

# FAQ: Fair Chance to Compete for Jobs Act of 2019 (S.387/H.R.1076)

*The Fair Chance to Compete for Jobs Act of 2019 (FCA) passed Congress on December 17, 2019, as part of the National Defense Authorization Act. This fact sheet describes the key provisions of this landmark “ban the box” legislation and its impact on the employment opportunities of people with records.*

## Summary of Key Provisions

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- Federal agencies (including offices within the executive, legislative, and judicial branches) and federal civilian and defense contractors may not request information on arrest and conviction history until a conditional job offer has been extended to the applicant.
- Law enforcement positions involving access to classified or national security information and other specific positions are exempted from the law.
- Taking into account relevant civil rights laws, the U.S. Office of Personnel Management (OPM) will issue regulations implementing key features of the FCA, which will be adopted by the General Services Administration and other oversight entities enforcing the law.
- The oversight entities will adopt procedures for job applicants and private contractors to file complaints alleging violations of the law.
- Escalating penalties can be imposed after an initial written warning is issued to a federal agency representative or private contractor that violates the law. Depending on the severity of the violation, federal agencies are authorized to suspend payment to a federal contractor until the employer complies with the law.
- The law will take effect two years from the date of enactment.

## Frequently Asked Questions

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### **What are the basic features of the federal Fair Chance Act?**

The Fair Chance to Compete for Jobs Act of 2019 (S. 387/H.R. 1076) passed Congress on December 17, 2019, as part of the National Defense Authorization Act (NDAA) ([H. Rept. 116-333](#), Title XI, Sections 1121-1124). It will help qualified workers with arrest or conviction records compete fairly for employment in federal agencies and with federal contractors. Like other “ban the box” laws that have been adopted around the country, the bill would prohibit employers from asking about arrest and conviction history on job applications and instead would delay that background check until a conditional job offer has been extended to the applicant.

**Does the FCA prevent employers from conducting a background check to determine involvement with the judicial system?**

No. The bill does not prevent employers from seeking information such as a history of arrests and convictions to make the hiring decision. It only delays the inquiry into a person's history with the judicial system until later in the hiring process to provide the applicants with a fair chance to first demonstrate their qualifications for the job.

**What federal employers and contractors are covered by the FCA?**

The FCA expressly covers all executive agencies (including cabinet agencies and the U.S. Postal Service, but not including the armed forces), the legislative branch, and the judicial branch of the federal government (other than judges, justices, and magistrates). It also applies to civilian agency and defense contracts entered into with private employers.

**Does the FCA make any exceptions for particular positions?**

Yes. The law does not apply to positions where a background check is required by law, provided the relevant background check law requires consideration of the individual's record prior to the conditional offer of employment (typically, federal laws do not specify at what stage in the hiring process a background check must be conducted). In addition, the law expressly exempts federal agencies or federal contractors that are hiring for law enforcement or national security positions and for positions involving access to classified information. In addition, as part of the regulatory process described below, the designated oversight agencies may adopt additional exempted positions, which must take into account the potential discriminatory impact of the policy as required by Title VII of the Civil Rights Act of 1964.

**Is there a complaint process to protect applicants whose FCA rights have been violated?**

Yes. The FCA requires each of the major oversight agencies (including OPM, the Administrative Office of the U.S. Courts, the General Services Administration, and the Department of Defense) to establish and publish a complaint and appeal procedure allowing job applicants to allege violations of the FCA.

**Are there penalties authorized by the FCA to help enforce the law?**

Yes. The penalties and remedies are specific to the different categories of employers covered by the law, as follows:

- For federal executive agencies, OPM must issue an initial "adverse action" warning to the employee of a federal agency in charge of the hiring process. If the situation is not corrected and there are subsequent violations, the federal agency representative may be subjected to additional penalties, including suspension and certain civil penalties (not exceeding \$500).
- For the legislative branch, the penalties are consistent with those that apply to federal executive agencies.
- For the judicial branch, the penalties that apply are consistent with the federal laws governing judicial branch employees.
- For civilian and defense agency contractors, the federal agency must first issue a written warning to the private contractor. If the situation is not corrected and there are any subsequent violations, the federal agency may take further action against the contractor, including suspending contract payments.

### **When does the FCA take effect, and what actions must be taken by the oversight agencies before implementation?**

The FCA takes effect two years from the date that the NDAA is signed into law by the President (i.e., in late December of 2021). However, the FCA imposes slightly different timeframes for the designated oversight agencies to issue their implementing regulations and policies.

- For federal executive agencies, OPM must issue implementing regulations within one year of enactment.
- For the legislative branch, the Board of Directors of the Office of Congressional Workplace Rights has 18 months to issue implementing regulations consistent with the OPM regulations.
- For the judicial branch, the Administrative Office of the U.S. Courts has 18 months to issue implementing regulations consistent with OPM regulations.
- For civilian and defense agency contractors, the General Services Administration and the Department of Defense have 16 months to issue implementing regulations.

### **Does the FCA supersede the “ban the box” regulation adopted by OPM in 2016?**

Yes. In 2016, OPM finalized regulations requiring most federal agencies to wait until the conditional offer stage of the hiring process to request criminal history information from a job candidate.<sup>1</sup> This policy, which fully took effect on March 31, 2017, was already the recommended practice by OPM as expressed in prior regulations. Although the OPM regulation and the FCA are consistent in most respects (e.g., they both require the federal agencies to wait until the conditional offer of employment to request criminal history information), the FCA includes additional measures, including a complaint process and penalties, that go beyond the OPM regulations. Thus, the FCA supersedes the OPM regulations, and OPM will issue new regulations implementing the FCA.

### **What is the origin and evolution of the “ban the box” policy?**

The passage of the Fair Chance Act is a milestone in the **ban-the-box movement**, which was founded and led by **All of Us or None**, a membership organization of people and families directly affected by the criminal justice system that is devoted to the full restoration of rights denied to people with records. All of Us or None championed the first ban-the-box policy in San Francisco in 2005 and the-box policies have since been embraced by 35 states and more than 150 cities and counties across the United States.<sup>2</sup> Thirteen states and more than a dozen major cities have extended the policy to both public and private sector employers, covering roughly one-third of the nation’s workforce. Some of the nation’s largest employers, including JPMorgan Chase, Koch Industries, Facebook, Google, Starbucks, Target, Home Depot, and Walmart, ban the box on their job applications as well.

### **What federal lawmakers and national organizations supported the bill?**

The FCA, which was first introduced in late 2015, has especially strong bipartisan support from criminal justice reform leaders in Congress, including the Senate lead sponsors, Senators Cory Booker (D-NJ) and Ron Johnson (R-WI), and the lead sponsors in the House, Congressman Elijah Cummings (D-MD), who championed the bill in the House before he passed away in October 2019, and Congressman Doug Collins (R-GA). The bill has also been embraced by organizations across the political spectrum, including the ACLU, American Conservative Union, FreedomWorks, the Justice Action Network, JustLeadershipUSA, the

Leadership Conference for Civil and Human Rights, the National Employment Law Project, Prison Fellowship, R Street Institute, and the Safer Foundation.<sup>3</sup>

### **How does the policy help workers, employers, and communities?**

More than 70 million adults in the United States have an arrest or conviction record that can show up on a routine background check for employment. As a result, one in three adults often have serious challenges securing employment in order to provide for their families and communities. Indeed, the unemployment rate for formerly incarcerated people is exceptionally high (27 percent).<sup>4</sup> Unemployment for people with criminal records is nearly five times the rate of people without records: Black women with records are most impacted with an unemployment rate of 43.6 percent, compared to 6.4 percent for Black women without a record.<sup>5</sup>

Studies show that a conviction record reduces the likelihood of a callback by nearly 50 percent for men. Thus, the FCA, combined with other criminal justice reform policies, will both remove barriers to employment for people with records and promote public safety in the communities hardest hit by unemployment.<sup>6</sup> The FCA also helps employers meet the substantial demand for qualified workers—it expands the pool of qualified job applicants by removing the chilling effect that people with records face when arrest and conviction history information is requested at the application stage of the hiring process.

### **Is there evidence that the policy improves the job prospects of people with records?**

Yes. There are several studies documenting the significant positive impact on hiring of people with records in the public and private sector. For example, a 2019 study conducted by Daniel Shoag of Case Western University and Stan Veuger of the American Enterprise Institute found the policy increases employment by 4 percent in the nation's most criminalized neighborhoods (i.e., neighborhoods with the highest concentrations of people with records).<sup>7</sup> Another major study conducted by Professor Terry-Ann Craigie of Connecticut College found that ban-the-box policies increase public employment for people with records by 30 percent.<sup>8</sup> These findings are consistent with data reported by jurisdictions such as Washington, D.C.; Durham, North Carolina; and other communities that have adopted ban-the-box policies.

### **How many people will benefit from the FCA when it is fully implemented?**

NELP estimates that every year, more than 700,000 new job applicants with records will benefit from the Fair Chance Act. This figure takes into account the number of people applying for roughly 150,000 federal contract positions each year, and uses a conservative assumption that 10 percent of applicants will have a record, which is consistent with OPM's reported rate.<sup>9</sup> NELP's estimate does not include the number of applicants with records applying for federal agency position since OPM has had a ban-the-box policy in place since 2016, nor does it factor in whether the private contractors will extend the policy companywide to position that are not funded by a federal contract.

## Endnotes

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<sup>1</sup> 5 CFR Sections 330.1300, 731.103 (<https://www.govinfo.gov/content/pkg/FR-2016-12-01/pdf/2016-28782.pdf>)

<sup>2</sup> National Employment Law Project, “Ban the Box: U.S. Cities, Counties and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions” (July 2019). (<https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-July-2019.pdf>).

<sup>3</sup> See joint statement of the organizations in support for House passage of the Fair Chance Act, available online at <http://www.justiceactionnetwork.org/wp-content/uploads/2019/07/Letter-from-Bipartisan-Coalition-Applying-Fair-Chance-Act-House-Vote-1.pdf>

<sup>4</sup> Prison Policy Institute, “Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People” (July 2018). (<https://www.prisonpolicy.org/reports/outofwork.html>)

<sup>5</sup> Ibid.

<sup>6</sup> National Employment Law Project, “Research Support Fair Chance Policies” (August 2016). (<https://s27147.pcdn.co/wp-content/uploads/Fair-Chance-Ban-the-Box-Research.pdf>).

<sup>7</sup> Daniel Shoag, Stan Veuger, “‘Ban the Box’ Measures Help High Crime Neighborhoods” (American Enterprise Institute Economics Working Paper 2016-08, updated March 2019). (<http://www.aei.org/publication/banning-the-box-consequences-of-bans-on-criminal-record-screening-in-employment-applications/>)

<sup>8</sup> Terry-Ann Craigie, “Ban the Box, Convictions and Public Sector Employment” (SSRN: January 27, 2017) ([https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2906893](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2906893)).

<sup>9</sup> The estimate is based on the total number of people employed in federal contract positions in 2015 (5,285,000), the proportion of the workforce hired or replaced each year (3.9 percent), the average number of applications per job opening (36), and the percent of workers who applied for federal positions that had an arrest or conviction record (10 percent). Because the ban-the-box policy has governed federal agency hiring since 2017, the estimate does not account for the number of applicants with records for federal employment (the federal workforce is generally one-half to one-third of the size of the federal contractor workforce). Applying these assumptions, NELP estimates that 742,014 people with records will apply each year for the available federal contractor positions. Sources: Paul Light, “The True Size of Government: Tracking Washington’s Blended Workforce, 1984-2015” (The Volker Alliance: October 2017)

(<https://www.volkeralliance.org/sites/default/files/attachments/Issue%20Paper%20True%20Size%20of%20Government.pdf>); U.S. Bureau of Labor Statistics, “Job Openings and Labor Turnover Survey News Release; September 2019” (November 5, 2019), at Table A

(<https://www.bls.gov/news.release/jolts.htm>); Roy Maurer, “2017 Recruiting Data Shows Fewer Job Applicants, More Hires” (Society for Human Resources Management: August 20, 2018)

(<https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/jobvite-recruiting-data-fewer-job-applicants-hires.aspx>); Madeline Neighly, Maurice Emsellem, “Wanted: Accurate FBI Background Checks for Employment” (National Employment Law Project: July 2016), at page 23 (<https://s27147.pcdn.co/wp-content/uploads/2015/02/Report-Wanted-Accurate-FBI-Background-Checks-Employment-1.pdf>).

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