

Fair Chance Hiring for Employers

Part Four: Banning the Box Even When Background Checks Are Legally Required

By Beth Avery, Senior Staff Attorney

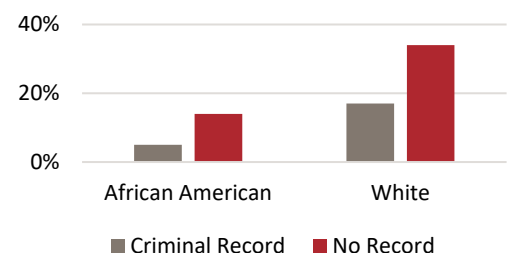
For most jobs, employer background checks are unnecessary. However, if your company performs background checks for some or all positions, it can adopt policies to reduce unfair barriers to hiring workers with arrest and conviction records. NELP’s eight-part “Fair Chance Hiring for Employers” series of policy briefs comprehensively explores the steps employers can take toward fair chance hiring. Part Four explains how to adjust application forms to ensure they do not deter workers with records or lead applicants with records to be unfairly excluded.

Job application forms are generally the first opportunity for interested individuals to share their skills and qualifications with your hiring team. Even when the law requires a background check, employers need not conduct those checks early in the hiring process nor require applicants to self-report their record. The following are four ways your company can make its application and interview process fairer and more welcoming to people with records.

A. ‘Ban the box’ and delay background checks until after a conditional offer

Eliminating questions about arrest and conviction records from job application forms and interviews—and instead, delaying background checks until after a conditional job offer—is a significant initial step toward fair chance hiring. Removing such questions can increase the number of qualified people with records who apply for your open positions and lead your HR staff to evaluate them more fairly. Studies show that when employers learn of a conviction record up front, they are much less likely to select the applicant, especially if the applicant is Black. The callback rate for white applicants drops by half, and callbacks for Black applicants drop by nearly two-thirds, when the initial application form reveals a record.¹

Job Callbacks Drop by Half for White Workers with Records, by Almost Two-Thirds for Black Workers with Records



“The box” on a job application—where applicants are asked to put a checkmark if they have been convicted of any past offense—frequently deters people with records from applying. Its appearance is viewed as a sure sign they will not get the job. Similarly, applicants with records may drop out of your hiring process if they are asked about their conviction history during another phase of the application and interview process. Consequently, delaying background checks until after a conditional job offer encourages the largest candidate pool.

The Glaring Unfairness of “The Box” —Record Inquiries on Job Applications

“I went online and began the application process. I put in my name, my address, my phone number, and other very basic information. And then the question appeared—the dreaded question that those of us with an arrest or conviction fear most: ‘Have you ever been convicted of a crime?’ I took a deep breath, checked ‘Yes,’ and hit enter. What happened next was devastating. The screen went completely black. Then a message appeared. It said, ‘Something you answered disqualified you for this job.’ Well, I knew it was not my name. I knew it was not my address. The answer was glaring: I was disqualified for a job without even having the opportunity to enter my qualifications.”

— Teresa Hodge, Co-founder, Mission:Launch²

**HAVE YOU EVER BEEN
CONVICTED OF A FELONY
OR MISDEMEANOR?**

YES

NO

EXPLAIN: _____

Waiting until after a conditional offer to conduct a background check also enhances transparency and clarity around the use of selection criteria. If your HR staff knows of a candidate’s record when evaluating their credentials, staff may conflate even minor concerns about conviction history with their estimation of the applicant’s skills, accomplishments, and qualifications. The stigma of a record is strong, and even well-intentioned HR professionals will be affected by their internal biases.³ By delaying the review of a jobseeker’s conviction history until after a conditional job offer, the hiring assessment will naturally focus on what matters most: finding the person whose skills and experience make them most likely to succeed in the position.

State or local “ban the box” laws may require employers to delay conducting background checks or otherwise asking about criminal records. (NELP documents state and local fair chance hiring laws in our [state and local ban-the-box guide](#).⁴) Even when not required by law, your company should select the most qualified candidate and offer them the job before conducting a criminal background check.

Even if ban-the-box critics are to be believed, what their studies reveal is employer racism that exists regardless of any ban-the-box policy. As explained by the late economist Bill Spriggs, “statistical discrimination” is a constant micro-aggression—a “polite” way of excusing racism in hiring.⁵ Using race as a proxy for criminal history is illegal racial profiling.⁶ Instead of avoiding a policy that helps ensure job opportunities for people with records in case it could result in racist hiring behaviors, companies should commit to educating HR staff about racial bias and the unfair stigma of a record. Staff involved in hiring must understand fair chance employment so that they don’t experiment with racial profiling as a way to exclude job applicants with records.

Misleading ‘Statistical Discrimination’ Arguments and Why You Should Still ‘Ban the Box’

Some critics of ban-the-box policies cite the common—but often misleading—economic concept of “statistical discrimination” as a reason to abandon these policies. When an employer lacks access to criminal record information, they say, the employer will use race as a proxy for a criminal record and decline to interview or hire Black and Latino applicants, who are statistically more likely to have a record.⁷ It remains unclear, however, whether this discrimination occurs; other studies observe very different trends.⁸ Moreover, the same studies that purport to show statistical discrimination actually report increased hiring of most Black workers after the adoption of ban-the-box policies.⁹ And even the loudest critics of ban-the-box policies support employers voluntarily removing “the box” and delaying background checks.¹⁰

Some employers mistakenly believe that merely banning the box renders their hiring process sufficiently accessible to qualified workers with records. However, there are various other ways that people with records and people of color can be unfairly excluded from hiring or otherwise set up for failure. The steps that follow here—as well as those in the rest of this eight-part “Fair Chance Hiring for Employers” series of policy briefs—detail additional best practices your company should adopt to promote equitable hiring.

B. Avoid the ‘candor trap’ by eliminating any requirement for applicants to self-disclose their record

Conviction records are complicated and not easily summarized by an applicant. Candidates may be unable to recall the details of their conviction history or be confused about what they need to report versus what they may believe to have been expunged or be otherwise irrelevant. Moreover, because of past experiences of rejection, responding to questions about their record can cause a high level of anxiety for job applicants with records. Therefore, even after a conditional offer, a better way to determine the content of the candidate’s record is to skip asking them to self-disclose and instead simply conduct the required background check (and then share a copy of the background check report with the applicant).

Some employers nevertheless perceive asking candidates to self-report their records as a test of integrity. This misguided expectation of self-disclosure, however, undermines fair chance hiring by distracting from what matters most—competence, qualifications, and experience. Far from ensuring trustworthiness, self-disclosure more often tests whether the job applicant understands and has memorized rap sheet details, many of which confuse even attorneys. Employers learn little about a candidate’s likely work performance from such a rough proxy. And, perversely, employers lose qualified applicants when they rescind job offers because a candidate inaccurately reported record information that would not otherwise have blocked their employment.

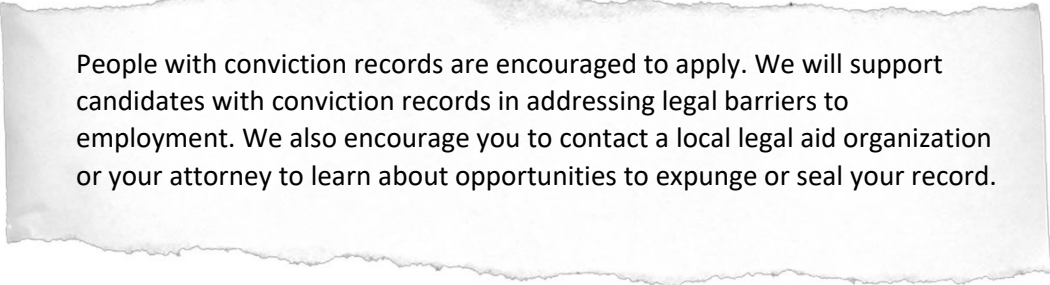
C. Carefully consider whether and how to mention background checks on job application forms

Even mentioning a background check in a job posting or application form can discourage potential applicants with records. In light of that reality, you should carefully consider whether and how to include any information about background checks on your application forms.

Requests for consent to conduct a background check should be removed from job application forms. Even if that background check would not be conducted until after a conditional offer, requesting consent in the initial application can confuse and discourage applicants. Such consent can be obtained after a conditional offer—in writing and in a fully transparent manner.

On occasion, it may be advisable to enhance transparency for the candidate by flagging legal requirements or prohibitions in the job application forms. For example, this may be the case if the applicant can take immediate, proactive steps to increase their chances of overcoming any legal hurdles (such as by applying to a government agency for a waiver of a particular hiring restriction).¹¹ Again, be sure to describe the laws in a way that reduces the discouraging effect that their mention may have on applicants with records.

The purpose of including this information is to benefit the applicant, so limit information to what is easily understandable and won't deter most people with records from applying. With that in mind, one best practice is to precede any information about legally required background checks with an affirmative statement that encourages people with records to apply:



People with conviction records are encouraged to apply. We will support candidates with conviction records in addressing legal barriers to employment. We also encourage you to contact a local legal aid organization or your attorney to learn about opportunities to expunge or seal your record.

D. Enhance transparency of the hiring process and fairness of the interview

Transparency about the hiring process is crucial to building trust with potential future employees. An opaque process will frustrate applicants and may lead some to drop out—especially jobseekers with records, many of whom likely have been treated unfairly by employers in the past. Your staff should be trained to affirmatively offer a roadmap to the overall hiring process so that applicants know what to expect—especially with respect to post-offer background screening.

The representatives from your company who interact with applicants early in the hiring process—including sourcers, recruiters, and interviewers—should be trained to provide accurate information about the hiring process and how to respond if an applicant discloses a conviction or arrest record. Staff must know not to ask about a candidate’s criminal background, as prohibited by some state and local ban-the-box laws. But training should be even more comprehensive. Because of past experiences and confusion about the hiring process, applicants may incorrectly assume that your staff is already aware of their conviction or arrest record at the interview stage. To counteract this assumption and avoid confusion, train staff to affirmatively inform candidates that the company will not seek information about the applicant’s criminal background on application forms or during interviews.

Confusion About the Hiring Process May Lead Candidates to Assume the Worst

“Nora” interviewed to work at a large company that (unbeknownst to her) had a policy of not inquiring about conviction records until after a conditional offer. Nevertheless, Nora later reflected that she had “assumed” that the interviewers knew about her record, and she concluded that her record was the reason she didn’t get the job. “If they weren’t happy with me, I wouldn’t have [made it] to the second interview. I did. They were happy. It was whoever made that final [decision]. I’m not sure of how they made that determination in the end. . . . Basically, I can’t see any other reason why I wouldn’t have got[ten] the job.”

A college graduate with over 10 years of office-work experience, Nora twice progressed to a second-round interview. However, she was not offered the position in either instance. The hiring process was not adequately explained to Nora, who didn’t understand that the company wouldn’t find out about her record until after a job offer and that applicants commonly progress to second-round interviews without receiving a job offer. Had the recruiter and interviewers made these aspects of the process clear, Nora would have been spared much confusion, frustration, and, ultimately, negative feelings toward the company. In the end, she questioned the employer’s commitment to second chances: “[T]hey were saying, ‘We’re willing to give you a chance’. . . . It was like they’re saying one thing but then they’re doing another. . . . What are they willing to do to give somebody a chance? They’re saying it, but are they really doing it?”¹²

Even if not questioned about it, a candidate may inadvertently disclose information about their arrest or conviction record during an interview, or they may choose to discuss it because their conviction history is an integral part of their personal story. Train staff to respond appropriately in such situations.

First, staff should avoid asking probing follow-up questions about the person’s past offense or conviction history. Instead, advise interviewers to politely remind the applicant that they are not required to disclose information about their conviction history and that hiring staff will not consider the past record until after a conditional offer.

Second, staff should be trained not to allow the stigma of a record to influence their assessment of the candidate. Clearly inform interviewers and hiring managers that it is not their job to weed out applicants with records and that specially trained staff will thoroughly review conviction history to ensure eligibility for hire *after* a candidate is selected.

From a legal standpoint, some local private-sector ban-the-box laws mandate whether and how an employer may consider criminal history information disclosed during an interview. For example, if an applicant discloses their record to an employer in Portland, Oregon, the employer “must disregard that information and must take reasonable steps to prevent further disclosure or dissemination of the [a]pplicant’s [c]riminal [h]istory.”¹³ Similarly, after inadvertent self-disclosure, a New York City employer “should continue its hiring process and must not examine the applicant’s conviction history information until after deciding whether or not to make a conditional offer of employment. If the applicant raises their criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant’s criminal history further.”¹⁴

Consult your legal team to determine whether your office is subject to such a law. While not a substitute for legal advice, [NELP’s State and Local Ban-the-Box Guide](#) includes information about private-sector fair chance hiring laws across the country.¹⁵

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Endnotes

- ¹ Devah Pager, *The Mark of a Criminal Record*, 108 Am. J. Soc. 937 (2003), http://scholar.harvard.edu/files/pager/files/pager_ajs.pdf
- ² Teresa Hodge, Testimony before U.S. House of Representatives Committee on Oversight and Reform (2019), <https://ilusa.org/wp-content/uploads/2019/03/Hodge-Testimony-030819-2.pdf>.
- ³ Dallas Augustine, Noah Zatz & Naomi Sugie, UCLA Inst. for Res. on Labor & Emp’t, *Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box* (2020), <https://irle.ucla.edu/publication/why-do-employers-discriminate-against-people-with-records-stigma-and-the-case-for-ban-the-box/>.
- ⁴ Beth Avery & Han Lu, Nat’l Emp’t Law Project, “Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies” (2021), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/> (periodically updated).
- ⁵ William Spriggs, Dep’t of Econ., Howard Univ., “Is now a teachable moment for economists?: An open letter to economists from Bill Spriggs” 2 (June 9, 2020), https://www.minneapolisfed.org/~media/assets/people/william-spriggs/spriggs-letter_0609_b.pdf.
- ⁶ Such racial profiling in hiring violates Title VII of the Civil Rights Act of 1964, among other civil rights laws.
- ⁷ Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Racial Discrimination: A Field Experiment*, 133 Q. J. of Econ. 191 (2017); Jennifer Doleac & Benjamin Hansen, *The Unintended Consequences of “Ban the Box”: Statistical Discrimination and Employment Outcomes When Criminal Histories are Hidden*, 38 J. Lab. Econ. 321 (2020).
- ⁸ Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 Econ. Inquiry 425 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596435; see also Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling*, (Harv. Kennedy Sch., Working Paper No. 16-015, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782599.
- ⁹ Maurice Emsellem & Beth Avery, Nat’l Emp’t Law Project, *Racial Profiling in Hiring: A Critique of New “Ban the Box” Studies* 5-6 (2016), <https://www.nelp.org/publication/racial-profiling-in-hiring-a-critique-of-new-ban-the-box-studies/> (discussing the Agan, Doleac, and Shoag studies).
- ¹⁰ For example, Jennifer Doleac has asserted “there’s no reason to expect that employers that voluntarily stop asking about applicants’ criminal records would begin discriminating based on race. . . . [W]e should encourage further employer education and action on this front.” Jennifer Doleac, Comment to “Policy Debates: How Can We Improve Ban the Box Policies?,” Urban Inst., <https://www.urban.org/debates/how-can-we-improve-ban-box-policies> (last visited Aug. 6, 2021).
- ¹¹ For example, when applying to work at a financial institution, workers with records can apply to the Federal Deposit Insurance Corporation for a waiver of legal restrictions that would otherwise prevent them from working for a bank. See Nat’l Emp’t Law Project, et al., *Fair Chance Hiring in Financial Services* 25-27, 36-39 (2023), <https://www.nelp.org/publication/fair-chance->

[hiring-in-financial-services/](#).

¹² Telephone interview with “Nora” (Feb. 10, 2021) (transcript on file with author). To maintain worker anonymity, this brief uses a pseudonym and omits the employer name.

¹³ City of Portland, Oregon, “ADM-21.01 – Removing Barriers to Employment Administrative Rules” at RBE 2.02(3), <https://www.portland.gov/sites/default/files/2020-06/exhibit-a-amended-admin-rules-06-01-16.pdf> (last visited Oct. 13, 2021).

¹⁴ N.Y.C. Comm’n on Human Rights, *Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* 12 (2021), <https://www1.nyc.gov/assets/cchr/downloads/pdf/fca-guidance-july-15-2021.pdf>.

¹⁵ Avery & Lu, *supra* note 4.

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