The reliability of criminal history checks is questionable

as records frequently are inaccurate for a variety of reasons, such as jurisdictions failing to update the status of cases, use of aliases, and misinterpretation of the records. If applicants are screened out based upon an inaccurate criminal history, but there is no communication with the applicant, the record may never be corrected.

Although ban the box includes communication regarding criminal history between the employer and applicant after the job offer, the criminal record may still prevent employment. In 2012, the EEOC issued guidance to employers that criminal history alone should not be used in making employment decisions. Rather, the offense must be related to a job duty to preclude the person from being hired. In this case, the employer is required to disclose that the criminal history is the reason for the decision not to hire. Employers may be reluctant to do so and may find other means of screening and selecting applicants.

In three recent studies researchers discovered unintended consequences of ban the box. Daniel Shoag of the Harvard Kennedy School found that employment increased by 4 percent in top quartile of the highest crime neighborhoods, but these jobs were low-wage jobs in the public sector. The employment rate of women decreased, while employment for African-American men increased. The study also showed that employers also raised requirements for education and experience after implementation of ban the box measures.¹⁰ Amanda Agan and Sonja Starr of the Princeton Department of Economics and the University of Michigan Law School conducted a field experiment and discovered that the gap between white and black applicants for call backs for interviews expanded from 7 percent to 45 percent.¹¹

¹⁰ Daniel Shoag and Stan Veuger, "No Woman No Crime: Ban the Box, Employment, and Upskilling," Harvard Kennedy School, working paper No. 16-015, March 2016, accessed May 17, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782599.

¹¹ Amanda Agan and Sonja Starr, "Ban the Box, Criminal Records and Statistical Discrimination: A Field Experiment," University of Michigan Law and Economics research paper

⁹ Ibid.

Jennifer Doleac and Benjamin Hanson of the University of Virginia and the University of Oregon conducted a study for the Brookings Institute, which revealed ban the box policies decreased probability of employment by 5.1 percent for young, low-skilled black men and 2.9 percent for young, low-skilled Hispanic men. They concluded that employers use other information such as race to screen candidates when criminal history is unavailable, as the arrest rate for minority populations is higher.¹²

Recommendations

In order to overcome these challenges, the following strategies have been implemented in the U.S. Probation Office, Eastern District of Missouri to increase the employment opportunities for those under supervision. These efforts resulted in the unemployment rate of those under supervision in the district being less than the unemployment rate in the community for 72 consecutive months. The employment program has been recognized as a national model, reducing recidivism to 14.9 percent compared to the national rate of 67.5 percent reported in a study by the Bureau of Justice Statistics.¹³

Recruit employers through education about the benefits of hiring an ex-offender. Employment is a standard condition of supervision. The Work Opportunity Tax Credit provides up to \$2,400 to employers who hire an ex-offender within 12 months of placement on probation or release from

prison.¹⁴ The Federal Bonding Program also provides bonding insurance often at no cost to employers to protect against theft, fraud, embezzlement or stealing. Mandatory drug testing is conducted, which can provide a cost savings for employers. U.S. Probation also has a third-party risk policy in which the ex-offender may not be allowed to work for an employer if there are potential risks of victimization based upon the person's characteristics or history. The probation officer and employer also share the goal of job retention and work together to ensure that the applicant is job ready.

Prepare the ex-offender to address criminal history in interviews. Even when an employer is willing to hire someone with a criminal history, the applicant must still compete with many others for the position. The probation office trains the ex-offender to answer questions regarding criminal history and provides mock job interviewing practice. For example, if this is the person's first conviction, it is important to state that this was a one-time mistake or, if all the criminal history was related to substance abuse, to emphasize this and share the treatment that has been completed to prevent future drug use.

Meet the needs of employers. The applicant must be reminded that the interview is about meeting the needs of the employer, not providing a job for the individual. The probation office conducts assessments to match the person's interests with the job and ensure that the applicant has the aptitude and skills required to perform the job duties. Training programs that include apprenticeships and certifications that meet the needs of the employers are encouraged, including those for a commercial driver's license, auto mechanics, certified nurse's aide, and construction.

By including these strategies in planning for implantation of ban the box laws or policies,

No. 16-012, June 2016, accessed May 17, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2795795.

¹² Jennifer L. Doleac and Benjamin Hansen, "Does 'Ban the Box' Help or Hurt Low Skilled Workers? Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden," University of Virginia and University of Oregon, research paper, January 2017, accessed May 17, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2812811.

¹³ Jennifer L. Doleac, "'Ban the Box' Does More Harm Than Good," Brookings Institution, May 31, 2016, accessed May 17, 2017, <https://www.brookings.edu/opinions/ban-the-box-does-more-harm-than-good/>.

¹⁴ U.S. Department of Labor, Work Opportunity Tax Credit, accessed May 17, 2017, <https://www.doleta.gov/business/incentives/opptax/eligible.cfm#Ex-felons>.

outcomes will be enhanced. The qualified applicant pool for employers will be expanded. Opportunities for employment will increase, and the intended result of ban the box policies may be realized.