Emily Morrow
Professor Tierney
Independent Clinical – Office of the New York State Attorney General
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"Ban the Box" Law Enforcement Trends

I. Introduction

Thirty-three states and over 150 cities have enacted "ban the box" or "fair chance" laws. These laws generally require that employers remove questions inquiring into an applicant's criminal history from an initial job application or otherwise delay background checks until the applicant has progressed to a certain stage in the hiring process.[1] "Ban the box" and "fair chance" laws are designed to ensure that employers use neutral criteria to evaluate an application and judge an application by his or her qualifications for the position at issue. In short, they are designed lessen discrimination on the basis of criminal history or prior conviction in job-hiring and mitigate some of the well-documented collateral consequences stemming from mass-incarceration by helping to facilitate re-entry and promote equity in the workplace. These laws have become increasingly popular in the past decade. Even President Barack Obama announced that he would instruct federal employers to "ban the box" from job applications to ensure that individuals with prior criminal histories have an opportunity to compete for federal jobs.[2]

The mechanics of state and local "ban the box" laws vary across jurisdiction. Certain state laws and policies extend only to public sector employers.[3] Other state laws extend to private employers as well.[4] Sometimes, enforcement power is delegated to the State Attorney

[1] Beth Avery and Phil Hernandez, Nat'l Emp't Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, (Sept 25, 2018), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/

[2] Press Release, WHITE HOUSE OFFICE OF PRESS SEC'Y, Fact Sheet: President Obama Announces New Actions to Promote Rehabilitation and Reintegration for the Formerly-Incarcerated (Nov. 2, 2015), https://www.whitehouse.gov/the-press-office/2015/11/02/fact-sheet-president-obamaannounces-new-actions-promote-rehabilitation.

[3] *See infra,* Part II.

[4] *See infra,* Part II.

General. But enforcement power may also be delegated to state agencies, such as a state Department of Labor or Commissioner for Human Rights.[5] To date, recent enforcement actions brought by the Office of the State Attorney General of New York and Massachusetts underscore the important role these institutions play in enforcing these laws.

II. Variation Among State Laws

"Ban the box" and "fair chance" laws largely share a common purpose: preventing criminal recidivism by promoting social rehabilitation and expanding employment opportunities for individuals with criminal records. The earliest "ban the box" laws were local – developing first in San Francisco and Boston and later gaining wider support in the mid-2000s in response to a nationwide re-entry influx as individuals completed sentences imposed during the 1980's "tough-on-crime" era and sought to rejoin the workforce.[6]

Although the laws are animated by similar concerns, the specific activities each law prohibits vary widely. State laws from Hawaii and Washington provide useful historical benchmarks. Hawaii passed the first state-wide ban the box law in 1998. This law extended to employment in both the public and private sectors and prohibits a criminal history inquiry until after a conditional offer of employment.[7] Washington's Fair Chance Act, one of the most recent pieces of state-wide legislation, passed in 2018 is similarly comprehensive. It applies to both private and public employers and prohibits employers from conducting a background check until

[5] *See infra,* Part II. Municipalities may have their own version of a state "ban the box" law. For example, New York City passed its own Fair Chance Act in 2015, which prohibits employers in New York City from asking about a job applicant's conviction until the end of the hiring process. Enforcement power is delegated to the New York City Commission of Human Rights which finalized rules implementing the law in 2017. *See* Beth Avery and Phil Hernandez, Nat'l Emp't Law Project, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, 41 (Sept 25, 2018), https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/

[6] Joseph Fishkin, *The Anti-Bottleneck Principle in Employment Discrimination Law*, 91 Wash. U. L. Rev. 1429, 1455-56 (2014).

[7] Hawaii's Fair Chance Law, verifyprotect.com, https://www.verifyprotect.com/ban-the-box/hawaii/ (last visited March 2, 2019).

after the employer has determined that an applicant is "otherwise qualified" for the job.[8] But it goes further in prohibiting employers from advertising jobs in a way that excludes people with records or setting up any policy which so excludes applicants with criminal histories before making an individualized assessment of qualification.[9]

Scholars have identified six main areas in which state "ban the box" laws deviate. These include: (1) whether the law extends to public and/or private employers; (2) the point at which an employer may conduct a background check or inquire into criminal history; (3) the type of information an employer may consider when conducting a background check; (4) which factors an employer may consider when evaluating criminal history; (5) disclosure obligations; and (6) enforcement delegation.[10]

Most state laws extend coverage only to public employers which are typically defined as agencies at either the state, municipal, or district level. But according to the National Employment Law Project, of the thirty-three states with "ban-the-box" laws, eleven apply their

[8] Avery, *supra* note 1, at 19.
[9] *Id.*
[10] Christina O'Connell, *Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2819-20 (2015).

laws to private employers as well.[11] These states are: California,[12] Connecticut,[13] Hawaii,[14] Illinois,[15] Massachusetts,[16] Minnesota,[17] New Jersey,[18] Oregon,[19] Rhode Island,[20] Vermont,[21] and

[11] Avery, *supra* note 1, at 1.

[12] Cal. Gov't Code § 12952 (West) ("(a) Except as provided in subdivision (d), it is an unlawful employment practice for an employer with five or more employees to do any of the following: (1) To include on any application for employment, before the employer makes a conditional offer of employment to the applicant, any question that seeks the disclosure of an applicant's conviction history. (2) To inquire into or consider the conviction history of the applicant, including any inquiry about conviction history on any employment application, until after the employer has made a conditional offer of employment to the applicant. (3) To consider, distribute, or disseminate information about . . . (A) Arrest not followed by conviction , . . . (B) Referral to or participation in a pretrial or posttrial diversion program. (C) Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law, or any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation. . . . (c)(1)(A) An employer that intends to deny an applicant a position of employment solely or in part because of the applicant's conviction history shall make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job.").

[13] Conn. Gen. Stat. Ann. § 31-51i (West) ("(a) For the purposes of this section, "employer" means any person engaged in business who has one or more employees, including the state or any political subdivision of the state. (b) No employer shall inquire about a prospective employee's prior arrests, criminal charges or convictions on an initial employment application, unless (1) the employer is required to do so by an applicable state or federal law, or (2) a security or fidelity bond or an equivalent bond is required for the position for which the prospective employee is seeking employment. …").

[14] Haw. Rev. Stat. Ann. § 378-1 (West) ("Employer" means any person, including the State or any of its political subdivisions and any agent of such person, having one or more employees, but shall not include the United States."); *Id*. at § 378-2 (West) ("(a) It shall be an unlawful discriminatory practice: (1) Because of race, sex including gender identity or expression, sexual orientation, age, religion, color, ancestry, disability, marital status, arrest and court record, or domestic or sexual violence victim status if the domestic or sexual violence victim provides notice to the victim's employer of such status or the employer has actual knowledge of such status: (A) For any employer to refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual in compensation or in the terms, conditions, or privileges of employment; (B) For any employment agency to fail or refuse to refer for employment, or to classify or otherwise to discriminate against, any individual …").

[15] 820 Ill. Comp. Stat. Ann. 75/10 (West) (""Employer" means any person or private entity that has 15 or more employees in the current or preceding calendar year, and any agent of such an entity or person."); *Id.* at 75/15 (West) ("(a) An employer or employment agency may not inquire about or into, consider, or require disclosure of the criminal record or criminal history of an applicant until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency or, if there is not an interview, until after a conditional offer of employment is made to the applicant by the employer or employment agency.").

[16] Mass. Gen. Laws Ann. ch. 151B, § 1 (West) ("The term "employer" does not include a . . . corporation, if . . . not organized for private profit, nor does it include any employer with fewer than six persons in his employ, but shall include an employer of domestic workers including those covered under section 190 of chapter 149, the commonwealth and all political subdivisions, boards, departments and commissions thereof."; *Id.* at § 4 ("It shall be an unlawful practice: … For an employer, … to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors …, or (iv) a criminal record, or anything related to a criminal record, that has been sealed or expunged pursuant to chapter 276.").

[17] Minn. Stat. Ann. § 364.021 ("(a) A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.").

[18] N.J. Stat. Ann. § 34:6B-5 (West) (""Employer" means an employer or employer's agent, representative, or designee. The term "employer" does not include the Department of Corrections, State Parole Board, county

Washington.[22] Notably some states which extend liability to private sector employers include provisions to protect employers who face a particularly high risk of negligent hiring liability.[23] Although these states are in the minority, "advocates embrace [these laws] as the next step in the evolution of these policies."[24]

Other regimes do not "ban the box" *per se*, but rather regulate *when* and the process by which criminal history can be considered in the hiring process. For example, the laws may

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corrections departments, or any State or local law enforcement agency."); *Id*. at § 34:6B-14 ("a. Except as otherwise provided . . . (1) An employer shall not require an applicant for employment to complete any employment application that makes any inquiries regarding an applicant's criminal record, including an expunged criminal record, during the initial employment application process. (2) An employer shall not make any oral or written inquiry regarding an applicant's criminal record, including an expunged criminal record, or use an online application that requires the disclosure of an applicant's criminal record, including an expunged criminal record, during the initial employment application process.").

[19] Or. Rev. Stat. Ann. § 659A.001 (West) ("(4)(a) "Employer" means any person who in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed."); *Id*. at § 659A.360 ("(1) It is an unlawful practice for an employer to exclude an applicant from an initial interview solely because of a past criminal conviction. (2) An employer excludes an applicant from an initial interview if the employer: (a) Requires an applicant to disclose on an employment application a criminal conviction; (b) Requires an applicant to disclose, prior to an initial interview, a criminal conviction; or (c) If no interview is conducted, requires an applicant to disclose, prior to making a conditional offer of employment, a criminal conviction.").

[20] 28 R.I. Gen. Laws Ann. § 28-5-6 (West) ("(8)(i) "Employer" includes the state and all political subdivisions of the state and any person in this state employing four (4) or more individuals, and any person acting in the interest of an employer directly or indirectly."); *Id*. at § 28-5-7 ("It shall be an unlawful employment practice: (7) For any employer to include on any application for employment, except applications for law enforcement agency positions or positions related to law enforcement agencies, a question inquiring or to otherwise inquire either orally or in writing whether the applicant has ever been arrested, charged with or convicted of any crime …").

[21] Vt. Stat. Ann. tit. 21, § 495d (West) ("(1) "Employer" means any individual, organization, or governmental body including any partnership, association, trustee, estate, corporation, joint stock company, insurance company, or legal representative, whether domestic or foreign, or the receiver, trustee in bankruptcy, trustee, or successor thereof, and any common carrier by mail, motor, water, air, or express company doing business in or operating within this State, and any agent of such employer, which has one or more individuals performing services for it within this State."); *Id*. at § 495j ("(a) Except as provided in subsection (b) of this section, an employer shall not request criminal history record information on its initial employee application form. An employer may inquire about a prospective employee's criminal history record during an interview or once the prospective employee has been deemed otherwise qualified for the position.").

[22] Wash. Rev. Code Ann. § 49.94.005 (West) ("(2) "Employer" includes public agencies, private individuals, businesses and corporations, contractors, temporary staffing agencies, training and apprenticeship programs, and job placement, referral, and employment agencies."); *Id*. at § 49.94.010 ("(1) An employer may not include any question on any application for employment, inquire either orally or in writing, receive information through a criminal history background check, or otherwise obtain information about an applicant's criminal record until after the employer initially determines that the applicant is otherwise qualified for the position. Once the employer has initially determined that the applicant is otherwise qualified, the employer may inquire into or obtain information about a criminal record.").

[23] O'Connell, *supra* note 10 at 2821 (citing Haw. Rev. Stat. § 378-2.5(a), (d)).

[24] Avery, *supra* note 1 at 1.

permit an employer to inquire into criminal history and conduct a background check once the employer has determined the applicant is qualified; after the first interview; or after a conditional offer has been made.[25]

Similarly, these laws often regulate not only *when* an inquiry can be conducted but *what* kinds of information an employer can seek in an inquiry or background check. For example, under New York state law employers may not inquire into arrests or charges that did not result in conviction or take adverse action in response to such information.[26] Other states preclude inquiry into convictions which have been erased or elements of an applicant's history from when he or she was younger than seventeen.[27]

Other state laws which permit an employer to consider particular components of an applicant's criminal history at specific points in the hiring process still provide guidance as to *how* this information can be considered. Scholars have noted that there are certain provisions common to all state ban the box laws that, in this way, function as *exemptions*. For example, when a particular crime is relevant to the job at issue, those employers may, on initial applications, ask about those relevant crimes.[28] More generally, certain categories of jobs are entirely exempt from the statute–these employers may ask about any past convictions on an initial application.[29]

Guidance as to how criminal history may be written at a very high level of generality, as in the case of Hawaii's state law which notes that an employer can withdraw an offer when an

[25] O'Connell, *supra* note 10, at 2821-23.
[26] N.Y. Exec. Law § 296(16).
[27] O'Connell, *supra* note 10, at 2824 (citing Mass. Gen. Laws ch. 6, § 172(a)(4) (2014)).
[28] Fishkin at 1458-59 (citing Haw. Rev. Stat. Ann. § 378-2.5(a), (d) (LexisNexis 2010 & Supp. 2012); Mass. Gen. Laws Ann. ANN. ch. 151B, § 4(9½) (Supp. 2013); Minn. Stat. Ann. § 364.09 (West 2012);.Phila., PA Code tit. 9, ch. 9-3500, § 9-3505 (2014).
[29] *Id.*
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applicant's criminal history bears a "rational relationship" to the job's responsibility.[30] Or the guidance may be very specific, as in the case of New York state law. New York law states that employers may not "deny any license or employment" due to a prior conviction or criminal offense, or for lack of "good moral character" based on a prior conviction or offense, unless "there is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual," or the employment or licensure "would involve an unreasonable risk to property or … safety."[31]

To determine if there is a "direct relationship" between the criminal offense and the employment sought, the New York Correction Law proscribes a multi-factor test. An employer must consider: "(a) [t]he public policy of this State . . . to encourage the licensure and employment . . . (b) [t]he specific duties and responsibilities necessarily related to the license or employment . . . (c) [t]he bearing, if any, the criminal offense . . . will have on his fitness or ability to perform one or more such duties or responsibilities (d) [t]he time which has elapsed . . . (e) [t]he age of the person at the time of occurrence . . . (f) [t]he seriousness of the offense or offenses (g) [a]ny information produced . . . in regard to his rehabilitation and good conduct (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."[32]

Enforcement delegation is similarly varied with little scholarly consensus as to which institution is the most effective. Most state statutes do not explicitly delegate enforcement power to a particular agency or state institution, nor do they outline particular penalties or remedies. Some states delegate oversight and enforcement power over all employment discrimination

[30] Haw. Rev. Stat. § 378-2.5(b).
[31] N.Y. Correct. Law § 752; N.Y. Exec. Law § 296(15).
[32] N.Y. Correct. Law § 753.

issues, including discrimination on the basis of criminal history, to the State Department of Labor.[33] "Ban-the-box" laws in Illinois and Delaware specifically delegate enforcement to Illinois and Delaware's state Departments of Labor.[34] Other states have created special commissions for investigating violations of ban-the-box laws in particular and for imposing fines and penalties up to specified amounts.[35] For example, Rhode Island and Massachusetts delegate investigatory responsibilities to these special commissions.[36] Minnesota, on the other hand, has a bifurcated policy for public and private employers.[37] Under this scheme, public employers are responsible for monitoring their own compliance, subject to adjudication under the Administrative Procedure Act, while private employers are subject to oversight and investigation by the state's commissioner of human rights.[38] Other state laws delegate the authority to conduct investigations and impose penalties to a state's commissioner of human rights.

As the Economic Policy Institute notes, state Attorneys Generals can, and do, play an important supplementary role in enforcing state laws protecting workers rights, especially when state agencies face funding constraints.[39] Uniquely, the Washington Fair Chance Act delegates sole enforcement authority to the Washington State Attorney General's office and permits monetary penalties as an enforcement mechanism.[40] To date, the Attorney General's office has not taken affirmative enforcement action. Still, the structure of the law may signal trends for states seeking to enact similar legislation.

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[33] O'Connell, *supra* note 20, at 2827 (citing Del. Code Ann. tit. 19, § 712(a) (West 2014) and 820 Ill. Comp. Stat. 75/20 (2014)).
[34] *Id.* at 2827.
[35] *Id.*
[36] *Id.* (citing Mas. Gen. Laws ch. 6, § 168(a)–(b) (2014) and R.I. Gen. Laws. Ann. R.I. § 28-5-8 (West 2013)).
[37] *Id.*
[38] *Id.* at 2928 (citing Minn. Stat. § 364.06 (2014)).
[39] Terri Gerstein and Marni von Wilpert, Economic Policy Institute, *State attorneys general can play key roles in protecting workers' rights* (May 7, 2018), https://www.epi.org/publication/state-attorneys-general-can-play-key-roles-in-protecting-workers-rights/
[40] Avery, *supra* note 1, at 19.

III. Case Studies

Despite the wide presence and growing popularity of ban-the-box laws in states and cities around the country, prominent enforcement actions are limited. This signals that to the extent that enforcement depends on private rights of action, litigants likely still lack adequate resources or mechanisms to bring their claims to a state agency and into court. Or, it signals that to the extent that state institutions like state attorneys general are responsible for enforcement, investigatory burdens may be too significant. Resource constraints are likely especially burdensome for offices without dedicated civil rights or labor bureaus or research silos. The case studies that follow, however, may be models for effective enforcement by state attorneys general.

a. New York

The New York State Attorney General has led several successful investigations and enforcement actions of its state ban the box legislation.

In 2014, the New York Attorney General announced settlements with Bed Bath and Beyond and with Party City, both for unlawfully disqualifying candidates based on past criminal convictions. The Attorney General's investigation of Bed Bath and Beyond revealed a pattern of refusing to consider applications submitted by individuals with a prior felony conviction, in violation of New York State law, which requires that before an employer can reject an applicant on the basis of a criminal record, it must assess the individual record to determine whether it is relevant to the job.[41] Under the terms of the settlement, Bed Bath And Beyond agreed to modify its policies to be compliant with New York State law, conduct trainings, preserve records, and

[41] Press Release, Office of the New York State Attorney General, A.G. Schneiderman Announces Settlement With Major Retailer To End Ban On Hiring Applicants With Criminal Convictions (Apr. 22, 2014), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-major-retailer-end-ban-hiring-applicants-criminal

report remediation to the Attorney General's office.[42] It also agreed to pay $125,000 in relief, part of which was awarded as restitution to individuals denied employment, and part of which was paid to non-profit organizations that provide job training for individuals with criminal records.[43] The Attorney General's investigation on Party City revealed that Party City refused to hire individuals with felony convictions for full-time positions in violation of the same New York State law.[44] Party City agreed to revise its hiring policies, conduct training, reconsider applications from previously disqualified applicants, and pay a $95,000 penalty.[45]

In 2017, the New York Attorney General announced a settlement with Big Lots Stores and Marshalls, two national retailers, for violation of local Buffalo, New York law which prohibits inquiry into criminal history on initial employment applications, at their Buffalo, New York locations.[46] Under the terms of the settlement, in addition to agreeing to implement new policies, training, and reporting procedures to comply with local and New York State law, Big Lots agreed to pay a penalty of $100,000 and Marshalls agreed to a penalty of $95,000.[47] And, both retailers agreed to take affirmative steps to recruit applicants with criminal histories.[48]

In 2018, the New York Attorney General settled with Aldo Group, Inc. (Aldo), a global shoe retailer, for violation of the New York City law.[49] Aldo has 53 stores across New York

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[42] *Id.*
[43] *Id.*
[44] Press Release, Office of the New York State Attorney General, A.G. Schneiderman Announces Agreement With Party City To End Discrimination In Hiring Based On Criminal Records (Oct 24, 2014), https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-party-city-end-discrimination-hiring-based
[45] *Id.*
[46] Press Release, Office of the New York State Attorney General, A.G. Schneiderman Announces Settlements With Two Major National Retailers Over Violations Of 'Ban The Box' Law (Jan. 20, 2016), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlements-two-major-national-retailers-over-violations-
[47] *Id.*
[48] *Id.*
[49] Press Release, Office of the New York State Attorney General, A.G. Underwood Announces Settlement With Aldo Group Inc. To End Hiring Discrimination Based On Criminal Records (June 19, 2018), https://ag.ny.gov/press-release/ag-underwood-announces-settlement-aldo-group-inc-end-hiring-discrimination-based

State, 30 of which are in New York City.[50] The New York Attorney General's investigation revealed that Aldo's employment applications included an inquiry into criminal history—a violation of New York City's Fair Chance Act—and that Aldo lacked policies for properly evaluating criminal records.[51] As a result, managers understood that they had wide discretion to consider an applicant's criminal record and could dismiss an applicant on the basis of a prior felony conviction alone.[52] The terms of the settlement require that Aldo pay a penalty of $120,000 to New York State, modify their employment applications to be in compliance with New York City law, create policies and trainings to comply with New York State law which required an individual assessment of criminal history at an appropriate point in the hiring process, and report its progress to the New York Attorney General.[53]

b. Massachusetts

In 2018, the Office of the Attorney General of Massachusetts announced a settlement resulting from an investigation into Boston and Cambridge-area employers, which found that twenty-one employers failed to comply with Massachusetts' "ban the box law" by inquiring into criminal history on an initial application.[54] The Massachusetts Attorney General entered into settlement agreements with four employers, and issued warning letters to seventeen others.[55] Under the terms of the settlement, , three companies—Edible Arrangements, Five Guys Burgers

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] Press Release, Office of the Attorney General of Massachusetts, AG Healey Cites Employers for Violating State CORI Law in Hiring Practices (June 6, 2018), https://www.mass.gov/news/ag-healey-cites-employers-for-violating-state-cori-law-in-hiring-practices
[55] *Id.*

and Fries, and L'Occitane—agreed to pay a penalty of $5,000 and take steps to comply with the law.[56]

c. Litigation by Private Firms

Private firms also play a role in enforcing "ban the box" legislation. For example, Outten & Golden LLP and Willing, Wiliams & Davidson filed a complaint with City of Philadelphia Commission on Human Relations in 2016, alleging that Lyft Inc. violated the City of Philadelphia's Fair Criminal Records Screening Standards Ordinance. In 2017, Outten & Golden and Youth Represent filed a class action law suit in federal district court against Barclays Center, Levy Restaurants, Inc., and Professional Sports Catering LLC alleging violations of New York City's Fair Chance Act.[57] The case settled in September 2018.[58] Private firms cannot, and should not, replace state institutions from acting as primary agents of civil rights law enforcement, however, they do play an important role alongside.

IV. "Ban the Box" Law Enforcement Moving Forward

Many scholars and advocates celebrate the potential that "ban the box" and "fair chance" laws have to challenge an employer's "overreliance" on criminal history when screening job applicants. Their popularity has even prompted federal lawmakers to introduce similar nationwide legislation. In 2017, Rep. Elijah Cummings of Maryland and Senator Cory Booker of New Jersey introduced the federal "Fair Chance Act" (S.842/H.R.1905), which would preclude Federal agencies and contractors from requesting an applicant's criminal history before

[56] *Id.*
[57] Press Release, Outten & Golden LLP, Barclays Accused of Illegal Screening of Job Applicants (Aug. 7, 2017) https://www.outtengolden.com/outten-and-golden-llp-barclays-accused-of-illegal-screening-of-job-applicants
[58] LAW360, Barclays Center Settles Suit Over Biased Background Checks (Sept. 13, 2018, 7:24 PM) https://www.law360.com/articles/1082581

the applicant has received a conditional offer.[59] But scholars also caution that "ban the box" laws alone won't cure the discriminatory impact of criminal records policies, raising important questions for effective, and *meaningful*, enforcement.[60]

Studies show that even when employers are prohibited from inquiring into criminal history on the face of their application, implicit biases and assumptions about race and criminal history result in the perpetuation of racial disparities in call-backs during the hiring process.[61] This research shows that ban-the-box laws do not help individuals with criminal records find jobs as much as proponents argue, and may even reduce employment outcomes for young, low-skilled black men in particular who are precluded for signaling to employers that they lack a criminal record by way of "the box".[62] So even if applicants are protected from criminal history discrimination, other forms of discrimination persist. In response, some scholars argue that the purpose underlying "ban-the-box" laws may be best-served if the laws are integrated with existing federal anti-discrimination statutes like Title VII, which allows claimants to challenge laws based on their disparate racial impact, provided that these enforcement agencies make combatting discrimination on the basis of racial biases and inferences a priority.[63]

A separate line of criticism posing a potential roadblock for successful enforcement stems from employers' concern that "ban-the-box" laws will unduly burden their operations.

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[59] Press Release, National Employment Law Center, Congress Introduces Bipartisan Legislation to Ensure Formerly Incarcerated and People with Records Have Fair Chance to Work, (Apr. 6, 2017) https://www.nelp.org/news-releases/congress-introduces-bipartisan-legislation-to-ensure-formerly-incarcerated-and-people-with-records-have-fair-chance-to-work/

[60] Jonathan J. Smith, *Banning the Box but Keeping the Discrimination?: Disparate Impact and Employers' Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV.198, 200 (2014).

[61] Alexia Elejalde-Ruiz, *Ban-the-Box Laws May Worsen Racial Bias Against Black Job Candidates, Study Says*, CHI. TRIBUNE, (March 2, 2019, 9:48 PM), http://www.chicagotribune.com/business/ct-ban-the-box-racial-bias-0720-biz20160719-story.html.

[62] Jennifer L. Doleac, *Strategies to Productively Reincorporate the Formerly-Incarcerated into Communities: A Review of the Literature*, IZA Discussion Paper No. 11646, 18 (June 16, 2018), http://dx.doi.org/10.2139/ssrn.3198112

[63] Dallan F. Flake, *Do Ban the Box Laws Really Work?* 104 IOWA L. REV. __, 45 (forthcoming 2019).

Employers must balance their compliance with "ban-the-box" laws with a legitimate obligation to keep their workplaces safe and prevent liability for negligent hiring. On this point, Adriel Garcia writes that "employers are placed in a no-win situation: the common law encourages employers to conduct background checks . . . [but] legislatures are hampering the background checks that employers can conduct. The result is a 'legal minefield.'"[64] However, other studies show that, in fact, there is almost no empirical support to prove or disprove the claim that "ban the box" laws pose an undue burden.[65] In response, "ban-the-box" advocates argue that employers are not precluded from *ever* conducting a background check to ensure workplace safety, the check is simply deferred in the hiring process.[66]

Some scholars argue that the "resurgence in litigation aimed at fair hiring practices with criminal histories is a direct reaction to the widespread discrimination against people with criminal backgrounds and the growing ban-the-box movement nationwide."[67] But it is not immediately clear that private litigation is the most effective mechanism for holding offenders accountable given the dearth of significant state court judgments on claims arising under "ban-the-box" laws.[68] Thus, scholars argue that to be truly effective, "ban the box" laws need an avenue for "meaningful agency enforcement" *in addition to* providing a private right of action since most individuals are not in a position to enforce the private right or investigate abusive practices.[69] Thus, Washington state's "ban the box" law which delegates enforcement power

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[64] Adriel Garcia, *The* Kobayashi Maru *of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current "Ban the Box" Legislation*, 85 TEMPLE L. REV. 921, 923 (2013).
[65] Flake, *supra* note 63, at 46.
[66] O'Connell, *supra* note 10, at 2807 (citing Rhonda Smith, *Employer Concerns About Liability Loom As Push for Ban-the-Box Policies Spreads*, BLOOMBERG BNA (Aug. 18, 2014), http://www.bna.com/employer-concerns-liability-n17179893943/.
[67] O'Connell at 2817 (citing Michelle Rodriquez & Maurice Emsellem, Nat'l Emp't Law Project, 65 Million—Need Not Apply, 1, 12 (2011)).
[68] *Id*. at 2826 (noting that in 2015, "[t]here is no court case to date alleging violations of ban-the-box laws").
[69] Sandra J. Mullings, Employment of Ex-Offenders: The Time has Come for a True Antidiscrimination Statute, 64 Syracuse L. Rev. 261, 292 (2014).

exclusively to the Attorney General to investigate complaints, issue discovery demands, and pursue sanction, could hinder effective enforcement if it does not also provide a private cause of action.[70] A federal agency like the Equal Employment Opportunity Commission (EEOC) or state Attorneys General,[71] as described above, are likely to be in the best position to provide meaningful enforcement.

Effective, meaningful, enforcement also requires that employers be on notice of their obligations and the consequences for any violations. Similarly, job seekers need to be informed of their rights. Indeed, since compliance with any one particular "ban the box" law is usually not particularly complicated, enforcement agencies, employers, and job-seekers would benefit if the agency simply issued facts sheets and compliance manuals. But for companies with widespread or nationwide operations, or that operate in states with layered municipal and state regimes, compliance may be more difficult.[72] Here, enforcement procedures could benefit significantly from heightened clarity and uniformity among the state laws and among municipal laws which are at risk of preemptions by the state.[73]

While there are benefits that flow from allowing state legislatures to tailor their enforcement mechanisms to local needs and resource limitations and jurisdictional constraints in among state agencies pose downsides.

V. Conclusion

Ban the Box laws represent an important step forward in our collective social and political effort to achieve equality of opportunity. These laws vary widely in their terms and

[70] Joseph P. Hoag, DAVIS WRIGHT TREMAIN LLP, *New "Ban the Box" Laws in Washington Take Effect June 2018* (May 24, 2018), https://www.dwt.com/New-Ban-the-box-Laws-in-Washington-Take-Effect-June-2018-05-24-2018/.
[71] *Id.*
[72] O'Connell, supra note 10, at 2826-28.
[73] *Id.* at 2826.

scope. Significant benefits flow from allowing state legislatures to tailor these terms to local needs and resource limitations or jurisdictional constraints on agencies. But, divergent state laws and could benefit significantly from efforts to streamline cohere around meaningful enforcement mechanisms. State Attorneys General offices, particularly those with dedicated and flexible civil rights or labor bureaus, are in a prime position to lead this effort.