

Criminal Justice and Employment Discrimination: Improving Fair Chance Hiring Laws

Maria Granik* and Marianne DelPo Kulow**

ABSTRACT

One in three adults in the U.S.—nearly eighty million people—have some type of criminal record that may appear on a routine background check for employment. Arrest, conviction, and incarceration substantially interfere with a person's ability to find a job. Almost half of unemployed men in the United States have a criminal conviction by the time they turn thirty-five, and sixty percent of people who have been incarcerated remain unemployed one year after release—a critical period at the crossroads between community reengagement and new criminal activity. Since employment is a key factor for decreasing the likelihood of re-offense, policies that expand access to jobs for people with records lower incarceration rates, decrease taxpayer costs of prisons and government assistance programs, and create safer communities. This article examines an important strategy for improving employment opportunities for justice-involved individuals: laws that address hiring discrimination that is based on criminal background checks. Thirty-seven states and over 150 cities and counties have adopted such laws to encourage hiring based on the applicants' skills and qualifications, while discouraging employment decisions based on pre-conceived notions about people with records. The laws remove questions about criminal history from job applications, increasingly delay background checks until after interviews or conditional job offers, at times prohibit the use of arrest or juvenile records in hiring, and in some states require a legitimate business reason for rejecting candidates based on their criminal history. These laws play a crucial role in providing access to employment for applicants with records, while also expanding the talent pool for employers.

TABLE OF CONTENTS

INTRODUCTION	398
I. SCOPE OF THE PROBLEM	400
A. Criminal Records and High Unemployment Rates	401
1. Barriers to Employment for Applicants with Records	401
2. Economic and Social Costs of Unemployment	402
B. Misconceptions about the Risks of Hiring Employees with Records	404
1. The Stigma of Arrest or Criminal Conviction	404
2. Risk of Re-offense and Poor Performance	405

* Assistant Professor of Law, Bentley University.

** Gregory H. Adamian Professor of Law, Bentley University. We are grateful to Emma Fisher, Kendall Woodcock, and Anmol Somaiya for their excellent research assistance. We would also like to thank the editors at the *Harvard Law and Policy Review* for their insightful suggestions and for all their hard work on the article. This research was supported in part by a grant from the Bentley University Research Council.

II.	OVERVIEW OF EXISTING LAWS	408
A.	<i>Ban the Box and Fair Chance Laws</i>	408
1.	<i>State laws</i>	410
2.	<i>Federal laws</i>	413
B.	<i>Clean Slate Laws</i>	415
1.	<i>State laws</i>	415
2.	<i>Federal laws</i>	416
III.	CRITIQUES AND RESPONSES	417
A.	<i>Questions of Effectiveness</i>	418
B.	<i>Fair Chance Laws as Part of Broader Criminal Justice Reform</i>	421
C.	<i>Fair Chance and Other Policies Enhance Each Other</i>	423
IV.	FOCUS ON FUTURE REFORMS	424
A.	<i>Economic Incentives for Employers to Promote Fair Chance Hiring</i>	424
1.	<i>Federal and State Tax Credits</i>	425
2.	<i>Misconduct Insurance</i>	433
3.	<i>Federal Contract Preference</i>	434
B.	<i>Working Against Stigma: Education and Collaboration</i>	435
C.	<i>Implementation Strategies by Employers</i>	437
D.	<i>Improved Enforcement of Fair Chance Laws by State and Federal Agencies</i>	438
	CONCLUSION	441

INTRODUCTION

Fair Chance hiring laws and policies create work opportunities for people with a record of arrest, conviction, or incarceration so they can provide for themselves and their families. For those who have served time in prison, employment is a precondition of successful reentry and significantly reduces the chances of future encounters with the criminal justice system.¹ Yet, job applicants with records “are much less likely to hear back from [a] potential employer.”² Employment discrimination against people with criminal records also perpetuates racial discrimination because of disproportionately high rates of criminal justice involvement for people of color.³ Barriers to employment

¹ See NAT’L EMP L. PROJECT, *Fact Sheet: Research Supports Fair Chance Policies*, 2 (Apr. 17, 2024), <https://www.nelp.org/app/uploads/2024/04/Research-Supports-Fair-Chance-Policies-Apr.2024.pdf> [<https://perma.cc/F8CM-7DUG>] (hereinafter “*Research Supports Fair Chance Policies*”) (noting “employment [is] the single most important influence of decreasing the likelihood of rearrest” and that “nearly twice as many employed people had avoided rearrest as compared to those who did not find employment” two years after release) (citing Mark T. Berg & Beth M. Huebner, *Reentry and the Ties that Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 1, 2 (2011)).

² *Id.* at 4.

³ See DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* 71 (2017). Indeed, Pager argues that black ex-offenders may be “doubly disadvantaged” by being both more likely to be incarcerated than whites, and more strongly affected by the stigma of a criminal record in seeking employment. Although the topic of racial discrimination in the criminal justice system is closely related to the issues we discuss, a detailed

affect millions of people and their families in the United States, where nearly one in three adults—or about eighty million people—have some criminal record and more than 550,000 return to communities every year after release from state or federal prison.⁴

Advocates have been promoting legal reforms to address these challenges for several decades. One approach has focused on limiting the use of background checks in hiring by prohibiting employers from including questions about criminal records on job applications. These policies are known as Ban the Box (BTB) because they remove the check box to disclose past arrests and convictions from job application forms. Ban the Box was the starting point for reform, but many of these laws have evolved to “adopt other best practices” aimed at “diminishing the harmful effects of hiring policies that exclude people with criminal records.”⁵

These best practices, which several jurisdictions have implemented in recent years, include delaying background checks until after an interview or a conditional employment offer, preventing employers from using irrelevant or old convictions to reject candidates, and ensuring that applicants have the opportunity to provide evidence of mitigating circumstances and rehabilitation.⁶ Laws that encompass these types of additional employer restrictions are generally called Fair Chance laws. Thirty-seven states and over 150 cities and counties have adopted some form of a Fair Chance or Ban the Box law with the goal of encouraging employers to “consider a job candidate’s qualifications first—without the stigma of a conviction or arrest record.”⁷

Despite the progress that these laws represent, qualified job applicants with records continue to struggle to find employment. The need for additional legal and policy reforms is clear, and organizations like Just Leadership USA (JLUSA), the National Employment Law Project (NELP), and many others have been at the forefront of the work to advance reform efforts.⁸ This article seeks to contribute to the fight against employment discrimination by articulating the policy reasons for Fair Chance laws, responding to some recent

discussion of it is beyond the scope of this paper. For a seminal work on this topic, *see* MICHELLE ALEXANDER, *THE NEW JIM CROW* (2010).

⁴ *Research Supports Fair Chance Policies*, *supra* note 1, at 1.

⁵ RACHEL M. KLEINMAN & SANDHYA KAJEEPETA, THURGOOD MARSHALL INST. AT NAACP LEGAL DEF. FUND, *BARRED FROM WORK: THE DISCRIMINATORY IMPACTS ON CRIMINAL BACKGROUND CHECKS IN EMPLOYMENT* 12 (2023), <https://tminstituteldf.org/wp-content/uploads/2023/07/Barred-from-Work.pdf> [<https://perma.cc/S7PM-QZ8D>]. *See infra* Section II for a detailed discussion of the way Ban the Box laws have evolved. We use the term “Fair Chance” laws to refer to the broader range of laws aimed at preventing unjustified bias against job applicants with records. These include Ban the Box laws, which prohibit questions about criminal records from job applications, but also encompass broader protections for workers with records.

⁶ *See* BETH AVERY & HAN LU, NAT’L EMP. L. PROJECT, *BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR-CHANCE POLICIES TO ADVANCE EMPLOYMENT OPPORTUNITIES FOR PEOPLE WITH PAST CONVICTIONS* 3 (2021), <https://www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide/> [<https://perma.cc/BPL6-WK7L>].

⁷ *Id.* at 2.

⁸ *See About Us*, JUST LEADERSHIP USA, <https://jlusa.org/about/> [<https://perma.cc/NZ89-KU75>] (last visited Nov. 21, 2025). Formerly incarcerated people continue to spearhead this work. In fact, JLUSA “was founded on the principle that the people closest to the problem are the people closest to the solution, but furthest from resources and power.” *Id.*

criticisms of these laws as ineffective, and proposing legal reforms designed to improve employment prospects for justice-involved individuals.

Part I begins with an overview of the challenges that people with criminal records face in the employment context and the primary reasons for employers' resistance to hiring them. This part also discusses the taxpayer cost of unemployment and the positive emotional impact of work for those with criminal records. Part II provides an overview of existing state and federal laws designed to address employment discrimination against people with criminal records. Part III analyzes the claim that Ban the Box and Fair Chance laws are ineffective and shows that the evidence of ineffectiveness is inconclusive and does not support a turn away from this policy approach. The shortcomings of these laws should not undermine their legitimacy; instead, these flaws provide an impetus for additional reform efforts. Finally, Part IV provides a discussion of reforms that can make Fair Chance laws and policies more effective, arguing that the following four strategies hold the most promise: (1) meaningful incentives for employers such as tax credits, liability insurance, and federal contract preferences; (2) employer education about the benefits of fair chance hiring to help combat stigma; (3) more effective implementation of Fair Chance laws by employers; and (4) better enforcement by state and federal administrative agencies. Nic Watson, the director of a Philadelphia workforce development non-profit, eloquently summarized the benefits of Fair Chance laws: "[s]econd-chance hiring isn't just the right thing to do—it's one of the most effective tools we have to improve public safety, grow our economy, and reduce long-term poverty."⁹ This article strives to articulate the most productive legislative path for achieving these benefits.

I. SCOPE OF THE PROBLEM

As U.S. incarceration rates have risen since the 1980s to surpass those of every other independent democracy in the world, many Americans today have had some type of involvement with the criminal justice system.¹⁰ Analysts estimate that about one third of adults in the United States have a criminal record.¹¹ Some numeric comparisons help to grasp the magnitude of the problem vividly:

America now houses roughly the same number [of] people with criminal records as it does four-year college graduates. Nearly half of black males and almost 40 percent of white males are arrested by

⁹ Nic Watson, "Second Chance" Hiring is Good for the City's Future, PHILA. CITIZEN (May 1, 2025), <https://thephiladelphiacitizen.org/guest-commentary-second-chance-hiring-is-good-for-the-citys-future/> [https://perma.cc/M9FC-WY9X].

¹⁰ See Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL'Y INITIATIVE (June 2024), <https://www.prisonpolicy.org/global/2024.html> [https://perma.cc/4CWB-WM9F].

¹¹ Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College Diplomas*, BRENNAN CTR. FOR JUST. (Nov. 17, 2015), <https://www.brennancenter.org/our-work/analysis-opinion/just-facts-many-americans-have-criminal-records-college-diplomas> [https://perma.cc/9KWG-H3V5].

the age 23. If all arrested Americans were a nation, they would be the world's 18th largest. Larger than Canada. Larger than France. More than three times the size of Australia.¹²

The collateral effects of incarceration follow families of people with convictions as well; nearly half of U.S. children have at least one parent with a record.¹³ A history of criminal justice system involvement carries significant stigma, undermining the ability of those with a criminal record to find a job. At the same time, until April 2025, the United States was experiencing a labor shortage.¹⁴ Although that gap has largely closed, labor shortages remain in many places and industries and many economists believe that the problem will continue to worsen as demographics shift.¹⁵ Some commentators have suggested that employers should turn to people with criminal records in order to successfully address labor shortage issues.¹⁶ In this section we explore the wide-ranging effects of the high rates of unemployment among people with criminal records¹⁷ and analyze the misconceptions underlying employers' reluctance to hire those who have been arrested, convicted, or incarcerated.¹⁸

A. Criminal Records and High Unemployment Rates

1. Barriers to Employment for Applicants with Records

The vast majority of U.S. employers use criminal background checks as part of the hiring process. A 2012 Society for Human Resource Management survey revealed that nearly seventy percent of employers conduct criminal background checks on all their applicants.¹⁹ In another survey, "over 70% of job applicants nationwide reported undergoing a criminal background check."²⁰ Employers use background checks to screen out applicants with records for a variety of reasons that we explore in greater detail below.²¹ Their widespread use leads people with records to be shut out of employment at extremely high rates. According to a 2009 Justice Department study, any criminal conviction

¹² *Id.*

¹³ *Research Supports Fair Chance Policies*, *supra* note 1, at 3.

¹⁴ See Stephanie Ferguson Melhorn & Isabella Lucy, *America Works Data Center: The U.S. Workforce by the Numbers*, U.S. CHAMBER OF COM., (Nov. 11, 2025), <https://www.uschamber.com/workforce/america-works-data-center> [<https://perma.cc/22LH-F2BS>].

¹⁵ See *id.* ("Up until April 2025, the U.S. remained in a worker shortage: There were more open jobs than available workers, meaning that if every unemployed person in the country found a job, we would still have open jobs. That is still the case in many industries, but nationally the gap has largely closed... One big challenge for workforce participation: the American workforce is aging. Following the Great Recession, birth rates in the U.S. experienced a decline, ultimately reaching a historic low in 2020.").

¹⁶ See generally JEFFREY D. KORZENIK, *UNTAPPED TALENT: HOW SECOND CHANCE HIRING WORKS FOR YOUR BUSINESS AND THE COMMUNITY* (2021) (arguing that people with criminal records can be loyal and productive employees and giving examples of businesses that have successfully implemented second chance hiring practices).

¹⁷ *Infra* Section I.A.

¹⁸ *Infra* Section I.B.

¹⁹ Friedman, *supra* note 11.

²⁰ KLEINMAN & KAJEEPETA, *supra* note 5, at 4.

²¹ *Infra* Section I.B.

lowers the chances of a job applicant receiving an offer of employment by fifty percent.²² The National Employment Law Project reports that about sixty percent of people who are released from prison are unemployed a year after their release.²³ Moreover, the jobs that people with records are able to secure are generally not desirable or well-compensated. According to NELP, “[e]ven when people with records find employment, they are often offered the most unstable, dangerous, and underpaid jobs.”²⁴

Racial discrimination in the criminal justice system, which is “both well-documented and staggering,”²⁵ leads to a more pronounced negative impact of criminal history on employment for Black applicants. Indeed, “disproportionately high rates of criminal justice involvement for black people, combined with persistent racism and discrimination, make it particularly difficult for black job seekers to secure employment.”²⁶ Racial disparities in incarceration rates are themselves a result of well-documented history of discrimination and bias in the criminal justice system.²⁷ Studies also demonstrate the existence of racial disparities in post-incarceration employment. For example, the “working-age ‘prison penalty’ increases unemployment rates by 14 percentage points for white men, compared with 28 percentage points for Black men and 37 percentage points for Black women.”²⁸ These statistics suggest that racial discrimination persists post-incarceration, making it even harder for Black justice-involved individuals to secure employment than their white counterparts.

At the same time, it is clear that employment—particularly quality employment with fair compensation—is essential to ensure successful reentry into the community after prison and to reduce the likelihood of re-offense.²⁹ Employment creates the conditions for meaningful participation in society and economic stability, without which a return to criminal behavior is more likely.

2. *Economic and Social Costs of Unemployment*

Inadequate access to work opportunities for those with a criminal record creates substantial costs for society. A NELP report provides an overview

²² Friedman, *supra* note 11. See also Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOCIO. 937 (2003).

²³ BETH AVERY, NAT’L EMP L. PROJECT, FAIR CHANCE HIRING FOR EMPLOYERS PART ONE: UNDERSTANDING THE IMPORTANCE OF FAIR CHANCE HIRING 3 (2023), <https://www.nelp.org/app/uploads/2023/04/Policy-Brief-1-The-Case-for-Fair-Chance-Hiring-by-Employers-NELP.pdf> [<https://perma.cc/KK7B-PAXA>].

²⁴ *Id.*

²⁵ *Id.* at 2.

²⁶ Shawn Bushway et al., *Barred from Employment: More than Half of Unemployed Men in Their 30s Had a Criminal History of Arrest*, 8 SCI. ADVANCES 1, 2 (2022).

²⁷ See AVERY, *supra* note 23, at 2.

²⁸ KLEINMAN & KAJEEPETA, *supra* note 5, at 8 (citing Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, PRISON POL’Y INITIATIVE (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html> [<https://perma.cc/UQV8-DWAH>]).

²⁹ See AVERY, *supra* note 23, at 2–3.

of these economic losses resulting from the high levels of unemployment among people with criminal records: “The cost of corrections at each level of government has increased 660% from 1982 to 2006, consuming \$68 billion a year, and the reduced output of goods and services of people with felonies and prison records is estimated at between \$57 and \$65 billion in losses.”³⁰ In 2014, the losses to the U.S. gross domestic product from the lack of employment opportunities for people with a history of incarceration or a criminal record amounted to \$78 to \$87 billion.³¹ More recently, a 2020 study estimated that lost wages, in aggregate, cost people touched by the criminal justice system more than \$372 billion annually.³²

The economic costs for individuals and their families are profound as well. A conviction or imprisonment at a young age lowers a person’s earnings significantly over their lifetime. Criminal justice involvement impacts the earnings of Black and Latino people to a greater extent, further deepening the racial wealth gap.³³ On average, people who have been incarcerated experience a fifty-two percent reduction in earnings every year.³⁴ A felony conviction not resulting in prison time leads to an average reduction in annual earnings of twenty-two percent, while a misdemeanor conviction creates a sixteen percent reduction.³⁵

Restricted access to economic opportunities hinders social re-integration for people released from prison, while increasing their chances of reoffending. According to a 2011 study, “employment [is] the single most important influence on decreasing the likelihood of rearrest” for those who are released from incarceration.³⁶ Consequently, improving the chances of employment for people with criminal records will also reduce costs of their additional incarceration and contribute to safer communities.

Furthermore, unemployment “creates dignitary harms: work can be an important source of a person’s sense of self-worth, fulfillment, pride, and belonging.”³⁷ The opportunity to engage in meaningful work is an important

³⁰ KLEINMAN & KAJEEPETA, *supra* note 5, at 5 (quoting MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, NAT’L EMP. L. PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 3(2011), https://www.nelp.org/app/uploads/2015/03/65_Million_Need_Not_Apply1.pdf [<https://perma.cc/7QQ8-49M9>]).

³¹ CHERRIE BUCKNOR & ALAN BARBER, CTR. FOR ECON. & POL’Y RSCH, THE PRICE WE PAY: ECONOMIC COSTS OF BARRIERS TO EMPLOYMENT FOR FORMER PRISONERS AND PEOPLE CONVICTED OF FELONIES 2–3 (2016), <https://cepr.net/images/stories/reports/employment-prisoners-felonies-2016-06.pdf>.

³² TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS: HOW INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM DEEPENS INEQUALITY 7 (2020).

³³ *Id.* at 6.

³⁴ AVERY, *supra* note 23, at 3.

³⁵ *Research Supports Fair Chance Policies*, *supra* note 1, at 2.

³⁶ Berg & Huebner, *supra* note 1, at 2.

³⁷ KLEINMAN & KAJEEPETA, *supra* note 5, at 4 (citing L. Randall Wray & Mathew Forstater, *Full Employment and Social Justice in THE INSTITUTIONALIST TRADITION*, in LABOR ECONOMICS 253–56 (Dell P. Champlin & Janet T. Knoedler eds., 2004); *see also* Martha Nussbaum, *Capabilities as Fundamental Entitlements: Sen and Social Justice*, 9 FEMINIST ECON. 33, 42 (2003).

source of self-respect.³⁸ Given the central role of work in human experience more generally, it is not surprising that stable employment is crucial for preventing crime and diminishing the lifetime (and inter-generational) impact of incarceration.

The relationship between high quality employment and self-respect also highlights the need to reduce career-advancement barriers for people with records. A history of criminal justice involvement can prevent people from getting hired at the outset, but it can also inhibit them from promotions even if their job performance would otherwise open up those types of opportunities. Fair Chance laws and policies should be designed in a way that not only helps people get their foot in the door but also provides equal opportunity for career advancement.

B. Misconceptions about the Risks of Hiring Employees with Records

1. The Stigma of Arrest or Criminal Conviction

Employers' reluctance to hire people with criminal records stems, at least in part, from the stigma attached to encounters with the criminal justice system. Many commentators have noted that punishment for criminal behavior is not limited to the sentence imposed on offenders. The post-conviction barriers to employment, housing, public benefits, and other opportunities "are generally known as 'collateral consequences' or 'collateral sanctions,' and in 2015 the American Bar Association's National Inventory of the Collateral Consequences of Conviction counted roughly 45,000 of them nationwide."³⁹ The prevalence of these collateral consequences has led scholars and practitioners to speak of a "new civil death."⁴⁰ These restrictions on re-entry express society's moral condemnation of those who have committed criminal offenses. But they also tend to normalize the exclusion of people with records from essential aspects of life, including employment. In other words, employers refuse to consider people with records as part of their talent pool, even when their past criminal behavior bears no relation to their ability to succeed in the job, because they are "manifesting and reproducing stigma that comes with being marked by the criminal justice system as morally suspect and socially other."⁴¹

³⁸ See generally Jeffrey Moriarty, *Rawls, Self-Respect, and the Opportunity for Meaningful Work*, 34 SOC. THEORY & PRAC. 441, 441–59 (2009) (examining John Rawls's account of self-respect and his claim that the opportunity for meaningful work is a social basis of self-respect).

³⁹ Michael L. Zuckerman, *Irrational Collateral Sanctions*, 20 OHIO ST. J. CRIM. L. 87, 92 (2023) (citing AM. BAR ASS'N CRIM. JUST. SEC., NAT'L SUMMIT ON COLLATERAL CONSEQUENCES CONFERENCE REPORT (Feb. 27, 2015); see Joy Radice, *The Reintegrative State*, 66 EMORY L. J. 1315, 1321, n.15 (2017).

⁴⁰ Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1815–25 (2012); see ALEXANDER, *supra* note 3 at 142–43; see Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 527–28 (2006); see also Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L. J. 753, 754–56 (2011).

⁴¹ Naomi F. Sugie, Noah D. Zatz, & Dallas Augustine, *Employer Aversion to Criminal Records: An Experimental Study of Mechanisms*, 58 CRIMINOLOGY 5, 6 (2019) (explaining studies

The best way to combat stigma is through personal contact with individual applicants.⁴² These interactions create the space needed for hiring managers to evaluate candidates on their own terms, rather than based on generalized assumptions about what prior contact with the criminal justice system might mean. Another powerful way to challenge preconceived judgments about employees with records is through mentoring by other employers who have built successful fair chance hiring programs.⁴³ Even if employers can get past their prejudicial views about employees with records, concerns related to safety and job performance remain. We now examine the argument that these concerns, however legitimate at first glance, are in fact not well-grounded.

2. Risk of Re-offense and Poor Performance

Researchers have demonstrated that as people age and more time passes since they engaged in criminal behavior, the chances that they will reoffend diminish substantially. Indeed, “more than 25 percent of workers in the active workforce have at least one prior conviction.”⁴⁴ This statistic supports the claim that “[p]eople with conviction records can be (and are) successful employees.”⁴⁵ Empirical study of the time it takes for someone with a criminal record to be “redeemed”—or reach a point at which they are no more likely to be arrested than a person from the general population—is ongoing. But the results of studies conducted over the past two decades suggest that there is a measurable timeline for estimating risk of re-offense.

In a 2009 analysis published in the journal *Criminology*, Alfred Blumstein and Kiminori Nakamura analyzed criminal histories of 88,000 people who had been arrested for the first time in New York state in 1980.⁴⁶ Blumstein and Nakamura defined the concept of “hazard rate” to mean “the probability, over time, that someone who has stayed clean will be arrested.”⁴⁷ They found that the time it took for hazard rates to decline to the same level as that for people of the same age in the general population differed depending

have found that this stigma extends not just to felonies, but to lower-level violations as well); see also C. Uggen et al., *The Edge of Stigma: An Experimental Audit of the Effects of Low-Level Criminal Records on Employment*, 52 *CRIMINOLOGY* 627, 627–54 (2014) (showing that for low-level arrests, or what the authors term “the edge of stigma,” “the mark of a criminal record is indeed fainter, although still consequential, for the individuals and groups most subject to both arrest and low-wage work [i.e. racial minorities]”).

⁴² For a discussion of this claim see Section IV.B, *infra*.

⁴³ See KORZENIK, *supra* note 16, at 151–52 (discussing the impact of meetings with Nehemiah Manufacturing to learn about their second chance hiring program for winning support for such a program at JBL packaging).

⁴⁴ Shawn D. Bushway, *Resetting the Record: The Facts on Hiring People with Criminal Histories*, RAND (Jan. 9, 2024), https://www.rand.org/pubs/research_briefs/RBA2968-1.html [<https://perma.cc/QBA9-LGP7>].

⁴⁵ *Id.*

⁴⁶ Alfred Blumstein & Kiminori Nakamura, “Redemption” in the Presence of Widespread Criminal Background Checks, NAT’L INST. JUST. J. 11 (2009), <https://www.ojp.gov/pdffiles1/nij/226872.pdf> [<https://perma.cc/5C5R-Q82X>].

⁴⁷ *Id.* at 12 (defining hazard rate and providing a detailed analysis).

on the age of first offense and on the type of crime committed.⁴⁸ For example, the hazard rate for 18-year olds who committed robbery declined by the time they were 25.7 years old (or 7.7 years after the first offense).⁴⁹ For those who had committed burglary at age eighteen, it took 3.8 years post arrest for the hazard rate to decline to general-population level.⁵⁰ For aggravated assault, the time-period was 4.3 years.⁵¹ Recent research also corroborates the upshot of these findings. According to a 2024 RAND corporation policy brief, for example, “[t]he single most reliable factor in predicting future behavior is the amount of time that has passed since a person’s last conviction; a person’s likelihood of reoffending declines rapidly as more time passes without a conviction.”⁵² This research suggests a growing consensus that over time, the risk of re-offending becomes negligible, and comparable to the risk of someone of the same age who has never offended.

As such, these findings support a current trend in state laws to restrict employer access to information about criminal activity that happened a decade or more before the job application.⁵³ Employers in these states are still able to access records of more recent offenses. However, for those businesses willing to hire applicants with higher hazard rates, whether due to relatively recent offenses, age at or type of first offense, federal misconduct insurance is available.⁵⁴

Multiple complex factors affect recidivism rates, and a detailed discussion of them is beyond the scope of this article. But it is important to note that several research findings confirm the idea that recidivism rates decline consistently over time, such that the long-term exclusion of people with criminal records from the workforce is not only inhumane but also irrational.⁵⁵ Of course, employers’ concerns about the risk of re-offense are reasonable in some circumstances, even when convictions are older. Therefore, additional government incentives for those willing to hire employees with records can be important supplemental measures. We discuss some promising types of incentives such as tax credits, liability insurance, and federal contract preferences in detail in Section IV.A, *infra*.

There is mounting evidence that people with records tend to be good employees, based both on empirical studies and individual success stories from fair chance employers. According to NELP, “workers with records stay in their jobs longer and earn promotions faster than other workers.”⁵⁶ Kleinman and Kajeepeta, authors of the 2023 Thurgood Marshall Institute report titled “Barred from Work: the Discriminatory Impacts of Criminal Background

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Bushway, *supra* note 44.

⁵³ See, e.g., AVERY & LU, *supra* note 6, at 27–29 (chart providing comparison of state laws).

⁵⁴ This type of insurance is discussed in more depth in Section IV.A.2, *infra*.

⁵⁵ See Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Times: Robustness Testing, Out of State Arrests, and Racial Differences*, NAT’L INST. JUST. (Nov. 2012) 88, <https://www.ojp.gov/pdffiles1/nij/grants/240100.pdf> [<https://perma.cc/N8KR-UEMX>]. See also Bushway, *supra* note 44.

⁵⁶ *Research Supports Fair Chance Policies*, *supra* note 1, at 5.

Checks in Employment,” also cite multiple studies that “provid[e] promising evidence that a criminal record has little to no negative association with job performance and, if anything, may be linked with higher retention rates.”⁵⁷ Of course, these findings will vary by the type of job and the nature of the criminal record that a particular employee might have.⁵⁸ However, it is clear that at least in part, the overly negative views of employees with records are based on the stigma of conviction itself rather than on facts about their performance and professional development potential.

Stories from executives who have successfully implemented fair chance programs can be effective in dispelling these misconceptions. For example, Gina Schaefer, the founder and CEO of A Few Cool Hardware Stores, often speaks about her success in hiring and promoting employees with records while building a 50-million hardware store business.⁵⁹ In public appearances, Schaefer emphasizes her willingness to help other business leaders who are interested in fair chance hiring succeed as well.⁶⁰

The success of fair chance hiring can depend on providing specific kinds of support that employees with criminal records may need to flourish in the workplace. Accordingly, employers need to develop programs that increase the chances of success for the business and the workers with records. Some best practices include implementing effective onboarding and coaching programs for employees joining a company after prison.⁶¹ The costs of such programs can be offset by an increase in employees’ productivity and a reduction in workforce turnover.⁶² In addition, government subsidies for employers choosing to implement these structures for their second chance hires would provide much needed incentives. As mentioned above, leaders who have created supports successfully are often willing and even eager to share their strategies with others. As the CEO of one company that has built a thriving second-chance employment program for people with records put it:

We are very open to helping any other business out there that might have questions. We want to promote this. We feel this is a really great opportunity. Everyone wins with it. The team member wins because they get a job, the business wins because they get an engaged team member, the community wins because we’re not sending somebody back to prison.⁶³

⁵⁷ KLEINMAN & KAJEEPETA, *supra* note 5, at 10.

⁵⁸ *Id.* (noting that the rates of misconduct by employees with records were higher in sales jobs than customer service jobs).

⁵⁹ See, e.g., ASPEN INST., *Re-Entry and Good Jobs: Building the Second Chances We All Believe In*, at 22:30 and 43:00 (YouTube, Feb. 26, 2025), <https://www.youtube.com/watch?v=Qg0lodsPIUw> [<https://perma.cc/MJ66-Q24M>].

⁶⁰ See, e.g., *id.* at 1:10:00 (highlighting the importance of sharing stories from businesses who successfully implement second chance hiring). For a more detailed discussion of business-led efforts to promote fair chance hiring, see Section IV.B, *infra*.

⁶¹ See KORZENIK, *supra* note 16, at 160–64 (discussing the programs implemented by one successful fair chance employer in a chapter titled “Case Study—JBM Packaging.”).

⁶² *Id.* at 58, 81–82.

⁶³ *Id.* at 169 (quoting OHIO DEP’T OF REHAB. and CORR., *ORDC Partnership with JBM Envelope Company*, (YouTube, Mar. 2, 2018), <https://www.youtube.com/watch?v=md9GocUP>).

Improvements to Fair Chance hiring laws, combined with government incentives and voluntary, business-led programs, can have a substantial positive impact.⁶⁴

II. OVERVIEW OF EXISTING LAWS

The term Fair Chance laws covers a variety of laws that share a common goal of giving those with criminal records an opportunity to gain employment based on merit, rather than being precluded from job consideration due solely to employer bias.⁶⁵ Current Fair Chance hiring laws represent a panoply of approaches, which other commentators have described in detail.⁶⁶ This section does not aim to provide an exhaustive analysis but rather offers an overview of the current laws for the limited purpose of framing the relevant legal and policy issues for the discussion that follows.

A. Ban the Box and Fair Chance Laws

Hiring is a multi-step process, which typically includes application screening, interviews, and job offer decisions.⁶⁷ Each of these steps involves

Dn4 [<https://perma.cc/HW75-2G66>]; see also *infra* Section IV.A, discussing businesses' eligibility for federal and state tax credits as yet another benefit of these hires.

⁶⁴ See *infra* Part IV for a discussion of legal reforms and policy proposals designed to better accomplish these goals.

⁶⁵ See *infra* Part II, introduction (explaining the use of the term Fair Chance laws in this article).

⁶⁶ See, e.g., Caitlin T. Gaines, *Keeping Fair Chance Laws Fair: Implications for Employers and Employees Given the Expansion and Variety of Fair Chance Laws in the United States*, 72 CATH. U. L. REV. 535 (2023) (discussing the expansion of Fair Chance laws from Ban the Box laws to include a spectrum of policies aimed at reducing employment barriers for individuals with criminal records); see Hannah E. Wissler, *Overlooked and Undervalued: Ex-Offenders in the Employment Market*, 37 A.B.A. J. LAB. & EMP. L. 93 (2023) (advocating for Fair Chance laws and suggesting passing Clean Slate laws and educating defendants on the collateral consequences of a criminal conviction as additional policy solutions); see Dallan F. Flake, *Do Ban-the-Box Laws Really Work?* 104 IOWA L. REV. 1079 (2019) (reporting the findings of an experiment that used a fictitious applicant profile to compare the likelihood of receiving a callback in a BTB jurisdiction and a jurisdiction without BTB legislation); see Johnathan 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. 197, 212 (2014) (providing an overview of BTB laws and arguing that the EEOC must continue to play a vital role in advocating for people with criminal records, even in jurisdictions where BTB policies have been implemented); see also Lucy Gubernick, *Erasing the Mark of Cain—An Empirical Analysis of the Effect of Ban-the-Box Legislation on the Employment Outcomes of People of Color with Criminal Records*, 44 FORDHAM URB. L. J. 1153 (2017) (arguing that existing data about the effects of BTB laws are insufficient, and that data collection efforts must be strengthened to ensure the efficacy of BTB laws).

⁶⁷ See Deborah Weiss et al., *Do Ban-the-Box Policies Increase the Hiring of Applicants with Criminal Records?*, PLoS ONE 20(4) (2025), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0320736> [<https://perma.cc/2FVL-YY52>] (identifying three stages of the hiring cycle: (1) a "screening phase"—resume and application review (2) a "candidate assessment process," including "interviews, tests, and additional resume review by hiring managers and other interested parties," and (3) an offer and "background check stage," which in some states is now delayed until after "successful candidates receive an offer that is contingent on the results" of that background check).

a certain amount of subjectivity.⁶⁸ As noted in Sections I.A.1 and I.B, *supra*, employer bias against job applicants with criminal records is well-documented.⁶⁹ The subjective nature of hiring decisions makes it challenging to determine the degree to which employer discrimination contributes to the low interview and job offer rates for those with criminal records.⁷⁰ One way to avoid such discrimination is to ensure that employers are unaware of applicants' criminal records, at least during the preliminary screening and interviewing of applicants.⁷¹ By removing questions about criminal history from job applications, Ban the Box laws force employers to assess applicants and choose interviewees without being immediately biased by someone's history with the criminal justice system.⁷² In addition to delaying inquiries about criminal records by banning this question on job applications, many states also delay access until further in the hiring process and some mandate that employers document that they have engaged in "a fairer decision-making process by ...consider[ing] the job-relatedness of a conviction, time passed, and mitigating circumstances or rehabilitation evidence."⁷³ Laws that include any of these additional requirements are generally called Fair Chance laws, a term which has come to be used interchangeably with Ban the Box laws. This use is confusing because Ban

⁶⁸ See Robert L. Dipboye, *Developing the Research Basis for Controlling Bias in Hiring*, 22 J. Soc. ISSUES 153 (2012) (synthesizing decades of research on hiring bias and highlighting that subjectivity influences hiring decisions throughout the process—not just in one stage but across application, interviews, job offers, and promotions).

⁶⁹ Friedman, *supra* note 11 (reporting that a Justice Department study revealed that any criminal conviction lowered an applicant's chances of receiving a job offer by fifty percent); Amanda Agan & Sonja Starr, *The Effect of Criminal Records on Access to Employment*, 107 AM. ECON. REV. 560, 560 (2017) (reporting results of an audit study of 2,655 fictitious applications showing that applicants with felony convictions were about sixty percent less likely to receive a callback, across race, crime type, and industry).

⁷⁰ Noah Zatz, *Criminal Records Exclusion, "Rational Discrimination," and Ban the Box*, ON LABOR (July 22, 2020), <https://onlabor.org/criminal-records-exclusion-rational-discrimination-and-ban-the-box/> [<https://perma.cc/P9PF-XK42>] (discussing how employer discrimination stems from broad stigmatization and subjective bias, not just risk-based decision making, complicating detection and accountability).

⁷¹ See AVERY & LU, *supra* note 5 at 2; Weiss et al., *supra* note 67, at 2, 5, 18. It may seem extreme to keep employers in the dark about what could be quite relevant hiring information. However, even when laws postpone access to criminal records until the very end of the hiring process, i.e., after employers have made a job offer, employers still have an opportunity to reject those job applicants with relevant criminal records by making job offers conditional. *Id.* Furthermore, fair chance laws provide for exceptions to delaying record disclosure in jobs where criminal history is relevant.

⁷² CHRISTOPHER HERRING & SANDRA SUSAN SMITH, INST. FOR RSCH. ON LAB. & EMP. AT THE UNIV. OF CAL., BERKELEY, *THE LIMITS OF BAN THE BOX LEGISLATION*, 1 (2022), <https://irle.berkeley.edu/wp-content/uploads/2022/03/The-Limits-of-Ban-the-Box-Legislation-1.pdf> [<https://perma.cc/AV5W-VLNL>] (stating that Ban the Box laws are "designed to encourage employers to consider a job candidate's qualifications first—without the stigma of a criminal record—in the hopes of reducing barriers to employment that justice-involved individuals face."). Certain employers are exempt from Ban the Box requirements because the law prohibits them from hiring workers with records. For example, jobs at childcare centers or some financial institutions typically fall under this exception. See, e.g., MASS. OFFICE OF THE ATTORNEY GENERAL, *Guide to Criminal Records in Employment and Housing*, <https://www.mass.gov/guides/guide-to-criminal-records-in-employment-and-housing> [<https://perma.cc/29PP-RY4Q>] ("There are a few limited exceptions for certain types of jobs in specific industries (for example, jobs at day cares and certain financial institutions) where employers can ask about criminal records on job applications because they are legally prohibited from hiring people with criminal records for those jobs.").

⁷³ AVERY & LU, *supra* note 6, at 3.

the Box laws are classified separately from Fair Chance laws in some of the literature and, at best, are only one type of Fair Chance law.⁷⁴ In this article, we use the term “Ban the Box” for laws that mandate only the removal of the checkbox on job applications. We use the broader term “Fair Chance” for laws that have additional requirements.

1. State laws

In 1998, Hawaii became the first state to pass a Fair Chance law.⁷⁵ Subsequent efforts to pass Ban the Box and Fair Chance laws in other jurisdictions were spearheaded by formerly incarcerated people and their families through a grassroots organization, All of Us or None, which started its work in San Francisco and Alameda County in 2005.⁷⁶ Today, thirty-seven states, the District of Columbia, and over 150 cities and counties have adopted laws to protect job applicants with criminal records from discrimination.

Many states provide more extensive protections because bare bones BTB laws alone are easily circumvented.⁷⁷ If employers remove the “box” from their application forms but still request criminal records for all job applicants *before* interviews, they are likely to remain biased against applicants with records.⁷⁸ Therefore, over twenty states now have laws that delay employer access to criminal records until later in the hiring process, typically *after* interviews or *after* conditional job offers.⁷⁹ Hawaii’s 1998 law was the first to prohibit

⁷⁴ MICHELLE NATIVIDAD RODRIGUEZ & ZOE POLK, NAT’L EMP. L. PROJECT, BEST PRACTICES IN FAIR-CHANCE ENFORCEMENT, 1 (2015), <https://www.nelp.org/app/uploads/2015/06/Best-Practices-Fair-Chance-Enforcement.pdf> [<https://perma.cc/LJ46-SZN3>] (“Removing conviction inquiries from job applications is known as ‘ban the box.’ Fair-chance hiring policies include ban-the-box and other policies that create a structured hiring process to ease barriers.”) (emphasis added); MICHELLE NATIVIDAD RODRIGUEZ & ANASTASIA CHRISTMAN, NAT’L EMP. L. PROJECT, THE FAIR CHANCE-BAN THE BOX TOOLKIT, 4 (March 2015), <https://www.nelp.org/app/uploads/2015/04/NELP-Fair-Chance-Ban-the-Box-Toolkit.pdf> [<https://perma.cc/SUEM-G4HX>] (“‘Ban the Box,’ the rallying cry . . . refers to the policy of removing the conviction history check-box from job applications. . . . NELP advocates for a ‘fair chance’ hiring policy that includes removing the check-box, *plus a robust set of fair hiring policies* to ease employment barriers.”) (emphasis added).

⁷⁵ Haw. Rev. Stat. § 378-2.5 (2020); AVERY & LU, *supra* note 6, at 12–13. This statute also included prescient provisions, such as delaying employer access to criminal records until after a conditional offer. In this way, the law was more than merely a Ban the Box law, but it is characterized as such in compilations of state laws.

⁷⁶ KLEINMAN & KAJEEPETA, *supra* note 5, at 12. *See also*, Gaines, *supra* note 66, at 539.

⁷⁷ *See* AVERY & LU, *supra* note 6, at 3.

⁷⁸ *See* Flake, *supra* note 66, at 1089 (explaining that some early BTB statutes only barred the question on the paper/online application and did not regulate when employers could run background checks. Using Connecticut as the example, Flake notes the law “prohibits [criminal-record questions] only on the employment application itself,” which *left open the possibility that an employer could ask immediately after submission—or even make disclosure a pre-condition to applying*. He also points out that Illinois allowed inquiry “as soon as the applicant is selected for an interview.” Taken together, these examples illustrate that simply removing the checkbox did not stop employers from requesting criminal-record checks early (including before interviews), thus limiting BTB’s effectiveness.).

⁷⁹ AVERY & LU, *supra* note 6, at 27–29. For example, at least eighteen states delay until after interview (AZ, DE, IL, KY, LA, ME, MD, MN, NV, NH, NJ, NY, NC, ND, OR, RI, UT, VA) and as many as eight states (CA, CO, HI, IL, LA, MN, NV, UT) and D.C. postpone access until post-offer, at least in some circumstances, (e.g., there is no interview), although the states vary in

employers from accessing criminal records until after a conditional offer.⁸⁰ Other state laws began with less stringent prohibitions but have now amended their laws to delay access until later in the hiring process.⁸¹

Postponement of employer access to criminal records serves two purposes. First, as noted above, it prevents employer efforts to circumvent the “banned box.” This forces employers to engage not only in application review but also interviewee selection and interviews untainted by criminal record information. Second, delaying criminal background checks until at least after the direct contact of an interview provides further unbiased input into employer hiring decisions.⁸² The laws that further delay access to applicant records until after an employer makes a conditional job offer force employers to engage in the third hiring cycle step before learning about a chosen candidate’s criminal history. This latter approach is particularly important where job offer decisions are made by multiple people, including some who did not participate in interviews.

Early effectiveness research supports this extension of the access timeline.⁸³ Intermediate delay laws—those that postpone access only until after an interview—often seem merely to result in delayed employer discrimination.⁸⁴ Under such laws, employers will commonly request background checks on promising interviewees after completing all interviews.⁸⁵ With this information in hand, employers can still engage in discriminatory hiring decisions by choosing to offer the job to another finalist with roughly equivalent skills.⁸⁶

whether these laws apply to the private sector or only the public sector. *See id.* at 9–28 (detailing the requirements of fair chance laws state-by-state).

⁸⁰ MARGARET COLGATE LOVE, COLLATERAL CONSEQUENCES RES. CTR., *THE MANY ROADS FROM REENTRY TO REINTEGRATION: A NATIONAL SURVEY OF LAWS RESTORING RIGHTS AND OPPORTUNITIES AFTER ARREST OR CONVICTION* 102 (2022), https://web.archive.org/web/20230623015440/https://ccresourcecenter.org/wp-content/uploads/2022/08/MRFRTR_8.24.22.pdf [<https://perma.cc/NS3Z-VN8H>].

⁸¹ For a detailed discussion of the different approaches to Ban the Box and Fair Chance Laws in each states, *see* Wissler, *supra* note 66, at 103–09 (discussing variations on ban the box laws and classifying them into “highly protective,” “moderately protective,” and “low protective” laws) and at 111–15 (discussing fair chance laws that limit the ways in which employers can use information about the applicants’ criminal records and classifying these laws into highly, moderately, and low protective).

⁸² Weiss et al., *supra* note 67, at 2 (“BTB proponents suggest that employers are less likely to view criminal records as conclusively disqualifying after meeting applicants in person: ‘Rejection is harder once a personal relationship has been formed.’”) (quoting Love, *supra* note 40, at 774).

⁸³ *See Research Supports Fair Chance Policies*, *supra* note 1, at 6; *see also* MICHAEL HARTMAN, NAT’L CONF. OF STATE LEGISLATURES, *BAN THE BOX: POLICY SNAPSHOT 2* (2021), <https://documents.ncsl.org/wwwncsl/Criminal-Justice/Ban-the-Box-Policy-Snapshot.pdf> [<https://perma.cc/7LTL-R3S9>].

⁸⁴ Flake, *supra* note 66, at 1085 (noting that critics argue ban-the-box “merely delays an employer’s inevitable decision not to hire an ex-offender, often until after both the employer and applicant have heavily invested in the job-hiring process”).

⁸⁵ Lesley E. Schneider, et al., *Before and After Ban the Box: Who Complies with Anti-Discrimination Law?*, 47 LAW & SOC. INQUIRY 749, 774 (2022) (finding that after ban-the-box laws are implemented, employers can continue to use background checks as gatekeeping at the next legal stage (e.g., post-interview or at final background check stages)).

⁸⁶ *See* Flake, *supra* note 66, at 1123.

Applicants with records, even if they have the financial means to sue,⁸⁷ then have no way to effectively prove discrimination.

Job candidates and government enforcement agencies have better ammunition to challenge an employer's hiring behavior if an employer cannot access criminal record information until after making a conditional offer. At that point in the hiring process, it is much more apparent that the most likely reason for the rescinded offer is the employer's new knowledge about the applicant's criminal background.⁸⁸ In addition, the increased direct contact with the applicant and the timing of the disclosure are likely to ensure that employers are sufficiently committed to hiring that person such that only meaningfully relevant criminal records will cause an employer to reconsider its hiring decision and rescind its job offer.

To be clear, all employers can legally withdraw offers based on criminal records if the situation fits within an exception to laws that otherwise outlaw discrimination.⁸⁹ One type of such an exception are individual assessments that establish a rational relationship between an applicant's offense and the duties and responsibilities of the position sought.⁹⁰ An example of an individualized assessment is a school's rescission of a conditional employment offer to someone who pled guilty to indecent exposure two years before applying for the job.⁹¹

Another type of exception involves employer compliance with federal and state laws that exclude those with specific offenses from employment in specific jobs.⁹² In its 2012 Guidance, the EEOC provides several examples of statutory compliance: a county rule prohibition from employing anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration; a federal ban of ten years for individuals who are convicted of any criminal offense involving dishonesty, breach of trust, or money laundering from working in a bank; and the Maritime Transportation Security Act's provision that individuals with convictions for offenses such as espionage, treason, murder, and a federal crime of terrorism be permanently disqualified from obtaining a Transportation Workers Identification Credential (TWIC).⁹³

⁸⁷ See Samuel K Baier, *Reducing Employment Barriers for People with Criminal Records*, 46 J. CORP. L. 220, 229 (2020) (noting that "[f]ew private plaintiffs can muster the legal resources" to bring a discrimination lawsuit without the financial support of a federal agency, such as the EEOC).

⁸⁸ HERRING & SMITH, *supra* note 72 at 6 (noting that "Having a conditional offer withdrawn after a criminal background check was performed was far and away the form of discrimination experienced most transparently.").

⁸⁹ See Wissler, *supra* note 66, at 105 (summarizing exception/exclusions common in state ban the box laws).

⁹⁰ See Haw. Rev. Stat. § 378-2.5 (2020); see also HARTMAN, *supra* note 83, at 1.

⁹¹ U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*, 24 (Apr. 25, 2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions> [https://perma.cc/F7EU-LH87].

⁹² *Id.* at 24.

⁹³ *Id.* at 22.

Nonetheless, employers can still hide illegal reasons for rescinding an offer behind pretexts or they can choose to risk litigation, since that risk is so low. Therefore, to encourage compliance, as well as to prevent wasted time and resources on lawsuits challenging legitimate employer exclusion of candidates, some states require documentation of the employer's reasons for offer rescissions.⁹⁴ Still others provide opportunities for applicants to explain their criminal records, and some offer an appeal process for rejected applicants.⁹⁵ These additional rules aim to further deter illegal hiring decisions.

There are other important differences between the many state and local Fair Chance laws. For example, laws have varying threshold numbers of employees that a company must have to be subject to the law.⁹⁶ In addition and importantly, most statutes apply only to public employers. Of the thirty-seven states and 150 municipalities that have BTB or broader Fair Chance laws, only fifteen states and twenty-two cities have laws that include private employers.⁹⁷ Another key difference between the state and local laws is which records employers may access. Categories of excluded information vary but increasingly these include arrests that did not lead to convictions, misdemeanors, non-violent crimes, crimes irrelevant to the sought-after job, expunged records and/or convictions more than a decade old.⁹⁸ Exclusion of older convictions is strongly supported by research discussed in Section II.B.2, *supra*.

2. Federal laws

Although states took the lead in passing Ban the Box and Fair Chance laws, the federal government has also taken steps to improve employment rates of those with criminal records. The Second Chance Act of 2007, signed into law by President Bush, sought to reduce recidivism by authorizing federal grants to government agencies and nonprofit organizations to provide reentry services and programs.⁹⁹ In so doing, the Second Chance Act provided a vital

⁹⁴ See, e.g., AVERY & LU, *supra* note 6, at 9 (stating that the California fair chance law “requires written preliminary notice to the job applicant of the employer’s intent to rescind the conditional job offer; time for the applicant to respond with evidence of inaccuracies in the record, rehabilitation, or mitigating circumstances; and final written notice rescinding the job offer.”).

⁹⁵ *Id.* at 9–28 (providing a summary for each state’s fair chance law).

⁹⁶ *Id.* at 27–29 (providing a chart to illustrate the variety in Fair Chance laws amongst states). For example, Minnesota requires job screening if the conviction “directly relates” to the position, where other states, like Pennsylvania, have job screening questions that allow for consideration of convictions to the “extent to which they relate to the applicant’s suitability for the position” in general).

⁹⁷ AVERY & LU, *supra* note 6, at 2–3.

⁹⁸ See *id.* at 27–29 (chart providing comparison of state laws); COLLATERAL CONSEQUENCES RES. CTR., *50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, <https://web.archive.org/web/20260206111645/https://ccresourcecenter.org/state-restoration-profiles/50-state-comparison-comparison-of-criminal-records-in-licensing-and-employment/> [https://perma.cc/TL5C-LMJ3] (last visited Feb. 6, 2026) (hereinafter “50-State Comparison”) (in a state by state listing, stating that Arizona and Oklahoma do not allow release of information about non-violent crimes, and at least six states do not allow access to misdemeanor information in at least some circumstances: Arizona, Arkansas, Massachusetts, Michigan, Minnesota, and Nevada).

⁹⁹ Pub. L. No. 110-199, 122 Stat. 657, 660 (2008).

first step towards lowering unemployment among those with criminal records by including job training and job acquisition support services in its list of programs eligible for funding.¹⁰⁰

In late 2015, President Obama issued a directive to federal agencies to desist from asking most job applicants about criminal records on job applications and to allow federal agency inquiries about and access to these applicants' criminal records only post-offer.¹⁰¹ This federal policy directly mirrored state Ban the Box and Fair Chance laws. In 2018, President Trump signed into law the First Step Act which sought to reduce the size of the federal prison population.¹⁰² One mechanism included in this federal statute was reauthorization of the Second Chance Act.¹⁰³ Congress subsequently codified the Obama administration's federal policy and expanded it to cover federal contractors, by passing the Fair Chance to Compete for Jobs Act (Fair Chance Act) of 2019, which President Trump signed into law.¹⁰⁴

The Fair Chance Act incorporated many of the best practices test-driven by state laws.¹⁰⁵ Extending fair chance hiring to federal contractors has a greater reach than might be apparent because the federal government employs a substantial number of people through contractors. In fact, contractors and their employees now outnumber federal employees more than two to one.¹⁰⁶

Further federal actions extending Fair Chance laws to state public and private employers would expand state anti-discrimination laws to include

¹⁰⁰ *Id.* § 101(d)(3)(C).

¹⁰¹ *Fact Sheet: White House Announces New Commitments to the Fair Chance Business Pledge and Actions to Improve the Criminal Justice System*, OFF. OF THE PRESS SEC'Y, THE WHITE HOUSE, (Nov. 30, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/11/30/fact-sheet-white-house-announces-new-commitments-fair-chance-business> [<https://perma.cc/5XX2-P5QJ>].

¹⁰² *See* Second Chance Reauthorization Act of 2018, Pub. L. No. 115-391, 132 Stat. 5220 (2018) (codified as amended in scattered sections of 34 U.S.C.). *See also* NATHAN JAMES, CONG. RSCH. SERV., R45558 THE FIRST STEP ACT OF 2018: AN OVERVIEW (2019).

¹⁰³ Second Chance Reauthorization Act §§ 501–02, 132 Stat. at 5222–37. The Second Chance Reauthorization Act of 2018 reauthorized appropriations for and expanded the scope of some grant programs that were initially authorized under the Second Chance Act of 2007 (Pub. L. No. 110-199). The reauthorized programs include, among other programs, Careers Training Demonstration Grants and the Community-Based Mentoring and Transitional Service Grants to Nonprofit Organizations Program. *Id.*

¹⁰⁴ 5 U.S.C. § 9202; *The Fair Chance to Compete for Jobs Act*, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF INSPECTOR GEN. (Nov. 6, 2024), <https://oig.hhs.gov/careers/the-fair-chance-to-compete-for-jobs-act/> [<https://perma.cc/EY4U-YFK8>]. The Fair Chance Act passed as part of the National Defense Reauthorization Act. *The Fair Chance to Compete Act*, U.S. DEP'T OF TREASURY, (stating that on “December 20, 2019, the president signed into law the National Defense Authorization Act, which includes the Fair Chance to Compete for Jobs Act of 2019 (“Fair Chance Act” or “the Act”).”) <https://home.treasury.gov/about/careers-at-treasury/the-fair-chance-to-compete-act> [<https://perma.cc/J3SP-TWPM>] (last visited Feb. 2, 2026).

¹⁰⁵ *See* § 9202 (taking effect in 2021 and delaying inquiry until a conditional offer is extended but creating exceptions); 5 CFR § 920.202(a) (providing guidance on the law, effective in 2023). *See also* Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM'N, *EEOC Issues Enforcement Guidance: Commission Updates Guidance on Employer Use of Arrest and Conviction Records* (Apr. 25, 2012), <https://www.eeoc.gov/newsroom/eeoc-issues-enforcement-guidance> [<https://perma.cc/E3EG-RF8T>] (providing initial guidance).

¹⁰⁶ Ellie Kamarck, *Is Government Too Big? Reflections on the Size and Composition of Today's Federal Government*, BROOKINGS INST. (Jan. 25, 2025), <https://www.brookings.edu/articles/is-government-too-big-reflections-on-the-size-and-composition-of-todays-federal-government/> [<https://perma.cc/D349-DB7K>].

employers in the thirteen states that currently lack any type of Fair Chance law (including Ban the Box law). Such a federal law would also provide uniform minimum requirements among states on issues such as when during the hiring process employers may legally access applicant criminal records and which parts of those records employers may legally access.

B. Clean Slate Laws

Clean Slate laws are so named because they seek to provide a fresh start for many with criminal records by wiping the slates of documented criminal activity at least partially clean. By requiring automatic sealing or expungement of certain criminal record items,¹⁰⁷ Clean Slate laws avoid discrimination based on minor, old, and/or inaccurate criminal histories.¹⁰⁸ These laws focus on the criminal records themselves, rather than on delaying employers' access to those records. They are not meant to, nor should they, supplant Ban the Box or Fair Chance laws. Instead, they are intended to complement them.¹⁰⁹

When properly implemented, these record-focused laws limit the number of job applicants with any discoverable criminal history. For example, if an applicant's record contains only minor infractions committed more than a decade before their job application, in some Clean Slate law states an employer's inquiry would reveal no criminal record.¹¹⁰

1. State laws

Clean Slate laws exist in thirteen states and the District of Columbia.¹¹¹ Each of these laws requires the state to seal eligible criminal records without any action by the justice-impacted individual. This is a major improvement to current systems that require an individual to petition for expungement of

¹⁰⁷ *Clean Slate in States*, THE CLEAN SLATE INITIATIVE, <https://www.cleanslateinitiative.org/states> [<https://perma.cc/62M3-TR9V>] (last visited Jan. 6, 2026); See also Sharon Dietrich & Rebecca Vallas, *One Strike and You're Out*, CTR FOR AM. PROGRESS (Dec. 2, 2014), <https://www.americanprogress.org/article/one-strike-and-youre-out/> [<https://perma.cc/AQ4L-BKX6>]. Clean Slate emerged as a policy recommendation from a December 2014 paper written by Sharon Dietrich of Community Legal Services and Rebecca Vallas of the Center for American Progress.

¹⁰⁸ See *Clean Slate Advocacy Toolkit*, CMTY. LEGAL SERVICES AND CTR FOR AM. PROGRESS (Oct. 2017), <https://www.nelp.org/app/uploads/2017/11/Clean-Slate-Advocacy-Toolkit.pdf> [<https://perma.cc/7J2K-AMXP>] (detailing the types of information to be expunged and using Philadelphia's law as an example).

¹⁰⁹ See RODRIGUEZ & POLK, *supra* note 74, at 1.

¹¹⁰ See Riia O'Donnell, *What You Need to Know About Clean Slate Laws*, CRITICAL RSCH., (2023), <https://criticalresearch.com/faqs/clean-slate-laws/> [<https://perma.cc/89V3-N5FF>] (last visited on Sep. 21, 2025).

¹¹¹ See *Clean Slate in States*, *supra* note 107. See also 50-State Comparison, *supra* note 98 (providing details that illustrate that 40 states also have some form of statutory mechanism for record-sealing or expungement, though most of these require affirmative action by the record-holder and vary significantly in terms of which parts of criminal records can be sealed or expunged).

their criminal records, often one item at a time.¹¹² Automated record clearing is efficient and reduces costs because it avoids the time and expense of manual record review.¹¹³

By putting the impetus on the state and shifting the burden from the justice-impacted individual, Clean Slate laws can be a powerful and affordable tool to improve the fairness of job applicant selection. Nonetheless, the approach is not without limitations. There are practical and cost issues involved in states acquiring the necessary computer systems and coordinating these across multiple jurisdictions within and across states.¹¹⁴ Even where this has been or can be achieved, there is disagreement about which information should be sealed.¹¹⁵ For example, some people support sealing all non-violent felonies, while others may support expungement only of old convictions, misdemeanors, and juvenile records.¹¹⁶ Accordingly, current statutory sealing requirements are limited to those crimes upon which a majority of a state's lawmakers can agree.¹¹⁷

2. Federal laws

No federal Clean Slate laws have been passed to date, though two relevant federal bills are pending. The bipartisan co-sponsored Clean Slate Act would create a process for automatic expungement of some non-violent federal convictions.¹¹⁸ More specifically, the Clean Slate Act would “empower[] courts to automatically seal criminal records related to simple possession of

¹¹² See *Clean Slate Advocacy Toolkit*, *supra* note 108, at 1 (noting that the current system of petitions for expungement is “untenable” due to its “sheer volume,” which is overwhelming to both petitioners and courts).

¹¹³ *Id.* (stating that “by relying on automated query that can identify cases that qualify for sealing, a state can achieve the policy goal of sealing virtually all qualifying electronic records immediately without simultaneously overwhelming the courts”).

¹¹⁴ See Anne Teigen & Michael Hartman, *Lawmakers Discuss Ways to Make Clearing a Criminal Record Easier*, NAT'L CONF. STATE LEGISLATURES (May 31, 2023), <https://www.ncsl.org/state-legislatures-news/details/lawmakers-discuss-ways-to-make-clearing-a-criminal-record-easier> [<https://perma.cc/LU5N-JJJB>] (identifying implementation challenges). See also, e.g., LEGISLATIVE FISCAL ESTIMATE, S. 4154, 218th Leg., 1 (N.J. 2019) (stating that it would cost new Jersey an estimated \$10 million for technological development); Noah Denkler et al., *Cost Benefit Estimate of Clean Slate Laws in Florida*, FLA. STATE UNIV. (2023), <https://cosspp.fsu.edu/economics/wp-content/uploads/sites/10/2023/08/Clean-Slate-in-Florida.pdf> [<https://perma.cc/8HCV-N45R>] (estimating the one-time implementation costs of Clean Slate laws in Florida to total \$4.7 million). JOHN S. HOLLYWOOD & ZEV WINKELMAN, RAND, IMPROVING INFORMATION-SHARING ACROSS LAW ENFORCEMENT: WHY INFORMATION INTEGRATION REMAINS A CHALLENGE 3 (noting that the cost of records management systems (RMSs) and computer-aided dispatch (CAD) systems and the complexity of interoperability standards remain significant barriers to information sharing).

¹¹⁵ See Teigen & Hartman, *supra* note 114; see O'Donnell, *supra* note 110 (giving examples of types of items that Clean Slate laws in various states will remove or seal).

¹¹⁶ See O'Donnell, *supra* note 110 (giving details about which types of convictions can be sealed under various states' Clean Slate laws).

¹¹⁷ See *Clean Slate Advocacy Toolkit*, *supra* note 103, at 1.

¹¹⁸ See CLEAN SLATE ACT OF 2023, H.R. 2930, 118th Cong. (2023) (requiring automatic sealing of federal records for simple possession and other nonviolent marijuana offenses, establishing a petition process for additional record sealing, mandating automatic sealing of certain arrest records within 180 days, authorizing public defenders to assist indigent petitioners, and shielding employers from liability for misconduct tied to sealed records).

a controlled substance, any nonviolent offenses involving marijuana, and an arrest for an offense that did not result in a conviction after one year of completing imprisonment, probation, or supervised release.”¹¹⁹ Since offenses involving marijuana in particular are very prevalent,¹²⁰ many people could rely solely on this automation to have their records sealed, avoiding the necessity to separately petition for modification of their records, as they would have to do for some other offenses.¹²¹

In contrast to the Clean Slate Act, which only applies to federal criminal records, the bipartisan co-sponsored Fresh Start Act would focus on financial support for state Clean Slate laws.¹²² This law, most recently reintroduced in 2025, would simplify and expedite the expungement process by permitting states with Clean Slate laws to apply for federal funds to implement those laws.¹²³ The grant program would include financial support for automating state record-sealing systems, greatly increasing efficiency and removing even more of the burden from individual record holders.¹²⁴ As noted above, these types of costs and implementation details currently stand as significant roadblocks in getting state Clean Slate laws passed.¹²⁵ Removing these barriers would be a significant step.

III. CRITIQUES AND RESPONSES

In this section, we examine three main types of criticisms leveled at Ban the Box and Fair Chance laws and offer counterarguments for each of them. First, several researchers have suggested that Fair Chance laws are ineffective or even harmful. However, most studies to date have focused only on the effects of BTB laws because only these have been around long enough

¹¹⁹ ABOU NDIAYE, CONG. BLACK CAUCUS FOUND. & NAT’L RACIAL EQUITY INITIATIVE FOR SOC. JUST., *THE CLEAN SLATE ACT: A PATHWAY TO CRIMINAL JUSTICE REFORM 2* (2023), https://www.med.unc.edu/fammed/nctac/wp-content/uploads/sites/1256/2024/02/2023_CBCF_CPAR_NREI_A-Pathway-to-Criminal-Justice-Reform_1.2mkj.pdf [<https://perma.cc/TU6E-L79N>].

¹²⁰ *Clearing Criminal Records for Cannabis Offenses*, NAT’L CONF. STATE LEGISLATURES (2020), <https://www.ncsl.org/civil-and-criminal-justice/clearing-criminal-records-for-cannabis-offenses> [<https://perma.cc/PLY6-D54Q>] (stating that over seven million people were arrested for marijuana possession from 2001 to 2010); *Drug Related Crime Statistics*, NAT’L CTR. FOR DRUG ABUSE STAT. (NCDAS), <https://drugabusestatistics.org/drug-related-crime-statistics/> [<https://perma.cc/AZ4P-V9YY>] (last visited Sep. 10, 2025) (stating that 244,000 people are sent to prison annually for drug-related offenses); *How Many Federal Marijuana Prisoners Are There?*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/policy/federal/how-many-federal-marijuana-prisoners-are-there/> [<https://perma.cc/DWF7-VHDP>] (last visited Sep. 11, 2025).

¹²¹ CLEAN SLATE ACT OF 2023, *supra* note 118, at § 3560A (“Sealing of certain records upon petition.”).

¹²² *See* FRESH START ACT OF 2025, S. 2590, 119th Cong. (2025) (authorizing funding to help states automate record expungement and sealing, prohibiting states that delay record expungement or sealing due to fines or fees from receiving grant funding, and requiring states to report sealing and expungement data disaggregated by race, ethnicity, and gender).

¹²³ *Id.* at § 3(c).

¹²⁴ *Id.* at § 4.

¹²⁵ *See supra* Section II.B.1.

to produce sufficient data for analysis.¹²⁶ The results of these studies remain inconclusive and do not support a move away from Fair Chance laws, and especially from laws that have not yet been adequately studied.¹²⁷ Second, Fair Chance laws are not just an easy way to score political points; rather, they help serve a central goal of criminal justice reform, which is to improve reintegration of people with convictions into the community and to lower recidivism rates.¹²⁸ Finally, some commentators argue that Fair Chance laws do not go far enough in expanding work opportunities for applicants with records. Even so, these laws are compatible with other reforms and remain an important tool for combatting discrimination.¹²⁹ As such, policymakers can pursue a “both/and” approach rather than abandoning Fair Chance laws.

A. Questions of Effectiveness

Although several economic impact studies have attempted to quantify the effects of BTB laws, the results have been mixed so far. Doleac and Hansen conducted a study, published in 2020, that found a negative impact on employment rates among young, low-skilled Black and Hispanic men.¹³⁰ They concluded that employers used race as a proxy for criminal conviction when BTB laws prevented them from accessing applicants’ criminal history, thereby disadvantaging Black and Latino applicants, including those without criminal histories.¹³¹ A 2021 study by Sabia, McKay, Nguyen and Dave also found that BTB laws produced unintended consequences, namely that they lead to an increase in property crime rates.¹³² More specifically, the authors argue “that BTB laws are associated with an approximately 16 percent increase in criminal incidents involving working-age Hispanic men, driven by property crimes.”¹³³ Notably, despite this negative impact finding, the study did not find such an increase for working-age African-American men, even though according to Doleac and Hansen’s study this group also faced increased statistical discrimination in the wake of BTB laws.¹³⁴

Such conflicting outcomes call into question the claims that BTB laws increase racial discrimination in hiring. A recent paper by Anne Burton and David Wasser underscores the inadequacies of previous studies that found

¹²⁶ See Sharon S. Oselin et al., *Fair Chance Act Failures? Employers’ Hiring of People with Criminal Records*, 23 CRIMINOLOGY & PUB. POL’Y 361, 363 (2024) (“[g]iven there are even fewer policies that endorse EEOC protective guidelines, the body of research on the efficacy of ‘fair chance’ policies is particularly sparse, leaving substantial room for assessment about their implementation and impact.”).

¹²⁷ *Infra* Section III.A.

¹²⁸ *Infra* Section III.B.

¹²⁹ *Infra* Section III.C.

¹³⁰ Jennifer L. 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, 324–25 (2020).

¹³¹ *Id.* at 324.

¹³² Joseph J. Sabia et al., *The Unintended Effects of Ban-the-Box Laws on Crime*, 64 J. L. & ECON. 738, 801 (2021).

¹³³ *Id.* at 815.

¹³⁴ *Id.*

that BTB laws result in statistical discrimination.¹³⁵ The authors provide a thorough analysis of such studies and conclude that “the effects of BTB on the employment of those most likely to be statistically discriminated against are more ambiguous than previously portrayed.”¹³⁶ They demonstrate particular flaws in the Doleac and Hansen study, arguing that the small sample size in the Current Population Survey (CPS) dataset used in that study calls their conclusions into question.¹³⁷ Burton and Wasser argue that when using a different dataset, the American Community Survey (ACS), the results suggest that “removing ‘the box’ may not actually negatively affect the hiring of workers from the groups [they] study.”¹³⁸ Indeed, according to the U.S. Bureau of Labor Statistics, “[d]ata from the ACS . . . provide more extensive geographic and demographic coverage, and have smaller sampling errors.”¹³⁹ In sum, Burton and Wasser’s study demonstrates that the “unintended consequences” theories are still equivocal, at best.

To be sure, these types of findings are concerning, but there are strategies to address unintended discriminatory consequences if they do exist. For example, employers who use race as a proxy for criminal history in the absence of “the box” on the application violate civil rights law, and the unlawful practices could therefore be addressed through better enforcement of well-established laws such as Title VII of the Civil Rights Act of 1964. In any case, since there is not yet a definitive showing of harm, concerns about racial inequities should serve as an impetus for improvement rather than an argument against Fair Chance laws broadly. This is even more compelling in the face of other studies that reveal neutral or positive impacts of BTB laws.

In their 2024 article titled “Ban-the-box Laws: Fair and Effective?,” Robert Kaestner and Xifei Wang note that the “study of the effect of BTB laws is relatively sparse” and the research findings so far are of a “mixed nature.”¹⁴⁰ The authors focused their study on young (ages twenty-five to forty-four) men with low levels of education. Their results suggest that earlier “findings[] of a negative effect of BTB laws on young Black men’s employment . . . may be spurious” or may reflect differences in labor market conditions over time, rather than a causal connection between BTB laws and higher unemployment rates in this demographic.¹⁴¹ Overall, their study did not document either positive or negative quantitative effects of BTB laws, finding that “BTB laws have not been beneficial in terms of increasing employment, but they have not been harmful either.”¹⁴²

¹³⁵ Anne M. Burton & David N. Wasser, *Revisiting the Unintended Consequences of Ban the Box*, 250 J. PUB. ECON. 1, 2 (2025) (concluding that the evidence for negative unintended consequences of BTB laws is “even more mixed than previously understood”).

¹³⁶ *Id.* at 9.

¹³⁷ *Id.* at 2.

¹³⁸ *Id.* at 8.

¹³⁹ *Id.* at 7 (quoting U.S. BUREAU OF LABOR. STATS. *Notes on Using Current Population Survey (CPS) Subnational Data* (Mar. 17, 2023), <https://www.bls.gov/lau/notescps.htm> [<https://perma.cc/5Z2D-2LXC>]).

¹⁴⁰ Robert Kaestner & Xufei Wang, *Ban-the-Box Laws: Fair and Effective?*, 78 INT’L REV. L. & ECON. 1, 2 (2024).

¹⁴¹ *Id.*

¹⁴² *Id.*

Other studies have reached similar conclusions about the lack of negative effects of BTB laws. For example, economist Evan Rose concluded that Seattle's 2013 BTB law "had small effects on the employment and earnings of ex-offenders."¹⁴³ The "net zero" effect is, of course, not what advocates hope to achieve, but the absence of harm is encouraging. Indeed, the lack of positive impact may be due to circumstances that lend themselves to mitigation. Rose posits that the negligible effect can be attributed to two factors: first, "most ex-offenders know which jobs require a clean record and do not apply to them," and second, "even under BTB employers still check criminal records and reject all ex-offenders later in the interview process."¹⁴⁴ More comprehensive Fair Chance laws, along with better enforcement and stronger public information campaigns, could help address some of these concerns.¹⁴⁵

Some studies have found modest positive effects as well. In a 2020 article titled "Ban the Box, Convictions, and Public Employment," labor economist Terry-Ann Craigie found that "BTB policies raise the probability of public employment for those with convictions by 4 percentage points" in general, which "represents about 30%" average increase in the probability of a public employment for this population.¹⁴⁶ This result further illustrates that the study of BTB laws must continue and that definitive conclusions as to their lack of effectiveness are premature. The quantitative assessment of stricter Fair Chance laws is even less complete, given that this type of legislation is newer and that several jurisdictions are only beginning to implement such laws.¹⁴⁷

This brief overview of the economic studies is far from exhaustive, but it suffices to illustrate that the effect of BTB or Fair Chance laws—whether positive or negative—cannot yet be clearly established. For example, labor market conditions can affect the results in ways that are difficult to quantify.¹⁴⁸ As discussed in Section II, *supra*, Fair Chance laws are still evolving, and many more detailed studies will be needed to figure out the impact of these laws on employment when datasets become large enough to break out the data by variables such as labor market conditions, industry, job type, the type of employer, age, race, gender, education level of applicants, etc. Policy analysts and lawmakers should continue to closely monitor the data that economic researchers gather as more time passes. In the meantime, where there is no evidence of harm, the potential of Fair Chance laws to effect change supports their continued implementation and enforcement. This is particularly true because we do not yet have sufficient data to measure whether Fair Chance laws that delay access to records until after a conditional offer, coupled with other best practices discussed in Section II.A.1, *supra*, will lead to quantifiably positive results. Further, better implementation by employers, as well as more

¹⁴³ Evan K. Rose, *Does Banning the Box Help Ex-Offenders Get Jobs? Evaluating the Effects of a Prominent Example*, 39 J. LAB. ECON. 79, 111 (2021).

¹⁴⁴ *Id.*

¹⁴⁵ See *infra* Sections IV.B–D.

¹⁴⁶ Terry-Ann Craigie, *Ban the Box, Convictions, and Public Employment*, 58 ECON. INQUIRY 425, 426 (2020).

¹⁴⁷ See *supra* Part II (discussion of current trends in BTB and Fair Chance laws).

¹⁴⁸ See Kaestner & Wang, *supra* note 140, at 2.

effective enforcement by state and local governments, are likely to increase the effectiveness of Fair Chance laws.¹⁴⁹ Finally, the moral argument in favor of anti-discriminatory employment laws that protect workers with records is strong and counsels in favor of maintaining and improving BTB and other Fair Chance laws.

B. Fair Chance Laws as Part of Broader Criminal Justice Reform

If Ban the Box and Fair Chance laws were ineffective, why would so many jurisdictions choose to adopt them? One cynical answer is that they are relatively inexpensive (or cost-free) for elected officials to promote and adopt.¹⁵⁰ Since there has been bipartisan agreement regarding the importance of employment for formerly incarcerated or justice-involved individuals, these laws may be easier for legislators to pass than many others.¹⁵¹ In the absence of conclusive evidence of ineffectiveness, however, the cynicism is largely unwarranted. Regardless of political motivations, BTB and Fair Chance laws still hold promise for helping job applicants with records to get opportunities to have potential employers assess their qualifications objectively, without the bias that might attach to a past conviction. According to Beth Avery, a senior attorney at NELP: “the ban the box movement—powered by people with records and their families—can be credited with bringing the unfair status quo to the national attention and spurring further nuanced policy discussions.”¹⁵² It is of course important to recognize that Fair Chance laws alone cannot solve employment challenges facing people with records. “We should not pretend that such policies are ‘magic bullets’ that instantly cure complex problems, and the proponents of such legislation cannot walk away assuming the job is done.”¹⁵³ Nonetheless, while not a panacea, they are an important part of criminal justice reform landscape.

Indeed, public officials who promote Fair Chance laws merely for political gain but do nothing to take the implementation of these “well-intentioned” policies beyond the “surface level”¹⁵⁴ are unlikely to gain any special advantage. Fortunately, this does not appear to be the trend. Rather, lawmakers continue to improve and expand laws that help reintegrate people into civic life after a conviction and incarceration. For example, Washington state expanded its Ban the Box law, effective in July 2026, to prohibit employers from accessing information about criminal records until after a conditional

¹⁴⁹ See *infra* Sections IV.C–D.

¹⁵⁰ OPEN TO DEBATE, *Ban the Box: Should We Banish the Criminal History Check Box from Job Applications?*, at 27:34 (YouTube, Apr. 18, 2024), <https://www.youtube.com/watch?v=0887KNibSBI&t=2082s> [<https://perma.cc/A7NV-RUSF>].

¹⁵¹ See, e.g., KORZENIK, *supra* note 16, at 201–02.

¹⁵² Beth Avery, *People with Records Have Fought Hard to “Ban the Box”*, NAT’L EMP. L. PROJECT (Apr. 23, 2024), <https://www.nelp.org/people-with-records-have-fought-hard-to-ban-the-box/> [<https://perma.cc/D7NB-P7SL>].

¹⁵³ KORZENIK, *supra* note 16, at 201.

¹⁵⁴ See Michael J. McCusker, *Is Fair Chance Hiring Really Creating a Fair Chance?*, MEDIUM (July 5, 2025), <https://michmc1.medium.com/is-fair-chance-hiring-really-creating-a-fair-chance-c3cb86dae28a> [<https://perma.cc/2775-WA8V>].

offer has been extended.¹⁵⁵ This new law prohibits adverse employment actions against applicants with records without a legitimate business reason, creates notice requirements for employers, and imposes increased penalties for non-compliance.¹⁵⁶

City governments also continue to strengthen their fair chance laws. Philadelphia added protections for applicants and employees with records effective in January 2026, including a four-year lookback period for misdemeanors (reduced from seven years) and enhanced compliance requirements and fines for employers.¹⁵⁷ A Minneapolis ordinance, effective as of August 2025, added “justice-impacted status” to the list of protected classes, prohibiting adverse employment action against applicants or employees with a criminal record, “unless the employer can demonstrate that the history is reasonably related to the duties of the position.”¹⁵⁸ Together with the evolution of Fair Chance laws described in Section II.A.1, *supra*, these examples illustrate that these laws continue to expand because they respond to an important public need.

Some argue that Fair Chance laws may become superfluous if employers understand the business advantages of hiring people with records. In his book *Untapped Talent*, Jeffrey Korzenik wants “to make ‘Ban the Box’ legislation irrelevant” because “[i]f a checked box is not an immediate disqualification for employment, no government policy is needed.”¹⁵⁹ Still, he views Ban the Box laws “as a catalyst in the business community to understand how to make the most out of considering people with criminal records.”¹⁶⁰ Employers already recognize the benefits of second-chance hires. “A 2021 study by SHRM (Society for Human Resource Management) and the Charles Koch Institute found that: 85% of HR professionals and 81% of business leaders who hired individuals with criminal records reported that they performed the same or better than other employees.”¹⁶¹ Even more than a catalyst for understanding, Ban the Box and Fair Chance laws have an important expressive function in that they convey public recognition of the importance of redemption and rehabilitation, alerting the community to the fact that discrimination based on prior misconduct for which a person has already served fair punishment is

¹⁵⁵ Wash. Rev. Code § 49.94.020 (2025). For a discussion of current developments in fair chance laws, see *supra* Section II.A.

¹⁵⁶ Wash. Rev. Code § 49.94.020 (2025).

¹⁵⁷ Susan M. Corcoran, et al., *‘Ban the Box’ Expands in Philadelphia – Latest Updates for Employers*, THE NAT’L L. REV., <https://natlawreview.com/article/ban-box-expands-philadelphia-latest-updates-employers> [https://perma.cc/45AN-W3Z6] (Nov. 14, 2025).

¹⁵⁸ Alonzo Martinez, *Minneapolis Overhauls Civil Rights Law: What Employers Must Know*, FORBES, <https://www.forbes.com/sites/alonzomartinez/2025/05/30/minneapolis-overhauls-civil-rights-law-what-employers-must-know/> [https://perma.cc/8XUZ-QYLZ] (May 30, 2025).

¹⁵⁹ KORZENIK, *supra* note 16, at 200.

¹⁶⁰ *Id.*

¹⁶¹ McCusker, *supra* note 154; see also *New SHRM and CKI Survey Highlights Value of Workers with Criminal Records*, Soc’y FOR HUMAN RES. MGMT. (May 10, 2021), <https://www.shrm.org/about/press-room/new-shrm-cki-survey-highlights-value-workers-criminal-records> [https://perma.cc/P63Y-U9GU] (discussing the business benefits of hiring people with criminal records); Kim Gusman, *Finding Untapped Potential in Unexpected Places*, CAL. EMPLOYERS’ ASS’N. (Apr. 11, 2024), <https://employers.org/2024/05/01/finding-untapped-potential-in-unexpected-places-2/> [https://perma.cc/67B5-YKS4].

wrong.¹⁶² Thus, these laws can communicate to employers the value of justice-impacted individuals as employees while simultaneously communicating a message to society at-large about dignity, redemption and rehabilitation.

C. Fair Chance and Other Policies Enhance Each Other

Critics of Ban the Box and Fair Chance laws also argue that other policies would be more effective for improving employment prospects for people with records. For example, Doleac and Hansen recommend “providing more information about job applicants with records or improving the average ex-offender’s job readiness.”¹⁶³ To be sure, fair chance hiring has the best shot at achieving its goal of better employment outcomes for people with records if it works together with other legal and policy reforms. We discuss the benefits of such a holistic approach in Section V, *infra*. However, the assertion that Fair Chance laws work better in conjunction with other initiatives does not mean that they are themselves undesirable or dispensable. To the contrary, these laws form the foundation for a shift in hiring practices.¹⁶⁴ For example, in Section II.B.1, *supra*, we discussed an emerging trend in state laws towards automatic record clearing. These Clean Slate laws work in parallel with Fair Chance laws to ensure that the stigma of a criminal conviction does not prevent qualified applicants from securing employment. While these laws serve overlapping goals, they are not mutually exclusive. First, Clean Slate laws have only been implemented in thirteen states and Washington, D.C. so far,¹⁶⁵ while BTB or Fair Chance laws have been adopted by the federal government, as well as by thirty-seven states and over 150 cities and counties, with fifteen state and twenty-two city laws covering private employers as well.¹⁶⁶ Second, there is no uniformity between these laws in terms of what types of convictions and time lapses are prerequisites for expungement. Accordingly, Clean Slate and Fair Chance laws can work together to protect more potential applicants and expand the talent pool for employers.

Like Ban the Box and Fair Chance laws, record clearing legislation aims to minimize the collateral consequences of a criminal conviction and to expand access to jobs, housing, and education for people who have completed their criminal sentence. All these laws are based on the principles of “fairness, proportionality, and forgiveness.”¹⁶⁷ Criminology researchers Sarah Lageson and Alessandro Corda note that “[c]riminal record clearance mechanisms,

¹⁶² See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996) (exploring the expressive function of law, which refers to “the function of law in ‘making statements’ as opposed to controlling behavior directly”).

¹⁶³ Doleac & Hansen, *supra* note 130, at 362.

¹⁶⁴ See, e.g., *Research Supports Fair Chance Policies*, *supra* note 1, at 4–5 (discussing how fair chance policies can improve employment outcomes for people with criminal records).

¹⁶⁵ *Clean Slate in States*, *supra* note 107.

¹⁶⁶ See AVERY & LU, *supra* note 6, at 111–17 (providing a summary of fair chance laws by category as of the time of publication in 2021); see also *supra* Part II.

¹⁶⁷ Sarah E. Lageson & Alessandro Corda, *Chasing a Clean Slate: The Shifting Roles of Privacy and Technology in Criminal Record Expungement Law and Policy*, 38 HARV. J.L. & TECH. 1, 5 (2024).

such as expungement and sealing, are traditionally understood as rehabilitative, post-conviction or post-dismissal measures meant to ensure that people, once convicted or acquitted of a crime, no longer have records of their arrest or conviction in the public domain.”¹⁶⁸ They go on to argue that support for expungement and clean slate laws is also increasingly rooted in data privacy concerns.¹⁶⁹ In this way, BTB, Fair Chance, and Clean Slate laws can each help address different aspects of individual rights. Furthermore, it is important to maintain the legal pressure on employers not to inquire about criminal records where such an inquiry is not appropriate.¹⁷⁰

IV. FOCUS ON FUTURE REFORMS

Efforts to improve the employment rates of those with criminal records should involve both legal carrots and legal sticks. Fair Chance laws serve as sticks, punishing biased employers. Measures that encourage voluntary compliance with Fair Chance laws can work as carrots. It is vital that these two types of approaches be used to complement each other, because even expanded BTB, Fair Chance, and Clean Slate laws will leave some degree of undetected hiring discrimination.¹⁷¹

A. *Economic Incentives for Employers to Promote Fair Chance Hiring*

Economic incentives for employers to comply with Fair Chance laws can augment voluntary hiring policies that open up job opportunities for those with criminal records. There are currently three types of economic incentives available to employers who hire such applicants. These incentives include two federal tax credit opportunities,¹⁷² a number of parallel state tax credits,¹⁷³ and a federal bonding program which effectively provides risk insurance to those willing to “risk” employing someone with a criminal record.¹⁷⁴ Each of these programs can be improved to increase effectiveness. An additional and complementary economic incentive could be to create a federal contract preference for employers who employ people with criminal records.¹⁷⁵

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 38 (“post-sentence discrimination and the regulation of criminal history information increasingly frame and invoke crucial data privacy questions in today’s data-rich environment”).

¹⁷⁰ See *infra* Section IV.D (discussing cases where employees had no recourse to legal remedies after voluntarily disclosing their criminal history and the need for interpreting fair chance laws more broadly).

¹⁷¹ Persistent bias and the subjective nature of hiring decisions can lead employers to discriminate against applicants with records, even when the law prohibits rejecting someone based solely on their criminal history. See generally *supra* Part III; *infra* Sections IV.B–D.

¹⁷² Empowerment Zone Employment Credit, 26 U.S.C. § 1396; Work Opportunity Tax Credit, 26 U.S.C. § 51.

¹⁷³ *Infra* Section IV.A.1.

¹⁷⁴ *The Federal Bonding Program*, U.S. DEP’T OF LAB., <https://bonds4jobs.com/> [<https://perma.cc/A6CP-H6WT>] (last visited Aug. 4, 2025) (hereinafter *The Federal Bonding Program*). See also *infra* Section IV.A.2 (discussing the bonding program in detail).

¹⁷⁵ *Infra* Section IV.A.3.

1. Federal and State Tax Credits

The Empowerment Zone Employment Credit is one of two relevant federal tax programs. This credit provides a tax incentive for employers to hire residents of economically distressed areas.¹⁷⁶ The program allows an employer to claim a twenty percent credit on up to the first \$15,000 of wages paid to qualified employees.¹⁷⁷ The credit is not directly targeted at people with criminal records. However, since so many people who have been recently released from prison are severely economically challenged, employers utilizing this tax credit are indirectly also increasing the employment of some formerly incarcerated people.¹⁷⁸

The Work Opportunity Tax Credit (WOTC) is the federal tax incentive that directly impacts job applicants with criminal records.¹⁷⁹ This tax credit can be particularly useful in encouraging corporate compliance with Fair Chance laws because it explicitly provides tax relief to employers who hire “qualified ex-felon” applicants.¹⁸⁰ Targeted corporate tax incentives have proven to be effective in improving corporate compliance in other areas. For example, the Renewable Energy Investment Tax Credit (ITC) has been a key driver in the growth of business use of solar and wind energy, putting more businesses in compliance with Sustainable Development Goals (SDG) 7 (Affordable and Clean Energy) and SDG 13 (Climate Action).¹⁸¹ Tax incentives have also

¹⁷⁶ *Fact Sheet: Opportunity Zones*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/opportunity-zones> [<https://perma.cc/CXK3-5ZPY>] (last updated April 2022) (defining “opportunity zones” as a “tax incentive, an economic development tool that allows people to invest in distressed areas. This incentive’s purpose is to spur economic development and job creation in distressed communities by providing tax benefits to investors.”).

¹⁷⁷ See 26 U.S.C. §§ 1396(a), (b), (c)(2). Also note that substantially all the services must be provided in the employer’s trade or business within an empowerment zone and the employee’s principal residence while providing the services must be within the zone. *Id.* § 1396(d)(1).

¹⁷⁸ ADAM LOONEY & NICHOLAS TURNER, BROOKINGS INST., *WORK AND OPPORTUNITY BEFORE AND AFTER INCARCERATION* 7, 9, 11, 17 (2018), <https://www.brookings.edu/articles/work-and-opportunity-before-and-after-incarceration/> [<https://perma.cc/3HLA-DBJG>].

¹⁷⁹ 26 U.S.C. § 51. See generally *Work Opportunity Tax Credit*, INTERNAL REVENUE SERV., (last updated May 8, 2025) <https://www.irs.gov/businesses/small-businesses-self-employed/work-opportunity-tax-credit> [<https://perma.cc/JJ76-ZBDK>] (highlighting the legislative history behind the WOTC). Initially passed in 1996 as part of the Small Business Job Protection Act, the WOTC has been extended multiple times. Most recently, “[t]he Consolidated Appropriations Act, 2021 (Section 113 of Division EE P.L. 116-260) authorized the extension of the WOTC until December 31, 2025.” *Id.* Although the WOTC’s fate after the end of 2025 is uncertain, President Trump, in his last term, consistently supported increasing the employment rates of those with criminal records. One demonstration of this is his issuance of proclamations and statements tying his administration to these goals. One example of a proclamation that publicly declared his promotion of “second chance” employment opportunities and reentry support for people with criminal histories is his *Proclamation on Second Chance Month* in March 2020. This proclamation stated, in part, “help[ing] former inmates find rewarding work” is a way to break the cycle of crime and reduce recidivism and that his administration was promoting second-chance hiring as part of broader criminal justice reform. *Proclamation on Second Chance Month*, 2020, TRUMP WHITE HOUSE ARCHIVES, (Mar. 31, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-second-chance-month-2020/> [<https://perma.cc/58KH-V8Q3>].

¹⁸⁰ 26 U.S.C. § 51(d)(1).

¹⁸¹ Panseih Gharib, *7 Powerful Tax Incentives to Drive SDG-Aligned Business Practices*, PROFILE TREE, (June 17, 2025), <https://web.archive.org/web/20250620011420/https://profiletree.com/tax-incentives-to-drive-sdg-aligned-business-practices/> [<https://perma.cc/>]

succeeded in encouraging businesses to hire job applicants from other disadvantaged groups. For example, tax credits have worked to increase the hiring of job applicants with disabilities.¹⁸²

The U.S. Departments of Labor and Treasury jointly oversee the WOTC,¹⁸³ which is “a federal tax credit available to employers for hiring and employing individuals for certain targeted groups who have faced significant barriers to employment.”¹⁸⁴ The statute defines ten such “targeted groups.”¹⁸⁵ One of these groups is “qualified ex-felon[s].”¹⁸⁶

Conceptually, the WOTC—especially when combined with the Federal Bonding Program described below¹⁸⁷—seems to provide a promising incentive for companies to set aside their reservations and take a chance on a job applicant with a criminal record. However, in its current form, this tax credit is woefully underutilized for the “ex-felon” targeted group.¹⁸⁸ For example, in fiscal year 2024, only 49,661 WOTC credits were issued to businesses for employing “ex-felons.”¹⁸⁹ This number represents a mere 3.1 percent of all WOTC credits issued that year.¹⁹⁰ Moreover and significantly, it represents only nine percent of the approximately 550,000 inmates released each year from federal and state prisons.¹⁹¹

S7T8-RAZK] (explaining that since its implementation, the ITC has helped expand renewable energy capacity, create thousands of jobs, and reduce carbon emissions); *see also* 26 U.S.C. § 48 (allowing businesses that install solar or wind energy systems to claim a tax credit covering a percentage of installation costs, making clean energy adoption more financially viable).

¹⁸² U.S. GEN. ACCT. OFFICE, BUSINESS TAX INCENTIVES: INCENTIVES TO EMPLOY WORKERS WITH DISABILITIES RECEIVE LIMITED USE AND HAVE AN UNCERTAIN IMPACT, GAO-03-39 2, 8, 14, 18 (2002) <https://www.gao.gov/assets/gao-03-39.pdf> [<https://perma.cc/4ENL-QPAJ>] (noting that, albeit a small number, some employers reported revising hiring practices to increase hiring of disadvantaged workers to claim tax credits).

¹⁸³ *Work Opportunity Tax Credit Fact Sheet*, U.S. DEP’T OF LAB., (Jan. 2023), <https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/WOTC-Fact-Sheet-2023.pdf> [<https://perma.cc/BM4A-KH7D>] (hereinafter *Work Opportunity Tax Credit Fact Sheet*) (stating that “the U.S. Department of Labor (DOL) and the U.S. Department of the Treasury, through the Internal Revenue Service (IRS), jointly administer the implementation of the WOTC program” and explaining that Labor (through ETA) provides guidance and grant funding to state workforce agencies and that the IRS administers tax-related provisions and requirements of the credit). Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (1996) (providing the originally enacted version of the credit).

¹⁸⁴ *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183.

¹⁸⁵ *See* 26 U.S.C. § 51(d)(1) (providing list target groups for intended benefit of this tax credit program).

¹⁸⁶ *Id.* § 51(d)(1)(C); *see also Work Opportunity Tax Credit Fact Sheet*, *supra* note 183. Note that these groups have evolved since the original statute, but that “ex-felons” were one of the original “targeted groups” and remain one under the current statute. *See* Small Business Job Protection Act § 1201.

¹⁸⁷ *Infra* Section IV.A.2.

¹⁸⁸ *See* LOONEY & TURNER, *supra* note 17835 at 3 (highlighting underutilization of WOTC).

¹⁸⁹ U.S. DEP’T OF LAB., *WOTC Certifications by Recipient Group: State and National Details For Fiscal Year 2024* 14, <https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/State%20and%20National%20Details%20FY%202024.pdf> [<https://perma.cc/MAN4-K6LK>] (last visited Aug. 11, 2025).

¹⁹⁰ *Id.*; *see also* BENJAMIN COLLINS & SARAH A. DONOVAN, CONG. RSCH. SERV., R43729, THE WORK OPPORTUNITY TAX CREDIT 6 (2018) (displaying data that demonstrates a similar level of utilization in prior years).

¹⁹¹ *Research Supports Fair Chance Policies*, *supra* note 1, at 1. “[This figure represents the average (mean) number of individuals released from state and federal prison during the most recent five years for which data is currently available.” *Id.* at 8 n.2.

Commentators have asserted at least five reasons for this underutilization: (1) the process of acquiring the tax credit is burdensome,¹⁹² (2) many employers are unaware of the WOTC opportunity,¹⁹³ (3) the tax credit has too low a cap and too short a duration to sufficiently entice hesitant employers,¹⁹⁴ (4) only a limited class of inmates—“qualified ex-felons”—is eligible for the tax credit,¹⁹⁵ and (5) Fair Chance laws undermine the purpose of the WOTC.¹⁹⁶

Currently, employers must obtain a government certification that the applicant is indeed a member of a “targeted group” to receive the WOTC.¹⁹⁷ State Workforce Agencies (SWAs) issue these certifications after both the employer and applicant jointly submit a Pre-Screening and Certification Request.¹⁹⁸ The Employment and Training Administration (ETA), overseen by the U.S. Department of Labor, provides SWAs with policy guidance and funding.¹⁹⁹ SWAs and the ETA set short deadlines and strict timeframes

¹⁹² Tim Cate, *Is the WOTC Worth It?*, EXPERIAN (July 7, 2023), <https://www.experian.com/blogs/employer-services/is-the-wotc-program-worth-it/> [<https://perma.cc/R8XD-P8KU>] (“Another reason employers often cite explaining their reluctance to utilize this program is the perception of it being overly burdensome and requiring an onerous amount of administration. There are also worries that candidates may not be comfortable providing information about their potential eligibility for the program.”); see also Benjamin Priday, *Less Work, More Paper*, MILKEN INST. REV., (Oct. 31, 2022), <https://www.milkenreview.org/articles/less-paper-more-work> [<https://perma.cc/22ER-6L57>] (stating that one reason for WOTC underutilization is perceived administrative complexity).

¹⁹³ Cassandra Bozelko, *Companies that Hire Ex-Offenders Can Get a Tax Credit, But Very Few Actually Claim It*, BARRON’S: ECONOMY AND POLICY (Apr. 23, 2019), <https://www.barrons.com/articles/companies-that-hire-ex-offenders-can-get-a-tax-credit-but-very-few-actually-claim-it-51556019056> [<https://perma.cc/33TZ-XQNU>] (noting that “[a]wareness of the WOTC benefit needs to grow.”); Priscillia E. Hunt et al., *Breaking Down Barriers: Experiments into Policies that Might Incentivize Employers to Hire Ex-Offenders*, RAND 7 (Jan. 15, 2018), https://www.rand.org/pubs/research_reports/RR2142.html [<https://perma.cc/MVU8-ECL9>] (finding employers are often unaware of the WOTC).

¹⁹⁴ See ERNST & YOUNG, ECONOMIC ACTIVITY SUPPORTED BY THE IMPROVE AND ENHANCE THE WORK OPPORTUNITY TAX CREDIT ACT 2, 12–13 (2025), <https://smucker.house.gov/sites/evo-subsites/smucker.house.gov/files/evo-media-document/ey-improve-and-enhance-the-work-opportunity-tax-credit-act-report-final-04-21-2025.pdf> [<https://perma.cc/SA8B-5QWM>] (finding that “the maximum qualified wages used to calculate the [WOTC] have not been adjusted for inflation. As a result, the real (inflation-adjusted) value of the credit has declined over time” but that extension and expansion of the WOTC would add significant value); Bozelko, *supra* note 193 (stating that Connecticut employers are likely to respond to expanded tax incentives according to surveys).

¹⁹⁵ See Bozelko, *supra* note 193 (asserting that statutory limitation of “qualified ex-felon” is too limited).

¹⁹⁶ *Id.*; Katherine English, *Conflicting Approaches to Addressing Ex-Offender Unemployment: The Work Opportunity Tax Credit and Ban the Box*, 93 IND. L.J. 513, 530–31 (2018), (claiming the two do not work well together because Ban the Box delays inquiring into criminal records, while WOTC acknowledges the existence of a criminal background and advocates for using ex-felon status to gain employment).

¹⁹⁷ See 26 U.S.C. § 51(d)(13) (describing special rules for certification for targeted group); *Fact Sheet: Work Opportunity Tax Credit Fact Sheet*, *supra* note 183; *Work Opportunity Tax Credit* *supra* note 179.

¹⁹⁸ See 26 U.S.C. § 51(d)(13)(A) (establishing local agencies for WOTC employer and employee certification); see also *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183 (calling such agencies “State Workforce Development Agencies”).

¹⁹⁹ See § 51(d)(13)(A)(ii)(II) (providing flexibility to delegate and create regulations to administer the WOTC); *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183; *Work Opportunity Tax Credit Fact Sheet*, U.S. DEP’T OF LAB., (Jan. 2024), <https://www.dol.gov/sites/dolgov/files/ETA/wotc/pdfs/WOTC-Fact-Sheet-2024.pdf> [<https://perma.cc/7DJJ-8FJK>]; *Work Opportunity Tax Credit*, *supra* note 179.

within which this form must be submitted.²⁰⁰ This timing limitation is particularly problematic because, unlike the other statutorily “protected groups,” identification of an applicant as an “ex-felon” often happens late in the hiring process. Finally, only after an employer obtains the SWA certification can they claim the WOTC as a general business credit, and this process requires submission to the IRS of three distinct forms.²⁰¹

An additional obstacle to WOTC utilization is that many employers are completely unaware of the program.²⁰² Moreover, even employers who know about the WOTC may be unaware of some recent improvements and therefore continue to perceive the process to be prohibitively onerous. Even for employers aware of the WOTC and open to engaging in the multi-step application process, the low value of the WOTC deters employer utilization. The WOTC for each “ex-felon” is equal to forty percent of annual wages, but only up to \$6,000 of those wages.²⁰³ This means that the maximum tax credit per qualified employee is \$2,400. In addition, members of all targeted groups can only be claimed during their first year of employment, further limiting the tax credit’s value.²⁰⁴ The relatively low cap on the WOTC, coupled with the multi-step process necessary to obtain it, deters many employers from pursuing a WOTC.

There are at least three potentially effective ways to address these shortcomings. First, the process can be simplified with less bureaucratic oversight and more streamlined digital submission opportunities.²⁰⁵ Secondly, federal agencies can publish and disseminate information to eligible applicants with records about the availability of tax credits for employers.²⁰⁶ Further, the ETA and IRS can incorporate information about both WOTC’s existence and a streamlined process to obtain the credit into their existing communications with employers and those who prepare corporate tax returns.²⁰⁷ Efforts already underway to implement these types of changes illustrate that there is agency and legislative openness to such simplifications.²⁰⁸

²⁰⁰ See *Work Opportunity Tax Credit*, *supra* note 179 (providing deadlines such as twenty-eight days for determination).

²⁰¹ *Id.*; *Work Opportunity Tax Credit Fact Sheet*, *supra* note 183.

²⁰² Hunt, *supra* note 193, at 7; Priday, *supra* note 192 (noting that “[t]here is little awareness of the [WOTC] program.”).

²⁰³ 26 U.S.C. §§ 51(a), (b)(3).

²⁰⁴ *Id.* at § 51(b)(2); see also *id.* § 51(i)(3) (establishing an additional requirement of working at least 400 hours but allowing employers to claim workers who perform 120–400 hours of service at a reduced credit amount equal to twenty-five percent (versus forty percent) of wages). Unlike for “ex-felons” and members of other targeted groups, the WOTC for hiring certain veterans can be as high as \$24,000 (versus \$6,000) in wages. *Id.* at § 51(b)(3).

²⁰⁵ See English, *supra* note 196, at 527 (suggesting improvements to the WOTC to increase utilization).

²⁰⁶ *Improving the Work Opportunity Tax Credit (WOTC)*, LEGAL ACTION CTR. (Dec. 2014), https://www.lac.org/assets/files/Improving_the_WOTC_LAC_one-pager.pdf [<https://perma.cc/3H35-BB7A>] (last visited Aug. 13, 2024).

²⁰⁷ See *Work Opportunity Tax Credit*, *supra* note 179 (describing process for employers to communicate with SWAs regarding the WOTC and required forms for application process).

²⁰⁸ English, *supra* note 196, at 527 (describing WOTC reform efforts in Illinois).

Finally, the size of the credit can and should be increased to make the process worthwhile for employers. There is precedent for such an increase since other targeted groups have significantly higher caps. For example, disabled veterans have a cap of \$9,600 per hired applicant, rather than \$6,000.²⁰⁹ Parallel credits offered in at least eighteen states create another precedent.²¹⁰ These credits, often called “point of hire” or “piggyback” tax credits, mirror the WOTC by providing similar credits for state taxes, with some of these states actually offering greater incentives than the WOTC.²¹¹ For example, Illinois offers employers up to a \$1,500 credit for each ex-offender hired within *three* years of release.²¹² Iowa allows employers to deduct sixty-five percent of wages paid to ex-offenders (up to \$20,000 per employee) in the first twelve months, in addition to the WOTC.²¹³

The remaining two areas where relatively minor regulatory tweaks would enhance the effectiveness of the WOTC relate to the overly restrictive definition of qualified employees and the unnecessarily rigid deadlines. First, the definition of a “qualified ex-felon” is extremely narrow.²¹⁴ An SWA will only certify an applicant as a member of the “ex-felon” targeted group if they are hired *within a year* of being *convicted* of a *felony* or being released from prison for a felony.²¹⁵ Many criminal record holders lack felony convictions²¹⁶ and yet many people who do have such convictions remain unemployed much longer than one year post-release.²¹⁷ Expanding the definition of a qualified “ex-felon” to include individuals with *misdemeanor* convictions and any

²⁰⁹ *Fact Sheet on the Returning Heroes and Wounded Warrior Tax Credits*, OFF. OF THE PRESS SEC’Y, THE WHITE HOUSE, (Nov. 21, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/21/fact-sheet-returning-heroes-and-wounded-warrior-tax-credits> [<https://perma.cc/3PU7-MZEW>] (explaining that The Wounded Warrior Tax Credit doubles the existing tax credit for long-term unemployed veterans with service-connected disabilities by maintaining the existing Work Opportunity Tax Credit for veterans with service-connected disabilities and establishing a new credit of forty percent of the first \$24,000 of wages (up to \$9,600)). *See also* 26 U.S.C. § 51(b)(3); COLLINS & DONOVAN, *supra* note 190, at 4.

²¹⁰ *State Hiring Incentives*, CTI (2025) <https://ctilc.com/state-point-of-hire-credits/> [<https://perma.cc/Y7TY-DLEX>] (last visited Aug. 11, 2025).

²¹¹ *See id.*

²¹² Press Release, STATE OF ILL., *Governor Quinn Signs Legislation to Give Ex-Offenders a Second Chance*, (Apr. 11, 2013), <https://www.illinois.gov/news/release.html?releaseid=11407> [<https://perma.cc/K5BX-JDSF>].

²¹³ *Income Tax Benefit for Iowa Employers Who Hire Ex-Offenders*, STATE OF IOWA, DEP’T OF REV., <https://revenue.iowa.gov/taxes/tax-guidance/individual-income-tax/employers-who-hire-ex-offenders> [<https://perma.cc/4AWN-BUSQ>] (last visited Aug. 11, 2025).

²¹⁴ *See* Bozelko, *supra* note 193.

²¹⁵ *See* 26 U.S.C. § 51(d)(4) (defining an eligible ex-felon “as having a hiring date which is not more than 1 year after the last date on which such individual was so convicted or was released from prison”).

²¹⁶ BECCA CADOFF ET AL, JOHN JAY COLLEGE OF CRIM JUST., *CRIMINAL CONVICTION RECORDS IN NEW YORK CITY (1980-2019)* 20 (2021), https://datacollaborativeforjustice.org/wp-content/uploads/2021/04/2021_04_07_Conviction_Record_Report.pdf [<https://perma.cc/AVG6-E3LP>] (finding that approximately forty-four percent (328,712 of the 745,924 examined records) of those with criminal convictions have records that contain only misdemeanor convictions).

²¹⁷ *See* LOONEY & TURNER, *supra* note 188, at 13–14 (discussing large-scale post-incarceration unemployment among men); Leah Wang & Wanda Bertmanram, *New Data on Formerly Incarcerated People’s Employment Reveal Labor Market Injustices*, PRISON POLY INITIATIVE (Feb. 8 2022), <https://www.prisonpolicy.org/blog/2022/02/08/employment/> [<https://perma.cc/8HWC-7VHV>] (analyzing long-term unemployment for formerly incarcerated individuals).

offender hired within *five years* of release, would significantly reduce this statutory limitation.²¹⁸

The rigid deadline for submission of a request for a WOTC certification is also problematic for “qualified ex-felons.” Current law requires that employer and applicant together complete the necessary form to request an SWA “qualified ex-felon” certification on or before the day an employment offer is made and then submit the form within twenty-eight days of the applicant’s start date.²¹⁹ For the WOTC and Fair Chance laws to complement each other better, WOTC timing adjustments are needed.²²⁰ The deadline for submitting the initial certification request should be extended to sixty days. Alternatively, the clock for tax credit certification applications based on hiring “ex-felons” should begin when an employer gains access to an applicant’s criminal record, rather than on the employee’s start date. This would be impactful, particularly in states where background checks can only be completed after an employer makes a job offer, because gaining access to records takes time.

The turnaround time for receiving an applicant’s state criminal record is typically up to one week from the date that the request is submitted, or longer if it includes fingerprints.²²¹ With a twenty-eight-day WOTC submission deadline, this waiting time cuts off up to twenty-five percent of the twenty-eight-day window from conditional offer to the deadline for submitting a WOTC certification request. In addition, many employers now also request federal criminal background checks. FBI background checks use fingerprints, which increases the processing time. A survey conducted by the FBI Criminal Justice Information Service (CJIS) Division determined that the average time to process a civil fingerprint submission ranged from one day to forty-two days.²²² In the 2006 *Attorney General’s Report on Criminal Background Checks*,

post-release, highlighting that thirty-three percent of people released from federal prison remain unemployed four years following their release).

²¹⁸ English, *supra* note 196, at 527; *see also* Bushway, *supra* note 44 (noting that “[t]he single most reliable factor in predicting future behavior is the amount of time that has passed since a person’s last conviction; a person’s likelihood of reoffending declines rapidly as more time passes without a conviction”); AVERY, *supra* note 23, at 3 (explaining that one year after release, more than sixty percent of people who have been incarcerated remain unemployed, which highlights the need to lengthen the period of WOTC eligibility).

²¹⁹ *See Work Opportunity Tax Credit*, *supra* note 179 (explaining that Form 8850 must be signed under penalty of perjury and submitted to the state workforce agency within twenty-eight days of the job applicant’s start date).

²²⁰ *See* Bozelko, *supra* note 193 (suggesting that an application question should change to ask if the applicant is a member of any of the targeted groups that would make the employer eligible for a WOTC, rather than if they are specifically a felon, thereby preserving the confidentiality of the applicant’s criminal background). While an interesting idea, one wonders how long an applicant could reasonably postpone revealing which targeted group they belong to.

²²¹ *See, e.g., Individual and Family Fact Sheet: Pre-Employment Background Check*, STATE OF CONN., CONN. DEV. SERVS. (Oct. 2023), https://portal.ct.gov/dds/searchable-archive/selfadvocacyselfdetermination/self-determination-fact-sheets/fact-sheet---criminal-history-background-check?language=en_US [<https://perma.cc/N3GF-U5PC>] (stating that the “background check is usually completed in approximately five to ten business days. Fingerprint-based checks may take longer to complete than background checks that use only the person’s name and date of birth.”).

²²² U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 22, 30 (2006), https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ag_bgchecks_report.pdf [<https://perma.cc/TB4E-Y6F9>].

the Department of Justice (DOJ) noted that “long[] response times . . . [are] clearly unacceptable” and that “employers typically want screening results back within three business days.”²²³ Indeed, the DOJ states that a “point made by many submitting comments to the Department on this report is that criminal history checks of the FBI or state repositories that take a long time to return results [are] . . . useless to the employer and unfair to an applicant.”²²⁴ To complicate things further, the Report notes that, while approximately ninety percent of these criminal background checks reveal that the job applicant has no record, “additional[] time may be necessary for the screening when the search returns a record, such as where research is necessary to find missing dispositions.”²²⁵ Since it is the applicants who do have records that will allow an employer to apply for a WOTC, the longer processing time for these individuals’ information can further cut into the short twenty-eight-day window.

In light of these variable processing times, modifying the deadlines would ensure adequate time after a conditional offer for an employer to learn the details about the applicant’s criminal record, carefully assess whether to rescind a conditional offer, and to do so only if the record legitimately impacts the hiring decision. In this way, the employer would access the benefits of the tax credit after they have decided that all other factors do not impact their decision to hire the “ex-felon.”

Finally, successful Fair Chance laws create a situation where many employers are unaware of a job applicant’s criminal history until after making a job offer, or at least until after an interview. Some commentators view this as rendering the WOTC useless because employers cannot actively recruit people with records without being able to identify potential applicants who have criminal records until after the hiring process has begun or even ended.²²⁶

This critique misses two important facts. First, employers can still “recruit” by advertising job openings in targeted markets and by explicitly stating in those marketing efforts that they support the hiring of people with criminal records. Second, although active recruitment of members of targeted groups is one goal of the WOTC, the overall goal is to increase employment of members of these groups. Recruitment is just one way to accomplish this goal, and it may be more applicable to other targeted groups, for whom early disclosure of their membership in the relevant group carries less stigma than that of a criminal record. In addition, while the WOTC may somewhat limit active recruitment of applicants with records, this does not mean that it cannot contribute to the overall goal of improving their employment prospects. In this way, when coupled with Fair Chance hiring laws that delay employer access to applicants’ criminal records until late in the hiring process, the WOTC can serve the important role of curtailing an inclination to rescind a conditional offer. Once an employer has chosen someone as their preferred applicant, their consideration of withdrawing an offer may be sufficiently diminished so that

²²³ *Id.* at 94.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *E.g.*, English, *supra* note 196 at 526.

the tax credit would be enough to tip the scales towards keeping the offer in place. Finally, it is important to remember that many jurisdictions still do not have Fair Chance laws. The WOTC may be particularly useful in these places, since applicants will not have the protection of having their criminal records shielded from employers.

Measures to simplify the WOTC application process, increase employer awareness, raise its cap and duration, tweak its definition of “ex-felons,” and modify its application deadlines for “ex-felons” are minimal, straightforward, and attainable—even during these polarized times. The first necessary legislative step is to extend the WOTC’s expiration date, which is currently December 31, 2025.²²⁷ Historically, there has been bipartisan support of the WOTC and other laws that aim to increase employment for people with records.²²⁸ For example, bipartisan efforts have extended the WOTC expiration date more than a dozen times over twenty-five years.²²⁹ In fact, many WOTC extensions have occurred in years when different parties controlled the Congress, Senate, and White House, and each extension has passed with bipartisan support.²³⁰ In 2021, Ohio Republican Senator Rob Portman introduced a bill that would have made the WOTC permanent.²³¹ The bill never made it out of the Senate Finance Committee, but it had five co-sponsors, three of whom were Democrats.²³²

In the current political climate, with the House and Senate proposing and passing a number of tax bills that eliminate or curtail tax credits and the WOTC expiration date rapidly approaching, one might wonder if the WOTC has seen its final days. However, in February 2025, Pennsylvania Republican Representative Lloyd Smucker introduced the latest bill to extend the WOTC.²³³ The bill’s sixteen co-sponsors include seven Democrats

²²⁷ Wayne Rotger, *WOTC Renewal: What Employers Should Know During its Hiatus*, <https://www.experian.com/blogs/employer-services/wotc-renewal-what-employers-should-know-ahead-2025-expiration/> [https://perma.cc/GEY8-RRW5] (Jan. 13, 2026) (explaining that previous hiatus periods for WOTC included a retroactive period).

²²⁸ See, e.g., KORZENIK, *supra* note 16, at 201–02 (noting the rare display of bipartisanship in the passage of the First Step Act by a vote of eighty-eight to twelve by the Senate in 2018 and describing the Act as “the most comprehensive criminal justice reform legislation in decades”); *supra* Sections II.A.2, B.2 (discussing Trump signing into law congressional codification of an Obama administration policy for federal employers). Both the first and second Trump administrations have championed initiatives to improve employment of ex-felons. See *Fact Sheet, President Donald J. Trump Has Championed Reforms that Are Providing Hope for Forgotten Americans*, TRUMP WHITE HOUSE ARCHIVES (Feb. 20, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-championed-reforms-providing-hope-forgotten-americans/> [https://perma.cc/NN59-BW27] (highlighting advocacy during first Trump Administration).

²²⁹ COLLINS & DONOVAN, *supra* note 190 at 2 (listing the various laws by which Congress passed WOTC extensions).

²³⁰ *Id.* (listing the years during which Congress passed WOTC extensions, which span across periods of shifting party control of the federal government).

²³¹ Work Opportunity Tax Credit & Jobs Act, S. 269, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/269> [https://perma.cc/5Z38-PA8C].

²³² *Id.* (list of cosponsors available at <https://www.congress.gov/bill/117th-congress/senate-bill/269/cosponsors> [https://perma.cc/33XU-XB7S]).

²³³ Improve and Enhance the Work Opportunity Tax Credit Act (IEWOTC), H.R. 1177, 119th Cong. (2025).

and nine Republicans.²³⁴ In addition to extending the WOTC deadline, the *Improve and Enhance the Work Opportunity Tax Credit Act* (IEWOTC Act)²³⁵ contains provisions that would somewhat modernize and expand the WOTC program. The bill addresses the fact that the WOTC has not been updated in decades, causing its value to decline due to inflation. Among other things, the law would increase the current credit percentage from forty percent to fifty percent of qualified wages and add a second level of credit for employees who work 400 or more hours.²³⁶ Other provisions address at least partial streamlining of the WOTC application process.²³⁷

The IEWOTC bill has yet to move beyond the House Ways and Means Committee, but this bipartisan support of not only an extension, but also some improvements to the current law, is hopeful. It may mean that the House will soon vote favorably on Representative Smucker's bill and send it to the Senate, where bipartisan support for prior WOTC extensions²³⁸ bodes reasonably well for the bill's passage before the WOTC's year-end expiration. Alternatively, and perhaps more likely, Congress can pass a law in 2026 that extends the tax credit retroactively, as has routinely been done with prior extensions.²³⁹

2. Misconduct Insurance

The Federal Bonding Program (FBP),²⁴⁰ created by the U.S. Department of Labor in 1966, provides fidelity bond coverage to employers hiring workers with "backgrounds that pose significant barriers to securing or retaining employment."²⁴¹ Employers receive the FBP bonds free-of-charge as an incentive to hire such applicants. The bonds are primarily issued to support the hiring of justice-involved individuals.²⁴² This group includes people who

²³⁴ *Id.* (list of cosponsors available at <https://www.congress.gov/bill/119th-congress/house-bill/1177/cosponsors> [<https://perma.cc/HY9C-E7R4>]).

²³⁵ H.R. 1177, 119th Cong. (2025); S. 492, 119th Cong. (2025). These bills, originally introduced at the end of 2023, have been reintroduced in the current Congress by Representatives Steven Horsford (D-NV-4), Brian Fitzpatrick (R-PA-01), Mike Kelly (R-PA-16), Vern Buchanan (R-FL-16), and Tom Suozzi (D-NY-03). Senators Bill Cassidy (R-LA) and Maggie Hassan (D-NH) introduced a parallel bill in the Senate.

²³⁶ *Id.*

²³⁷ *See id.*

²³⁸ *See* COLLINS & DONOVAN, *supra* note 190, at 2.

²³⁹ *Id.* at 10, (stating that "The credit has lapsed a number of times before being retroactively reauthorized."); *see also id.* at 14, (noting that "the WOTC for non-veterans lapsed after December 31, 2011, and the WOTC for veterans lapsed after December 31, 2012," but that "The American Taxpayer Relief Act of 2012 . . . [retroactively] extended the WOTC for all eligible populations through December 31, 2013.").

²⁴⁰ U.S. DEPT OF LAB., *Training and Employment Notice* (Mar. 27, 2008) <https://www.dol.gov/sites/dolgov/files/ETA/advisories/TEN/2008/TEN37-07acc.pdf> [<https://perma.cc/6M4U-QAWA>] (Stating that DOL created the program); *The Federal Bonding Program*, *supra* note 174; *see also* U.S. DEPT OF JUST., *ANALYSIS OF THE FEDERAL BONDING PROGRAM, VOLUME 1 – PROGRAM HISTORY – FINAL REPORT* (1975), <https://www.ojp.gov/ncjrs/virtual-library/abstracts/analysis-federal-bonding-program-v-1-program-history-final-report> [<https://perma.cc/A53A-JA3T>] (giving a summary of the history and objectives of the program).

²⁴¹ *The Federal Bonding Program*, *supra* note 174.

²⁴² Private bonding sources typically label ex-offenders as "not bondable." *Loss of Capacity to Be Bonded*, in *ENCYCLOPEDIA OF COMMUNITY CORRECTIONS* (Shannon M. Barton-Bellessa, ed., 2012). While there is currently no free insurance or government sponsored insurance policy

have criminal records and are returning to the community.²⁴³ The program has proven promising if underutilized: it has supported more than 56,500 job placements, although it must be noted not all of these placements were for justice-involved individuals.²⁴⁴

FBP bonds protect the employer against losses caused by any fraudulent or dishonest acts of the bonded employee.²⁴⁵ Examples of such acts of employee dishonesty include theft, forgery, larceny, and embezzlement. In this way, the bonds are well suited to address the most prevalent employer concerns about hiring people with records.²⁴⁶ Unfortunately, each FBP bond has a \$5,000 limit, albeit with a zero-dollar deductible, and covers only the first six months of a selected individual's employment.²⁴⁷ Enhancing this outdated law by increasing the amount and length of coverage could further significantly ease employer concerns.²⁴⁸

3. Federal Contract Preference

Federal contract preferences serve as government incentives to influence the behavior of contractors and achieve specific socioeconomic goals. These preferences set aside a certain number of federally funded projects and/or give priority to project bids from designated types of private contractors. Current federal contract preferences include set-asides for small businesses,²⁴⁹ service-disabled veterans,²⁵⁰ and women-owned businesses.²⁵¹ There is currently no

for negligent hiring lawsuits, the government sometimes provides reimbursement for professional liability insurance for certain public agencies, like law enforcement or some other federal agencies. *See, e.g.,* GOV'T EMP. BENEFIT ASS'N, *Professional Liability Insurance*, https://www.geba.com/professional-liability-insurance/#section_3 [<https://perma.cc/P3F7-LVAD>] (last visited on Sep. 21, 2025). Such a model could be expanded to include private employers.

²⁴³ *Id.*

²⁴⁴ *The Federal Bonding Program*, *supra* note 174.

²⁴⁵ *Loss of Capacity to Be Bonded*, *supra* note 242 (stating that "[i]f an employee covered under the Federal Bonding Program steals from an employer, the employer will be reimbursed to the extent of the loss, limited by the bond amount, without having to pay any deductible.").

²⁴⁶ *See* discussion of state statutes that create exceptions for crimes of theft and dishonesty *infra*, Section II.A.1.

²⁴⁷ *See The Federal Bonding Program*, *supra* note 174.

²⁴⁸ As of September 2025, the U.S. Dollar Inflation Calculator from the Bureau of Labor Statistics shows that \$5,000 from 1966 is equivalent to more than \$50,000. This demonstrates that the maximum bond amount has lost a substantial amount of its value over the nearly 60 years since the U.S. Department of Labor created the Federal Bonding Program. *U.S. Bureau of Labor Statistics CPI Inflation Calculator*, https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/N57C-TPP6>] (last visited on Dec. 30, 2025).

²⁴⁹ *See e.g.* Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988); Small Business Act, Pub. L. No. 85-536, 72 Stat. 384 (1958); Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494 (1984) and the Small Business Administration HUBZone program, which creates special preferences for small businesses in historically underutilized business zones. CONG. RSCH. SERV., R41268, *Small Business Administration Hubzone Program* 1 (2025) <https://www.congress.gov/crs-product/R41268> [<https://perma.cc/P9KJ-YRN5>].

²⁵⁰ Veterans Benefits Act of 2003, Pub. L. 108-183, § 308, 117 Stat. 2651, 2662 (2003).

²⁵¹ Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291 § 825, 128 Stat. 3292, 3437 (2014); U.S. SMALL BUSINESS ADMIN., *Women-Owned Small Business Federal Contract Program*, (Nov. 18, 2025), <https://www>.

policy or law that grants preference in gaining federal contracts for those contractors who employ people with criminal records.

As with the WOTC tax credit, adding a law that would give contract preferences or set-asides to such businesses would add to the economic incentives that promote the hiring of people with records. This type of law may have the potential to impact more applicants than laws banning the box for government jobs, given that federal contractors have more than double the number of employees than the federal government.²⁵² As discussed in sections IV.B and C., *infra*, creating a set of complimentary legal efforts to encourage employment of those with criminal records offers the most promising approach.

B. *Working Against Stigma: Education and Collaboration*

Outside of the legislative arena, reformers should strive to educate businesses and other institutions on the benefits of hiring justice-involved individuals. The Society for Human Resource Management and the Charles Koch Institute conducted surveys on hiring and working with people with records in 2018 and again in 2021.²⁵³ The later survey found greater openness among business leaders and human resource (HR) professionals towards hiring employees with records. For example, “53% of HR professionals said they would hire individuals with criminal records (up from 37% in 2018)” and “38% of business leaders agreed (up from 33% in 2018).”²⁵⁴ This trend seems to indicate a move away from the stigma of criminal conviction and towards a more optimistic view that rehabilitation is possible. As some researchers have observed, there has been greater “political support for second chances” in recent decades, as well as an “emergence of more nuanced and even less punitive attitudes.”²⁵⁵

At the same time, the SHRM and Koch study also found that awareness about Ban the Box and Fair Chance laws among business leaders was still very low. While seventy-eight percent of HR professionals were familiar with the term by 2021 (up from sixty-eight percent in 2018), only thirteen percent of business leaders and eight percent of individuals who participated in the survey knew about it. Increased awareness among business leaders about the purpose and scope of Ban the Box and Fair Chance laws would further contribute to a shift in narrative about applicants with records, especially where the majority of managers and HR professionals who work with such

sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contract-program [https://perma.cc/AD9T-JDKZ].

²⁵² See Kamarck, *supra* note 106.

²⁵³ See SOC'Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST., 2021 GETTING TALENT BACK TO WORK 2 (May 2021), <https://www.shrm.org/content/dam/en/shrm/foundation/getting-talent-back-to-work-report.pdf> [https://perma.cc/XPP6-DDUP].

²⁵⁴ *Id.* at 2.

²⁵⁵ Lageson & Corda, *supra* note 167, at 37 (quoting Michael M. O'Hear & Darren Wheelock, *Public Attitudes Toward Punishment, Rehabilitation, and Reform: Lessons from the Marquette Law School Poll*, 29 FED. SENT'G. REP. 47, 47 (2016)).

employees believe that workers with records perform as well or better than workers without records.²⁵⁶

Business leaders are making the case for changing the narrative about employers with records.²⁵⁷ The existence of initiatives like the Second Chance Business Coalition indicates a shift in attitudes such that the advocacy of fair chance hiring is not a controversial moral stance (a business lobbying group that founded the coalition—Business Roundtable—is unlikely to take a position that does not reflect member consensus). The coalition consists of fifty large companies and is chaired by Jamie Dimon, Chairman and CEO of JPMorgan Chase, and Craig Arnold, former chairman & CEO of Eaton.²⁵⁸ According to a recent report by Eaton, for example, “[m]ore than 11 percent of Eaton’s 35,000 new hires from 2019 to 2024 had conviction histories, including over 1,000 second chance applicants hired in 2024 alone.”²⁵⁹ The report indicates that Eaton also requires staffing agencies and other companies in its supply chain to adopt second chance hiring policies.²⁶⁰ In order to successfully implement second chance hiring policies, businesses partner with re-entry organizations working in the community to help provide services to formerly incarcerated individuals in the form of education, job training, and others.²⁶¹

Applicants with records benefit from greater transparency on the part of employers. Clearly established and stated policies enable them “to focus their job search on employers willing to hire them.”²⁶² For example, in a 2023 report, the EEOC suggested that workers with records are not sufficiently informed about their eligibility to apply for jobs with the federal government. According to the agency, “[i]t is possible that people with incarceration records erroneously believe they are barred from federal employment and self-select

²⁵⁶ SOC’Y FOR HUMAN RES. MGMT. & CHARLES KOCH INST., *supra* note 253, at 2.

²⁵⁷ See THE BUSINESS ROUNDTABLE, *ICYMI: Business Roundtable Co-Hosts Event at the Wharton School to Advance Second Chance Employment* (Apr. 18, 2024), <https://www.business-roundtable.org/icymi-business-roundtable-co-hosts-event-at-the-wharton-school-to-advance-second-chance-employment> [<https://perma.cc/ZV9S-XHTD>] (reporting on roundtable event discussing benefits of hiring workers with records for businesses); BUSINESS ROUNDTABLE, *The Business Case for Second Chance Employment*, (Apr. 4, 2024), <https://vimeo.com/928040533/d762430bd7> [<https://perma.cc/V97U-WZHQ>] (recording of the panel discussion).

²⁵⁸ SECOND CHANCE BUS. COAL., *About SCBC*, <https://secondchancebusinesscoalition.org/about> [<https://perma.cc/L2CS-2YRM>] (last visited Mar. 21, 2026).

²⁵⁹ SECOND CHANCE BUS. COAL., *Leading by Example, Eaton’s Commitment to Second Chance Employment 1* (June 2025), <https://brt-second-chance-production.s3.amazonaws.com/EatonCaseStudy-Final-June2025.pdf> [<https://perma.cc/L66Y-BSJH>]. See also, e.g., *Reentry Reemployment Unit - Staff Resources*, MASSWORKFORCE, <https://www.mass.gov/info-details/reentry-reemployment-unit-staff-resources> [<https://perma.cc/QL6K-KD3U>] (last visited Sep. 2, 2025) (providing example of how state governments devote resources to connecting employers and applicants with records). In Massachusetts, the Reentry and Reemployment unit at the Executive Office of Labor and Workforce Development’s Department of Career Services works with employers to educate them about the benefits of hiring workers with records and to provide support services. *Id.*

²⁶⁰ SECOND CHANCE BUS. COAL., *supra* note 259, at 4.

²⁶¹ See, e.g., KORZENIK, *supra* note 16, at 130, 149 (discussing how partnerships with non-profit organizations and state agencies working with reintegration can help create successful second chance hiring programs for businesses).

²⁶² Jennifer Stocker, *Ban the Black Box: Criminal Background Screening and the Information-Withholding Problem*, 96 WASH. U.L. REV. 859, 879–80 (2019).

out of the applicant pool.”²⁶³ These misconceptions on the part of potential employees are also prevalent in the private labor market. Especially as the attitudes of employers begin to shift (prompted in part by Ban the Box and Fair Chance laws), better information for applicants about employers that will hire and support them would be very beneficial.

C. Implementation Strategies by Employers

While there is some evidence of greater openness on the part of employers to hiring workers with records, it is unclear whether hiring practices have actually shifted significantly. One study of compliance with Ban the Box laws in Minnesota, published in 2022, found that one in five employers were non-compliant with the law and still asked about criminal histories on job applications.²⁶⁴ The researchers also found that many employers “were either unaware of BTB or informally learned about the policy from other workplaces.”²⁶⁵ Even among those employers who removed the box from applications as the law required, “many continued to use criminal background checks and put stigmatizing criminal background check statements on their applications.”²⁶⁶ In other words, employers discouraged those with records from applying by signaling on the application that they will conduct background checks later in the hiring process. At the same time, the study did not find sufficient enforcement and sanctions for noncompliance. The authors concluded that governments seeking to effect change of hiring practices through BTB laws should invest in resources in notifying businesses about the law and in identifying and sanctioning noncompliance.²⁶⁷ As discussed in more detail in Section IV.D, *infra*, neither the goal nor the expressive function of BTB and Fair Chance laws can be achieved without appropriate enforcement.

Researchers examined the impact of California’s Fair Chance Act of 2018 (CFCA) on hiring practices involving applicants with records in a study published in 2024.²⁶⁸ This study is based on data collected in 2021, so we might expect that the attitudes and practices of employers will continue to evolve, especially considering the fact that the regulations implementing the law were only finalized in 2020 and that the pandemic may have affected the labor market during that time.²⁶⁹ California’s law is one of the strongest

²⁶³ Erich Wagner, EEOC: ‘Ban the Box’ Policies Are Effective at Federal Agencies, But the Government Needs to Raise Awareness, GOVERNMENT EXECUTIVE (Sep. 12, 2023), <https://www.govexec.com/workforce/2023/09/eec-ban-box-policies-are-effective-federal-agencies-government-needs-raise-awareness/390220/> [<https://perma.cc/YP88-8PYW>] (quoting U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N (EEOC), RSCH., EVALUATION, & APPLIED DATA DIV., OFF. OF FED. OPERATIONS, SECOND CHANCES PART I: FEDERAL EMPLOYMENT FOR WORKERS WITH PAST ARRESTS OR CONVICTIONS ii (2023), https://www.eeoc.gov/sites/default/files/2023-09/Second%20Chances%20Part%20I%20Report_final_508.pdf [<https://perma.cc/G62C-KVDB>]).

²⁶⁴ Schneider, et al., *supra* note 85, at 763.

²⁶⁵ *Id.* at 774.

²⁶⁶ *Id.* at 778.

²⁶⁷ *Id.*

²⁶⁸ Oselin et al., *supra* note 126 at 363.

²⁶⁹ See AVERY & LU, *supra* note 6, at 9.

in the U.S. because it applies to both public and private employers, delays background checks until after a conditional offer, and requires employers to consider the particulars of the timing and nature of the conviction, as well as its relevance to the job.²⁷⁰ CFCA also requires notice of the intent to rescind the offer due to criminal history, an opportunity for appeal, and a final written notice rescinding the offer.²⁷¹ The study resulted in three main findings: (1) employers continue to be reluctant to hire workers with records, especially outside of “unskilled, labor-heavy, or non-customer service-facing roles,”²⁷² (2) nearly eighty percent of employers consider criminal histories through formal or informal inquiries prior to the conditional offer in violation of the CFCA, and (3) the appeals process has a low success rate.²⁷³ These conclusions are pessimistic, but—as the study authors recognize—it is possible that a stronger positive impact of the law will become apparent with more time.

In addition to the educational efforts and community partnerships highlighted in Section IV.B above, more effective implementation requires strong leadership buy-in,²⁷⁴ transparency about hiring practices,²⁷⁵ education for HR staff to reduce bias and implement support services.²⁷⁶ Other measures that can improve second chance hiring include automatic expungement of certain categories of records (such as the one implemented by Clean Slate laws discussed in Section II.B, *supra*, for example), economic incentives (discussed in Section IV.A, *supra*), restrictions on the availability of records, stronger regulations of private background check companies to reduce reliance on faulty records, and increased state and local funding for re-entry services.²⁷⁷

D. Improved Enforcement of Fair Chance Laws by State and Federal Agencies

Fair chance laws will be more effective if more employers comply with them in meaningful ways. Compliance, in turn, depends on the existence of strong enforcement mechanisms.²⁷⁸ There are several obstacles in the path of better enforcement. As discussed in section II.B.1., *supra*, there are often insufficient resources at the government level. And, as discussed in Section II.A.1. *supra*, individual plaintiffs with records who are denied employment in violation of the law also lack resources to bring lawsuits. The EEOC and advocacy

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² Oselin et al., *supra* note 126, at 385.

²⁷³ *Id.*

²⁷⁴ See generally AVERY & LU, *supra* note 6, at 14–15 (citing Kentucky Governor Bevin highlighting the importance of leading by example at the state government level with hopes that it will push private business leadership to buy-in).

²⁷⁵ See, e.g., SECOND CHANCE BUS. COAL., *supra* note 259, at 3 (noting that “Eaton launched a webpage dedicated to describing its second chance employment program.”).

²⁷⁶ *Id.*; KORZENIK, *supra* note 16, at 161 (discussing the successful use of a “change coach” by JBM, a company that implemented a second chance hiring program).

²⁷⁷ KLEINMAN & KAJEEPETA, *supra* note 5, at 13–14.

²⁷⁸ See, e.g., Schneider, et al., *supra* note 85, at 778 (noting that “contexts in which legal changes are paired with few to no enforcement mechanisms . . . result in organizational noncompliance and continued discriminatory behavior.”).

organizations sometimes step in, but they are also low on resources and not always successful.

Litigation strategy for challenging hiring practices that screen out employees with records are often grounded in disparate impact theories under Title VII of the Civil Rights Act of 1964, whereby plaintiffs argue that “an employer’s emphasis on criminal background checks in hiring processes can have [a disparate impact] on minorities.”²⁷⁹ However, “the record suggests a low success rate for these types of challenges in court.”²⁸⁰ Moreover, the EEOC has stopped disparate impact enforcement under the second Trump administration.²⁸¹ For example, the agency recently dismissed its enforcement action against Sheetz, a large convenience store chain. The EEOC first sued Sheetz in June 2024, arguing that the company’s practice of screening criminal records had a discriminatory impact on Black, Native American, and other minority applicants.²⁸² In moving to dismiss its own lawsuit in June 2025, the EEOC cited president Trump’s Executive Order No. 14281, issued on April 23, 2025, which directed “all agencies [to] deprioritize enforcement of all statutes and regulations to the extent they include disparate-impact liability.”²⁸³ The executive order directs the Attorney General and the EEOC chair to assess all ongoing litigation under the “theory of disparate-impact liability, and [to] take appropriate action with respect to such matters consistent with the policy of [the] order.”²⁸⁴ “Appropriate action” in this context means dismissal of all disparate impact enforcement, so the federal government is not likely to contribute to the enforcement of Fair Chance laws, at least until a change in the administration.

This development on the federal level makes it all the more important for state governments to step up their own enforcement of Fair Chance laws, although that can be complicated in cases where employers operate across state lines.²⁸⁵ In addition, state Fair Chance laws do not always include clear enforcement mechanisms.²⁸⁶ States with robust Fair Chance laws that have clear enforcement and sanction provisions have been successful in going after companies for violations. California’s Civil Rights Department (CRD) sued

²⁷⁹ Gaines, *supra* note 66, at 539.

²⁸⁰ *Id.*

²⁸¹ Exec. Order No. 14281, 90 Fed. Reg. 17537 (Apr. 23, 2025) (“It is the policy of the United States to eliminate the use of disparate-impact liability in all contexts to the maximum degree possible to avoid violating the Constitution, Federal civil rights laws, and basic American ideals.”).

²⁸² Press Release, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *EEOC Sues Sheetz, Inc. for Racially Discriminatory Hiring Practice* (Apr. 18, 2024), <https://www.eeoc.gov/newsroom/eeoc-sues-sheetz-inc-racially-discriminatory-hiring-practice> [<https://perma.cc/9F7T-G5W5>].

²⁸³ Pl.’s Mot. to Dismiss, U.S. Equal Emp. Opportunity Comm’n v. Sheetz, Inc., No. 3:24-cv-00231 (W.D. Pa. June 6, 2025) (citing Exec. Order No. 14281, § 4, 90 Fed. Reg. at 17538).

²⁸⁴ Exec. Order No. 14281, § 6, 90 Fed. Reg. at 17538.

²⁸⁵ See Gaines, *supra* note 66, at 551 (noting that “employers operating in multiple states or jurisdictions with differing fair chance laws may have difficulty complying with the various regulations.”).

²⁸⁶ *Id.* at 552 (citing Christina O’Connell, Note, *Ban the Box: A Call to the Federal Government to Recognize A New Form Of Employment Discrimination*, 83 FORDHAM L. REV. 2801, 2826 (2015)) (“[a]t least seven state fair chance laws omit information about what agency or mechanism exists to enforce the new legislation”).

Ralphs, a grocery company in 2023 based on allegations that the employer “illegally denied jobs to hundreds of people based on their criminal history.”²⁸⁷ The case against Ralphs was the first lawsuit of its kind based on CFCA violation, and the CRD has ramped up enforcement since. In December 2024, the agency “announced individual settlements with Amazon, Ikea, Kohl’s, the Los Angeles Dodgers, The Citizen Hotel, and MPIJet over alleged violations” of the law.²⁸⁸ In April 2025, the CRD announced a settlement with a trucking and logistic company based in Iowa, which included a \$100,000 payment to the applicant for the violation, as well as several remedy measures such as fair chance training implementation, review of company policies, and reports to CRD of any policy changes within forty-five days.²⁸⁹

Advocates are also fighting in the courts on behalf of individual plaintiffs. For example, the Third Circuit recently reversed the District Court’s dismissal of a complaint filed by an applicant with a criminal record in *Phath v. Central Transport*.²⁹⁰ At issue in this case was whether the Pennsylvania Fair Chance law protects employees from hiring discrimination if they voluntarily self-disclose their criminal history.²⁹¹ Rodney Phath, the plaintiff-appellant, applied to work as a truck driver for Central Transport. He disclosed his fifteen-year-old criminal conviction to his prospective employer after the company told him that they were going to run a background check as part of the hiring process.²⁹² Central Transport rejected Phath based on this criminal record despite the fact that the offense occurred a long time ago and was not relevant to the job.²⁹³

The Commonwealth’s Criminal History Record Information Act (CHRIA) prohibits employers in Pennsylvania from considering a job applicant’s non-job-related criminal history in making a hiring decision.²⁹⁴ The District Court interpreted CHRIA very narrowly to prohibit employers

²⁸⁷ Suhauna Hussain, *Ralphs Illegally Denied Jobs to Formerly Incarcerated people, Civil Rights Lawsuit Alleges*, L.A. TIMES (Dec. 21, 2023), <https://www.latimes.com/business/story/2023-12-21/ralphs-illegally-denied-jobs-to-formerly-incarcerated-people-civil-rights-lawsuit-alleges> [https://perma.cc/UN3J-5XES]; Cal. C.R. Dep’t v. Ralphs Grocery Co., 2025 Cal. Super. LEXIS 3081 (Cal. Super. Ct. Feb. 6, 2025). In January 2025, the California Superior Court found that California’s Fair Chance statute requires at least one named aggravated party in civil enforcement actions to seek individual damages. *See id.* at *18 (granting leave to allow the Civil Rights Department to add names of aggrieved parties and schedule pre-trial conference).

²⁸⁸ Press Release, CAL. C.R. DEP’T, *California Settles with Big Box Retailers, Amazon, and Others Over Alleged Violations of State Fair Chance Act* (Dec. 3, 2024), <https://calcivilrights.ca.gov/2024/12/03/california-settles-with-big-box-retailers-amazon-and-others-over-alleged-violations-of-state-fair-chance-act/> [https://perma.cc/7E3J-Y4BB].

²⁸⁹ *Fair Chance Act Violation Settled by California Civil Rights Department*, JDP (Apr. 16, 2025), <https://www.jdp.com/blog/fair-chance-act-violation-settled-by-california-civil-rights-department/> [https://perma.cc/9KAE-GHLC] (citing announcement and settlement); *see also* Press Release, CAL. C.R. DEP’T, *Civil Rights Department Secures Fair Chance Act Settlement with Iowa-Based Trucking Company* (Apr. 3, 2025), <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2025/04/2025.04.03-Trucking-FCA-Settlement-Release.pdf> [https://perma.cc/PY78-TGU6] (detailing the settlement agreement).

²⁹⁰ 165 F.4th 780 (3d Cir. 2026).

²⁹¹ *Id.* at 782.

²⁹² Phath v. Cent. Transp. LLC, No. CV 24-0681, 2024 WL 5204175, at *1 (E.D. Pa. Dec. 23, 2024).

²⁹³ *See id.*

²⁹⁴ *See* 18 PA. CONS. STAT. § 9125 (1982).

from using old and irrelevant convictions to deny jobs to applicants only based on official criminal information file requests and dismissed the case.²⁹⁵ According to the court, “an employer’s use of information regarding an individual’s criminal history that was volunteered by that individual while applying for a job is not prohibited by CHRIA.”²⁹⁶ The Third Circuit disagreed, rejecting this formalist interpretation and holding that “even though the company learned of the conviction from [the applicant], not from a state agency’s files, the law still applies.”²⁹⁷ If employers elicit self-disclosure by announcing that they will conduct background checks as part of hiring, they can circumvent the law’s restrictions on discrimination against applicants with records. This interpretation of the law would discourage transparency, which is so central to successful second chance hiring.²⁹⁸ The Third Circuit’s refusal to limit Pennsylvania’s Fair Chance law in this way ensures that important protections for job seekers with records remain in place.

In sum, strong enforcement of Fair Chance laws is a key element for their successful implementation. If employers face meaningful sanctions as a result of non-compliance, they will be less likely to ignore legal prohibitions against discrimination for remote or irrelevant criminal histories. With better implementation, Fair Chance laws are likely to yield more promising results for both applicants and organizations searching for talented hires.

CONCLUSION

The goal of Fair Chance laws is to improve employment prospects for people with criminal records. These policies aim to minimize discrimination in hiring by encouraging employers to choose job applicants on the basis of skill and merit and not based on unfounded assumptions about the influence of past offenses on future behavior. Fair Chance laws are necessary because a criminal record often presents a barrier to employment, even long after a person has served their sentence. And since nearly thirty percent of the adult population in the United States has some criminal record, the difficulty in finding a job after involvement with the criminal justice system affects a very significant number of people. It is well established that high unemployment rates among those with criminal records increase the likelihood of re-offense, thus making neighborhoods less safe and raising taxpayer costs for prisons and unemployment support. At the same time, government organizations, non-profit and for-profit businesses often struggle to find qualified employees. Better access to employment for people with records provides a source of dignity and economic stability for them, while expanding the talent pool for hiring.

²⁹⁵ *Phath*, 2024 WL 5204175, at *3.

²⁹⁶ *Id.*

²⁹⁷ *Phath*, 165 F. 4th at 782.

²⁹⁸ See generally, Philip Goodman, *Work Your Story: Selective Voluntary Disclosure, Stigma Management, and Narratives of Seeking Employment After Prison*, 45 L. & Soc. INQUIRY 1113 (2020) (discussing the dangers of voluntary self-disclosure of a criminal history).

Some researchers have argued that Ban the Box and Fair Chance laws are ineffective—or worse, harmful—because if employers don't want to hire workers with records, they will find a way to reject them even if the law delays background checks or requires a reasonable connection between the job and the conviction to justify rejecting an ex-offender. These advocates argue that our resources are better spent on other approaches such as crime prevention, job training in prisons, and educating employers about the benefits of hiring ex-offenders. As one critic of the BTB strategy puts it, “policy-makers cannot simply wish away employers’ concerns about hiring those with criminal records.”²⁹⁹ While recognizing the validity of these concerns and the importance of collecting effectiveness data, we believe that these are not either/or choices and that Fair Chance laws can in fact succeed in promoting their goals. These laws should not be evaluated in isolation but rather utilized as one important tool for combating employment discrimination against people with records. Limiting employers’ use of background checks in hiring can work well together with other strategies including training for employees, education for business leaders and HR professionals, greater focus on preventing criminal behavior before it occurs, and developing and improving diversion programs for low-level first-time offenders. In addition, automatic expungement or Clean Slate laws have emerged recently as a promising counterpart to BTB and Fair Chance hiring laws.

Discriminatory behaviors towards job applicants with records are often based on unproven or false assumptions about their risk of re-offense or their ability to perform well at work.³⁰⁰ Fair Chance laws are crucial for bypassing prejudicial attitudes and requiring employers to act in accordance with fair and reasonable hiring procedures instead. These laws also play a role in transforming perceptions of justice-involved individuals by focusing on their potential to lead productive lives and contribute positively to their communities. Just as Fair Chance laws may have limited impact when standing alone, this is likely also true about Clean Slate laws. Criminal record data might continue to exist “well beyond government-held databases.”³⁰¹ Policies that prevent employers from relying on such “incomplete and ‘dirty data’” can help promote equitable hiring while reformers work to improve data privacy laws as well.³⁰² Federal, state, and local governments should implement or refine Fair Chance laws by creating stronger economic incentives for second chance hiring, investing in educational programs and community collaborations for employers to support better utilization, and pursuing more robust enforcement strategies to reduce non-compliance. In doing so, they can strengthen communities and businesses alike, while promoting dignity and rehabilitation for individuals.

²⁹⁹ Doleac & Hansen, *supra* note 130, at 362.

³⁰⁰ See, e.g., KLEINMAN & KAJEEPETA, *supra* note 5, at 13 (“Because evidence clearly demonstrates that recidivism risk declines rapidly as time since a conviction passes, background checks should at least be time-limited to a narrowly defined look-back period”); *Research Supports Fair Chance Policies*, *supra* note 1, at 5 (noting that “workers with records stay in their jobs longer and earn promotions faster than other workers.”).

³⁰¹ Lageson & Corda, *supra* note 167, at 46.

³⁰² *Id.* at 43.