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## Keeping Fair Chance Laws Fair: Implications for Employers and Employees Given the Expansion and Variety of Fair Chance Laws in the United States

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## Keeping Fair Chance Laws Fair: Implications for Employers and Employees Given the Expansion and Variety of Fair Chance Laws in the United States

### Cover Page Footnote

J.D. May 2023, The Catholic University of America, Columbus School of Law; M.S.W., May 2023, The Catholic University of America, National Catholic School of Social Service. I would like to thank Professor Cara H. Drinan for her encouragement and inordinately helpful guidance throughout the research and writing process for this piece. I also want to thank my friends and family for their unwavering support.

# KEEPING FAIR CHANCE LAWS FAIR: IMPLICATIONS FOR EMPLOYERS AND EMPLOYEES GIVEN THE EXPANSION AND VARIETY OF FAIR CHANCE LAWS IN THE UNITED STATES

*Caitlin Taub Gaines<sup>+</sup>*

*Jurisdictions around the United States have adopted, and are considering adopting, fair chance laws, also known as “ban the box” laws, to improve access to employment opportunities for those with criminal histories. For years, individuals with criminal records – approximately one in four U.S. adults – have been disadvantaged when employers heavily rely upon criminal background checks during the hiring process. Now, with the proliferation of fair chance laws which require employers to avoid considering criminal history in hiring decisions, public and private employers are faced with implementation concerns as they adapt their hiring practices to ensure compliance with the evolving legal framework. Compliance with fair chance laws not only reduces the chance of costly litigation for employers, but also will have implications for crime recidivism rates by giving recently incarcerated and released individuals expanded access to employment opportunities and reducing their likelihood of reoffending. Still, employers must continue to grapple with deeply rooted biases so as to avoid using other demographic data as substitutes for criminal history data and policymakers must continue to monitor and evaluate the specific compliance challenges employers face in order to ensure that these laws live up to their name of being “fair.”*

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<sup>+</sup> J.D. May 2023, The Catholic University of America, Columbus School of Law; M.S.W., May 2023, The Catholic University of America, National Catholic School of Social Service. I would like to thank Professor Cara H. Drinan for her encouragement and inordinately helpful guidance throughout the research and writing process for this piece. I also want to thank my friends and family for their unwavering support.

I. THE WIDENING LANDSCAPE OF FAIR CHANCE LAWS.....	540
A. <i>City and State Laws Pertaining to Public Employers</i> .....	540
B. <i>City and State Laws Pertaining to Private Employers</i> .....	541
C. <i>City and State Laws Limited by Employer Size</i> .....	542
D. <i>Federal Fair Chance Laws</i> .....	542
II. ZOOMING IN: LOCAL FAIR CHANCE PATCHWORKS .....	544
A. <i>Hawaii</i> .....	544
B. <i>New York City</i> .....	544
C. <i>Louisiana</i> .....	546
III. TRENDING LITIGATION ARISING FROM THE GROWING FAIR CHANCE LANDSCAPE .....	547
A. <i>Class Actions: Signposts for Compliance with Fair Chance Laws</i> ....	547
B. <i>Preemption Cases: Conflicts Between Fair Chance Laws</i> .....	548
C. <i>The EEOC's Varying Ability to Prevent Employment Discrimination</i> .....	549
IV. IMPLICATIONS OF FAIR CHANCE EXPANSION ON EMPLOYERS AND EMPLOYEES .....	550
A. <i>Implementation Concerns for Employers</i> .....	551
1. <i>Problems with Complying</i> .....	551
2. <i>Problems with Not Complying</i> .....	551
B. <i>Consequences for Employees</i> .....	552
CONCLUSION.....	553

When fifty-year-old Thomas Urioste was released from federal prison in March 2021 after serving almost ten years, he received a second chance from U.S. Rubber Recycling.<sup>1</sup> Unlike many other American businesses, U.S. Rubber has incorporated hiring formerly incarcerated men and women into its regular employment practices.<sup>2</sup> Today, thanks to the national proliferation of specific laws aimed at preventing employers from discriminating against the approximately twenty-million people with criminal histories, more people like Urioste are getting a second chance too.<sup>3</sup>

These referenced laws, typically called “ban the box” or “fair chance laws,”<sup>4</sup> are laws that various jurisdictions around the United States have adopted to improve access to employment for people with criminal histories, including those with convictions, arrests, or both.<sup>5</sup> The laws typically restrict whether, when, and how employers may consider a job applicant’s criminal history.<sup>6</sup> Currently, 37 states and over 150 cities and counties around the country have passed at least one of these types of laws and applied them to public employers.<sup>7</sup> Further, the federal government recently joined these jurisdictions by passing a law generally banning federal agencies and contractors from asking about a candidate’s criminal background until they have extended an offer to that individual.<sup>8</sup> So far, fifteen states and twenty-two cities have passed fair chance laws that apply to private employers.<sup>9</sup> The scope of fair chance laws varies by

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1. Don Lee, *Once shunned, people convicted of felonies find more employers open to hiring them*, L.A. TIMES (Oct. 5, 2021), <https://www.latimes.com/politics/story/2021-10-05/labor-ex-felons>.

2. *Id.*

3. *Id.*

4. This article will use the term “fair chance laws” to encompass ban the box and other laws aimed at providing opportunities to workers with criminal backgrounds.

5. Brian J. Clark, *Bolder, Broader “Ban the Box” Laws: How to Navigate Ever-Changing Criminal History Requirement*, VENABLE, LLP (Aug. 16, 2021), <https://www.venable.com/insights/publications/2021/08/bolder-broader-ban-the-box-laws-how-to-navigate>; Beth Avery & Han Lu, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT’L EMP. L. PROJECT 2 (Oct. 2021), <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-Oct-2021.pdf>. The origin of the phrase “ban the box” arose out of a box that applicants are often required to check if they have a criminal history. 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).

6. Clark, *supra* note 5.

7. Avery & Lu, *supra* note 5. As of December 2022, Gainesville, Florida is the most recent city to pass fair chance legislation in the U.S., and it became the first city in Florida to pass a fair chance law applicable to private employers. Katie Hyson, *Gainesville Becomes First City in Florida to Apply ‘Fair Chance Hiring’ to Private Employers*, WUFT (Dec. 16, 2022), <https://www.wuft.org/news/2022/12/16/gainesville-becomes-first-city-in-florida-to-apply-fair-chance-hiring-to-private-employers/>.

8. Michael Hartman, *Ban the Box*, NAT’L CONF. OF STATE LEGIS. 1–2 (June 2021), <https://documents.ncsl.org/wwwncsl/Criminal-Justice/Ban-the-Box-Policy-Snapshot.pdf>.

9. Avery & Lu, *supra* note 5, at 3.

jurisdiction, ranging from some laws stipulating that job applications should not inquire about conviction histories whatsoever to other laws that prevent employers from exploring an individual's conviction history until after they have been extended a conditional offer.<sup>10</sup>

Although criminal background checks promote workplace safety in appropriate situations, they generally inhibit individuals who have criminal records from finding work.<sup>11</sup> Blanket exclusions that disregard job applicants with criminal records ultimately disadvantage approximately one in four U.S. adults lacking clean criminal histories.<sup>12</sup> Furthermore, by relying too heavily on criminal background checks in the hiring process, employers are possibly "compromising public safety" since crime recidivism rates tend to drop when individuals recently released from incarceration are given access to employment opportunities.<sup>13</sup>

Companies big and small that have generally excluded those with criminal records from their applicant pool are now faced with implementation challenges and concerns because of fair chance and ban the box legislation.<sup>14</sup> These companies must now adapt their hiring practices to ensure compliance with a patchwork of evolving county, city, state, and federal laws aimed at removing barriers to entry into the workforce for individuals with criminal records.<sup>15</sup>

Uber, for instance, has confronted both of these challenges in New York City, as shown in *Golightly v. Uber Technologies, Inc.*, a class action brought by 1,300 Uber drivers.<sup>16</sup> The drivers claimed that the company was ignoring the November 2019 expansion of New York City's Fair Chance Act, which now protects contract workers with past criminal histories from being discriminated against in employment decisions.<sup>17</sup> As the plaintiffs argued, Uber's failure to comply with the City's law disproportionately impacted Black and Latinx drivers, as those groups are overrepresented in the American correctional

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10. *See id.*

11. Michelle N. Rodriguez & Maurice Emsellem, *65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment*, NAT'L EMP'T L. PROJECT 1 (Mar. 2011), [http://www.nelp.org/wp-content/uploads/2015/03/65\\_Million\\_Need\\_Not\\_Apply.pdf](http://www.nelp.org/wp-content/uploads/2015/03/65_Million_Need_Not_Apply.pdf).

12. *See id.* at 1, 4.

13. *Id.* at 1, 3; *see* Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, 40 AM. J. CRIM. JUST. 336, 340, 348 (2015); *see also* Daniel Shoag & Stan Veuger, *No Woman No Crime: Ban the Box, Employment, and Upskilling* 4 (Harv. Kennedy Sch., Working Paper, Paper No. 16-015, 2016), <https://ssrn.com/abstract=2782599>.

14. *See* Roy Maurer, *'Ban the Box' Turns 20: What Employers Need to Know*, SHRM (Nov. 12, 2018), <https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/ban-the-box-turns-20-what-employers-need-to-know.aspx>.

15. *See* 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, 2828 (2015).

16. *See* *Golightly v. Uber Techs., Inc.*, No. 21-cv-3005 (LJL), 2021 U.S. Dist. LEXIS 151100, at \*1-2 (S.D.N.Y. Aug. 11, 2021).

17. *Id.* at \*2.

system.<sup>18</sup> As of January 2022, Uber had filed a Motion to Compel Individual Arbitration and the discovery phase was still ongoing. To avoid this kind of legal exposure, companies must know how to comply with the various requirements of ban the box and fair chance laws, recognize how these laws interact with each other, and understand the consequences of non-compliance or misapplication of the requirements so that the laws do not adversely impact those whom they are meant to help.<sup>19</sup>

Today, over four-fifths of the U.S. population lives somewhere that has some type of fair chance law.<sup>20</sup> In 1998, Hawaii became the first state to enact a ban the box or fair chance policy, “banning public and private employers from inquiring about an applicant’s criminal background until a conditional offer of employment ha[d] been made.”<sup>21</sup> After Hawaii, the next wave of fair chance legislation was widely attributed to the All of Us or None organization. The national civil and human rights organization, largely comprised of previously incarcerated people and their families, developed a 2004 campaign to “ban the box,” meaning to remove the box that many job applicants must check if they have criminal histories.<sup>22</sup> All of Us or None successfully lobbied the San Francisco Board of Supervisors to remove the box from its public sector job applications, and cities including Boston, Chicago, and Atlanta followed by also banning the box.<sup>23</sup>

The rise in the popularity and quantity of fair chance laws has notably coincided with employers’ increased usage of criminal background checks during hiring, which can be attributed in part to technological advances allowing for easier and more affordable options for conducting the checks.<sup>24</sup> Although claims under Title VII of the Civil Rights Act of 1964 can address the disparate impact that an employer’s emphasis on criminal background checks in hiring processes can have on minorities, the record suggests a low success rate for these types of challenges in court.<sup>25</sup> Typically, employers have succeeded in court because either the plaintiff was unable to present sufficient statistical evidence of disparate impact or the employer was able to show that its allegedly

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18. Rachel Stone, *Uber Background Checks Hurt Black, Latinx Drivers, Suit Says*, LAW360 (Apr. 8, 2021), <https://www.law360.com/articles/1373459/uber-background-checks-hurt-black-latinx-drivers-suit-says>; see *Golightly*, 2021 U.S. Dist. LEXIS 151100, at \*2.

19. Angela Hanks, *Ban the Box and Beyond: Ensuring Individuals with a Criminal Record Have Access to the Labor Market*, CTR. FOR AM. PROGRESS (July 27, 2017), <https://www.americanprogress.org/issues/economy/reports/2017/07/27/436756/ban-box-beyond>.

20. Avery & Lu, *supra* note 5, at 3.

21. Christina Stacy & Mychal Cohen, *Ban the Box and Racial Discrimination: A Review of the Evidence and Policy Recommendations*, URBAN INST. 8 (Feb. 2017), [https://www.urban.org/sites/default/files/publication/88366/ban\\_the\\_box\\_and\\_racial\\_discrimination\\_4.pdf](https://www.urban.org/sites/default/files/publication/88366/ban_the_box_and_racial_discrimination_4.pdf).

22. *Id.*

23. Smith, *supra* note 5, at 212–13.

24. *Id.* at 198.

25. *Id.* at 202–03.

problematic hiring practice “is job related for the position in question and consistent with business necessity.”<sup>26</sup> In response, civil rights and criminal justice advocates have promoted legislation, like fair chance laws, to remove barriers to employment for individuals with criminal records.<sup>27</sup>

This Note is organized into five parts. Part I discusses the general trend of ban the box and fair chance law passage over the past twenty-five years, including how these laws have evolved to include both public and private employers. Part II analyzes Hawaii, Louisiana, and New York City’s local fair chance law patchworks as case studies. Part III explores litigation that has occurred in the wake of fair chance legislation, specifically class action lawsuits, arising pre-emption issues, and U.S. Equal Employment Opportunity Commission (EEOC)-led efforts. Part IV describes the various consequences and implementation concerns of applying fair chance laws to employers, including the possibility that fair chance laws are well intentioned, but nonetheless cause unintended consequences for prospective employees. By way of conclusion, Part V notes that fair chance laws are a promising path to a more inclusive work force, but when drafting or revising fair chance laws, policymakers should explicitly state how employers can ensure compliance with the laws to prevent confusion or the intentional circumvention of requirements.

## I. THE WIDENING LANDSCAPE OF FAIR CHANCE LAWS

Fair chance laws have expanded across the U.S., not only geographically but also in terms of scope, the types of employers and convictions, and the stages of the hiring process to which the laws may apply.<sup>28</sup>

### A. City and State Laws Pertaining to Public Employers

Most fair chance laws pertain to government employers.<sup>29</sup> To date, thirty-seven states have enacted laws or policies related to public sector employment.<sup>30</sup>

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26. *Id.* at 208–09 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

27. *Id.* at 211. Although it is beyond the scope of this Note, “Clean Slate” laws appear to be the next frontier in legislation aimed at creating more employment opportunities for people with criminal records. Clean Slate laws go even further than fair chance laws by sealing certain criminal records so that employers would not even be able to see a prospective employee’s criminal history several years after their sentence is complete. See Chris Marr & Robert Iafolla, *Punching In: ‘Clean Slate’ Laws Spreading Among States, Cities*, BLOOMBERG LAW (Dec. 5, 2022), <https://news.bloomberglaw.com/daily-labor-report/punching-in-clean-slate-laws-spreading-among-states-cities-28>.

28. Hanks, *supra* note 19; Smith, *supra* note 5, at 213.

29. See Margaret C. Love, *Restoration of Rights Project*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 27, 2022), [https://ccresourcecenter.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/#IV\\_Criminal\\_record\\_in\\_employment\\_licensing](https://ccresourcecenter.org/state-restoration-profiles/federalrestoration-of-rights-pardon-expungement-sealing/#IV_Criminal_record_in_employment_licensing).

30. Avery & Lu, *supra* note 5, at 2. These states include: Arizona (2017), California (2017, 2013, 2010), Colorado (2019, 2012), Connecticut (2016, 2010), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014, 2013), Indiana (2017), Kansas (2018), Kentucky (2017), Louisiana (2016), Maine (2021, 2019), Maryland (2020, 2013), Massachusetts (2010), Michigan (2018),



These public sector employers typically encompass state and local government agencies.<sup>31</sup> The format and content of fair chance laws applying to public sector employers varies. Many tend to limit the information that can be considered in an applicant's criminal record—for example, excluding arrests that did not lead to a conviction or criminal charges which have been expunged.<sup>32</sup> Others limit consideration of an applicant's criminal record to those past violations that have a relationship with the nature of the job in question.<sup>33</sup>

Some states are expanding the application of fair chance laws beyond the public sector. Other states, however, such as Michigan and Tennessee, have enacted public fair chance laws but have passed separate state laws stipulating that cities and counties may *not* further expand fair chance laws, including local private employers.<sup>34</sup>

### B. City and State Laws Pertaining to Private Employers

To date, fifteen states and twenty-two cities and counties have adopted laws and policies applying to private sector employment.<sup>35</sup> In addition, thirty-seven cities and counties, as well as the District of Columbia, have extended fair chance laws and policies to government contractors, and a number of others are considering doing so as well.<sup>36</sup> Beyond the laws, some private companies, including Starbucks and Google, have voluntarily adopted internal fair chance

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Minnesota (2013, 2009), Missouri (2016), Nebraska (2014), Nevada (2017), New Hampshire (2020), New Jersey (2014), New Mexico (2019, 2010), New York (2015), North Carolina (2020), North Dakota (2019), Ohio (2015), Oklahoma (2016), Oregon (2015), Pennsylvania (2017), Rhode Island (2013), Tennessee (2016), Utah (2017), Vermont (2016, 2015), Virginia (2020, 2015), Washington (2018), and Wisconsin (2016). *Id.*

31. See Hanks, *supra* note 19.

32. Avery & Lu, *supra* note 5, at 27–29.

33. *Id.* at 29.

34. See TENN. CODE ANN. §8-50-112(b), (f)(1); see also MICH. COMP. LAWS SERV. § 123.1384(4).

35. Avery & Lu, *supra* note 5, at 3. These jurisdictions include:

California, Colorado, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington . . . Austin, Baltimore, Buffalo, Chicago, Columbia (MO), DeSoto (TX), the District of Columbia, Kansas City (MO), Los Angeles, Montgomery County (MD), New York City, Philadelphia, Portland (OR), Prince George's County (MD), Rochester, San Francisco, Seattle, Spokane (WA), St. Louis, Waterloo (IA), Suffolk County (NY), and Westchester County (NY).

*Id.*

36. *Id.* Those jurisdictions considering extending fair chance laws to government contractors include North Carolina and the city of Tampa, Florida; the city of Jacksonville, Florida requires contractors to report regularly to the City with tallies of job opportunities for applicants with criminal records, and the city of Tamarac, Florida permits the City to consider fair chance hiring as a part of its criteria for hiring a contractor. *Id.* at 23, 45, 60, 109–10; see also TAMARAC, FLA. ORDINANCES, § 2-251(d)(2).

hiring policies for all applicants, regardless of place of employment.<sup>37</sup> Fair chance hiring policies within private companies can take different forms. Walmart, Home Depot, and Target, for instance, no longer request criminal record information at the beginning of their application process.<sup>38</sup> Slack, a technology communications company, established Next Chapter, a technology training program for formerly incarcerated individuals.<sup>39</sup> Many of its graduates now work full-time at Slack.<sup>40</sup> Since Next Chapter began, ten more companies have joined Slack, providing more technology sector employment opportunities for this population.<sup>41</sup>

### C. City and State Laws Limited by Employer Size

Several fair chance laws are limited only to employers of certain sizes.<sup>42</sup> For instance, the California Fair Chance Act only applies to employers “with five or more employees.”<sup>43</sup> Similarly, New Mexico’s private sector fair chance law specifically defines “employer” to include entities “employing four or more persons.”<sup>44</sup> In contrast, Waterloo, Iowa enacted an ordinance applying to private and public employers “regardless of size.”<sup>45</sup>

### D. Federal Fair Chance Laws

There are fewer federal laws and policies regarding the use of criminal history information in the hiring process as compared to state and city trends.<sup>46</sup> However, increased federal action in this space has inspired many jurisdictions to adopt fair chance policies and laws, or to at least model them in certain ways.<sup>47</sup> For example, the EEOC issued guidance in 2012 enumerating best practices for

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37. Avery & Lu, *supra* note 5, at 30. President Obama launched a “Fair Chance Business Pledge” in April 2016 to mobilize large U.S. private employers to limit criminal background screenings. Press Release, White House, *White House Launches the Fair Chance Business Pledge* (Apr. 11, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/04/11/fact-sheet-white-house-launches-fair-chance-business-pledge>.

38. Binyamin Appelbaum, *Out of Trouble, but Criminal Records Keep Men Out of Work*, N.Y. TIMES (Mar. 1, 2015), <https://www.nytimes.com/2015/03/01/business/out-of-trouble-but-criminal-records-keep-men-out-of-work.html>.

39. Lucretia Murphy, *Slack’s Fair Chance Hiring Journey: How Starting Small Can Make a Big Impact*, JFF (June 8, 2021), <https://www.jff.org/what-we-do/impact-stories/reentry-careers/slacks-fair-chance-hiring-journey-how-starting-small-can-make-a-big-impact/>.

40. *Id.*

41. *Id.*

42. *See, e.g.*, Avery & Lu, *supra* note 5, at 9.

43. CAL. GOV’T. CODE § 12952(a).

44. Avery & Lu, *supra* note 5, at 21.

45. *Id.* at 108; WATERLOO, IOWA, ORDINANCE No. 5522 (2019).

46. *See* Stephanie Leacock, Comment, *To Actually Give a Fair Chance: “Ban the Box” Laws and the “Rational Relationship” Standard*, 7 AM. U. BUS. L. REV. 383, 388 (2018).

47. Avery & Lu, *supra* note 5, at 3.

using criminal background checks in the hiring process.<sup>48</sup> Within this guidance, the EEOC announced that Title VII was likely violated by employers using applicants' arrest histories to inform hiring decisions, or by employers implementing blanket restrictions against all applicants with either misdemeanor or felony records.<sup>49</sup> The guidance further encouraged employers to conduct an "individualized assessment" for each applicant and to wait until after the final stages of the hiring process to inquire into a candidate's criminal history.<sup>50</sup>

In November 2015, then-President Barack Obama directed federal agencies to postpone exploring prospective employees' criminal records until later stages in the hiring process as part of a broader series of administrative actions focused on expanding opportunities for individuals with criminal records.<sup>51</sup> And, in December 2019, the National Defense Authorization Act added the "Fair Chance to Compete for Jobs Act of 2019," effective December 2021, mandating that most federal agencies and contractors could not inquire into a prospective employee's criminal history until after they have provided a conditional offer.<sup>52</sup> As of December 2022, the Biden Administration had proposed and solicited public comments on regulations further removing barriers for those with criminal histories seeking federal employment.<sup>53</sup> The proposed regulations expand the type of positions covered by the existing Fair Chance to Compete for

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48. See *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2012), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>. The EEOC noted the overrepresentation of Black and Hispanic men in arrest and incarceration rates and the employers' liability of violating Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, religion, sex, or national origin in employment decisions when making employment decisions based on criminal record. *Id.* In the same Guidance, the EEOC provided best practices for employers to avoid Title VII suits, including tailoring screening policies to "essential job requirements" and limiting questions about applicants' criminal records to narrowly tailored concerns "consistent with business necessity." *Id.*

49. *Id.*

50. Hanks, *supra* note 19; see also U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 48.

51. Avery & Lu, *supra* note 5, at 2; Hanks, *supra* note 19. This action by President Obama was in the form of a memorandum directed at the Office of Personnel Management (OPM), following which the OPM formalized a rule banning the box when hiring federal employees, effective December 2016. See Presidential Memorandum on Promoting Rehab. And Reintegration of Formerly Incarcerated Individuals, 81 Fed. Reg. 26993 (Apr. 29, 2016); see also Recruitment, Selection, and Placement (General) and Suitability, 81 Fed. Reg. 86555 (Dec. 1, 2016) (to be codified at 5 C.F.R. pts. 330, 731).

52. Avery & Lu, *supra* note 5, at 2.

53. Press Release, White House, FACT SHEET: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons (Apr. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-harris-administration-expands-second-chance-opportunities-for-formerly-incarcerated-persons/>.

Jobs Act and also enhances adverse action procedures.<sup>54</sup> While the Act previously only applied to positions in the competitive service, now the Act would also apply to positions in the excepted service and Senior Executive Service.<sup>55</sup>

Still, there has been no uniform national policy for both public and private employers regarding how or whether a prospective employee's criminal history can factor into the hiring process. Specific case studies best illustrate how this could create a complicated compliance landscape for many employers to navigate.

## II. ZOOMING IN: LOCAL FAIR CHANCE PATCHWORKS

The development of fair chance laws within Hawaii, New York City, and Louisiana demonstrates the diverse compliance challenges that employers may encounter depending on the jurisdictions in which they operate.

### A. Hawaii

As the pioneer in state fair chance laws, in 1998, Hawaii prohibited its public and private employers from inquiring about an applicant's conviction history until after they had extended an offer to them.<sup>56</sup> The law further permitted these employers to withdraw the offer only if there was a "rational relationship" between the position in question and an applicant's felony convictions from the last seven years and misdemeanor convictions from the past five years.<sup>57</sup> This early law remains one of the most stringent in the country, though it has remained consistent over the years, over time allowing employers operating in Hawaii to develop an understanding of how to comply.<sup>58</sup>

### B. New York City

Employers operating in New York City must comply both with the fair chance hiring laws enacted by the state of New York and those of New York City. In

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54. Press Release, White House, FACT SHEET: Biden-Harris Administration Expands Second Chance Opportunities for Formerly Incarcerated Persons (Apr. 26, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/26/fact-sheet-biden-harris-administration-expands-second-chance-opportunities-for-formerly-incarcerated-persons/>.

55. Fair Chance to Compete for Jobs, 87 Fed. Reg. 24885 (proposed Apr. 27, 2022) (to be codified at 5 C.F.R. pts. 302, 317, 319, 330, 731, 754, 920).

56. HAW. REV. STAT. § 378-2.5.

57. *Id.* at (a)–(c). The courts in Hawaii have interpreted the meaning of "rational relationship" in two cases, *Wright v. Home Depot U.S.A.*, 142 P.3d 265, 276 (Haw. 2006) (holding that whether a rational relationship exists between plaintiff's drug prior drug conviction and employment at Home Depot should be determined by the trier of fact and not as a matter of law) and *Shimose v. Hawai'i Health Sys. Corp.*, 345 P.3d 145, 153 (Haw. 2015) (holding that plaintiff's drug conviction did not bear a rational relationship to their access to non-controlled substances or as a radiology technician).

58. Dallan F. Flake, *Do Ban-the-Box Laws Really Work?*, 104 IOWA L. REV. 1079, 1087–88 (2019).

1976, New York enacted a law recognizing: “The public policy of [New York] . . . [is] to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.”<sup>59</sup> In practice, this law requires public or private employers to “carefully” consider eight factors when evaluating prospective employees’ criminal records and prohibits them from “excessively weighing” any of the factors against another.<sup>60</sup> Further, New York employers must satisfy the burden of proving one of two exceptions to bypass the eight-factor 23-A analysis:

[T]here is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or . . . the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.<sup>61</sup>

More recently, the New York City Council enacted the Fair Chance Act, effective August 2017, based on the following premise:

“[T]here is no greater danger to the health, morals, safety and welfare of the city . . . than the existence of groups prejudiced against one another and antagonistic to each other because of their actual or perceived differences, including those based on . . . conviction or arrest record.”<sup>62</sup>

The law makes denying employment or “tak[ing] adverse action against any employee” because they were “convicted of one or more criminal offenses,” or because they lack “good moral character” due to their conviction, an “unlawful discriminatory practice” for public *and* private employers prior to them extending a conditional employment offer.<sup>63</sup> The employer can only legally take

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59. N.Y. CORRECT. LAW § 753(1)(a); *see* Class Action Complaint at 5, *Soler v. Fresh Direct, LLC*, No. 1:20-cv-03431 (S.D.N.Y. May 1, 2020) (referencing public policy as a rationale for the law).

60. Class Action Complaint at 5, *Soler v. Fresh Direct, Inc.*, No. 1:20-cv-03431 (S.D.N.Y. May 1, 2020). *See* N.Y. CORRECT. LAW § 752. The eight factors for employers to consider are:

(a) The public policy of this state . . . to encourage the licensure and employment of persons previously convicted of one or more criminal offenses. (b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person. (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities. (d) The time which has elapsed since the occurrence of the criminal offense or offenses. (e) The age of the person at the time of occurrence of the criminal offense or offenses. (f) The seriousness of the offense or offenses. (g) Any information . . . in regard to . . . rehabilitation and good conduct. (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

N.Y. CORRECT. LAW § 753.

61. N.Y. CORRECT. LAW § 752.

62. N.Y.C. ADMIN. CODE § 8-101.

63. N.Y.C. ADMIN. CODE § 8-107(10).

adverse action if there is a “direct relationship between the criminal conviction and the employment” duties or “the continuation of the employment would involve an unreasonable risk to property” or the physical safety of others.<sup>64</sup> The Fair Chance Act was amended in December 2020 to include additional types of criminal records that employers cannot consider in the hiring process.<sup>65</sup> Specifically, an “unlawful discriminatory practice” now includes rescinding offers or taking adverse action against current employees based on *pending* arrests, convictions, or criminal accusations that occurred *prior* to employment.<sup>66</sup>

### C. Louisiana

Louisiana is the first Deep South state to adopt a fair chance law through its legislature.<sup>67</sup> Since 2016, Louisiana has continuously expanded the coverage of its fair chance laws, from unclassified state employment to classified state employment.<sup>68</sup> Notably, in June 2021, it extended fair chance laws to apply to private employment through Act 406.<sup>69</sup> The passage of Act 406 occurred following extensive campaigning by “Step Up Louisiana,” an organization mobilizing politicians, community activists, writers, and formerly incarcerated people committed to enacting more fair chance legislation in the state.<sup>70</sup> The law only applies to private employers with twenty or more employees.<sup>71</sup> Specifically, those employers may not take into account arrests or charges not resulting in convictions and must make “individual assessments” as to whether there is a “direct and adverse relationship” between the applicant’s criminal

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64. *Id.* at (b). “Unreasonable risk” is not defined in the statute, but courts suggest it “depends upon a subjective analysis of a variety of considerations relating to the nature of the license or employment sought and the prior misconduct.” *Matter of Acosta v. N.Y.C. Dep’t of Educ.*, 946 N.E.2d 731, 733 (N.Y. 2011) (quoting *Matter of Bonacorsa v. Van Lindt*, 523 N.E.2d 806, 809 (N.Y. 1988)).

65. Avery & Lu, *supra* note 5, at 51.

66. Robert Holzman, et al., *Amendments to the NYC Fair Chance Act and New Legal Enforcement Guidance Require City Employers to Substantially Change Their Background Check Protocols*, JD SUPRA (Aug. 6, 2021), <https://www.jdsupra.com/legalnews/amendments-to-the-nyc-fair-chance-act-6017543/>; see N.Y.C. ADMIN. CODE § 8-107(10).

67. Avery & Lu, *supra* note 5, at 15.

68. *Id.*; see LA. STAT. ANN. § 23:291.2.

69. Avery & Lu, *supra* note 5, at 15.

70. See Ryan Whirty, *Step Up Louisiana helps formerly incarcerated find second chance*, LA. WKLY. (June 23, 2020), <http://www.louisianaweekly.com/step-up-louisiana-helps-formerly-incarcerated-find-second-chance/>.

71. Pamela Devata & Jennifer L. Mora, *Louisiana Employers Now Subject to Fair Chance Law*, SEYFARTH SHAW LLP (Aug. 2, 2021), <https://www.seyfarth.com/news-insights/louisianaemployers-now-subject-to-fair-chance-law.html>.

record and the duties and responsibilities of the job in question.<sup>72</sup>

The rise in fair chance laws for applicants and employees with criminal records will allow this population to reenter the workforce and better integrate into society. Yet, with such frequent developments in this space, employers and employees must remain apprised of their hiring and firing rights. Recent trends in litigation related to fair chance laws demonstrate the consequences if employers or employees fail to do so.

### III. TRENDING LITIGATION ARISING FROM THE GROWING FAIR CHANCE LANDSCAPE

It has been historically difficult to track fair chance law compliance due to the inadequate or inconsistent enforcement and complaint processes.<sup>73</sup> However, lower volumes of complaints do not necessarily mean that fair chance laws are being enforced uniformly or properly.<sup>74</sup> The emergence of recent types of lawsuits, specifically class action lawsuits, lawsuits involving preemption, and lawsuits involving the EEOC, provide helpful insight into whether and how employers may be violating fair chance laws.

#### A. Class Actions: Signposts for Compliance with Fair Chance Laws

In recent years, an increasing number of employment discrimination class action complaints have been filed against companies, including for violating applicable local fair chance laws.<sup>75</sup> For instance, in May 2020, a class of individuals sued Fresh Direct, an online grocery store, claiming that the company had violated their rights under New York City and New York State's human rights laws by weighing certain factors related to the individuals' criminal backgrounds, including the age of the applicant during the offense, the time elapsed since the offense, and good conduct since the offense, less than the nature of the offense.<sup>76</sup> Similarly, in March 2021, a class of individuals sued FedEx for "willful[ly] and/or negligent[ly] violat[ing] . . . the New York City

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72. *Id.*; see Pamela Devata & Jennifer L. Mora, *Louisiana Employers Now Subject to Fair Chance Law*, SEYFARTH SHAW LLP (Aug. 2, 2021), <https://www.seyfarth.com/news-insights/louisiana-employers-now-subject-to-fair-chance-law.html>.

73. See Margaret Barthel, *Employers Are Still Avoiding Former Inmates*, THE ATLANTIC (Nov. 5, 2019), <https://www.theatlantic.com/politics/archive/2019/11/are-states-complying-ban-box-laws/601240/>.

74. See Audrey McGinchy, *Austin Law Requires Job Seekers With Criminal Pasts Get A Fair Shot. But It's Not Being Enforced*, AUSTIN MONITOR (Mar. 8, 2018), <https://www.austinmonitor.com/stories/2018/03/job-seekers-criminal-pasts-must-get-fair-shot-austin-law-isnt-enforced/>.

75. Leah Shepherd, *Class-Action Lawsuits Against Employers Grow*, SHRM (Jan. 27, 2023), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/class-action-lawsuits-settlements.aspx>.

76. Complaint at 2–3, 5, 8–9, *Soler v. Fresh Direct, Inc.*, No. 1:20-cv-03431 (S.D.N.Y. May 20, 2021); see N.Y. EXEC. LAW §290(1), (3); N.Y.C. ADMIN. CODE § 8-101; N.Y. CORRECT. LAW § 753.

Human Rights Law (“NYCHRL”)” when the company did background checks on applicants prior to extending them conditional offers and “averr[ing] that the content of the [background] report would significantly influence its decision of whether or not to hire Plaintiff[s].”<sup>77</sup>

Class action lawsuits are often viewed by advocates as a way of “secur[ing] systemic change”; they are a common litigation strategy in Title VII employment discrimination cases and Fair Credit Reporting Act (FCRA) cases.<sup>78</sup> The Consumer Financial Protection Bureau (CFPB), the agency that enforces the FCRA, recommended a limit on class action settlement monetary awards in January 2021 to mitigate the influx of large lawsuit settlements that arose from FCRA violation cases in the preceding years.<sup>79</sup> The success of class action lawsuits regarding compliance with other employment regulations has served as “legal compliance signposts” for employers.<sup>80</sup> Therefore, the volume of class action litigation alleging employer violations of fair chance laws in New York City alone suggests that employer non-compliance with these laws may be common.<sup>81</sup>

### B. Preemption Cases: Conflicts Between Fair Chance Laws

A recent Iowa Supreme Court case, *Iowa Association of Business & Industry v. City of Waterloo*, illustrated the potential implications of a complicated landscape of overlapping and sometimes contrasting laws regarding employers’ use of their applicants’ criminal records in the hiring process.<sup>82</sup> In 2019, the Iowa Association of Business and Industry (ABI) challenged a Waterloo, Iowa

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77. Class Action Complaint at 1–2, 7, *Franklin v. Fedex Ground, Inc.*, No. 1:21-cv-02204 (S.D.N.Y. Mar. 12, 2021); see N.Y.C. ADMIN. CODE § 8-101.

78. Brief for NAACP Legal Def. & Ed. Fund, Inc. et al. as Amici Curiae Supporting Appellee at 1, *Guerrero v. Cal. Dep’t of Corr. & Rehab.*, 701 F. App’x 613 (9th Cir. 2017); see Marjorie Soto Garcia & Michelle Strowhiro, *The 411 on Employment Background Checks in Stock and Asset Transactions*, MCDERMOTT WILL & EMERY (Aug. 19, 2022), <https://www.mwe.com/insights/the-411-on-employment-background-checks-in-stock-and-asset-transactions/>; see Elizabeth P. Weissert, Comment, *Get Out of Jail Free? Preventing Employment Discrimination Against People with Criminal Records Using Ban the Box Laws*, 164 U. PA. L. REV. 1529, 1539 (2016).

79. Thomas Ahearn, *Judge Approves Settlement of Nearby \$175,000 in FCRA Class Action Lawsuit*, EMP. SCREENING RES. (Mar. 19, 2021), <https://www.esrcheck.com/wordpress/2021/03/19/judge-approves-175000-settlement-fcra-lawsuit>.

80. *Id.*

81. The Society for Human Resources Management recently held a “Top Ten Trends for Background Checks in 2022” session, listing class action lawsuits under FCRA and fair chance hiring compliance among the top ten issues for 2022. *The Top Ten Trends for Background Checks in 2022 – What Every Employer Needs to Know*, SHRM, <https://conferences.shrm.org/conference/2022-talent-conference/session/top-ten-trends-background-checks-2022-what-every-employer>.

82. See Caitlin J. Ellis & Kenneth M. Wentz III, *Iowa Supreme Court: City’s “Ban the Box” Ordinance Is Preempted by State Law, But Not Entirely*, NAT’L L. REV. (Aug. 10, 2021); *Iowa Ass’n of Bus. & Indus. v. City of Waterloo*, 961 N.W.2d 465, 468, 470 (Iowa 2021).



ordinance restricting when and how employers may inquire into an applicant's criminal history.<sup>83</sup> The ABI argued that the local ordinance violated a state law banning cities from adopting laws regarding terms or conditions for employment that exceeds or conflicts with federal or state law.<sup>84</sup> In August 2021, the Iowa Supreme Court held that the ordinance was preempted by state law to the extent that it purports to regulate whether an employer can consider an employee's criminal history at all, but it is not preempted where it only regulates *timing*, as that is not a term or condition of employment.<sup>85</sup> The court noted that the ordinance exceeded the requirements of Title VII and the Iowa Civil Rights Act, as well as Iowa Code § 364.3(12)(a).<sup>86</sup>

*C. The EEOC's Varying Ability to Prevent Employment Discrimination*

With increased awareness of the racial inequality within the U.S. criminal justice system, fair chance and ban the box laws have become more popular in recent decades as a means of addressing racial disparities.<sup>87</sup> As these laws continue to be enacted, the EEOC has become more vocal about the impact of certain hiring practices on minority groups.<sup>88</sup> Specifically, the EEOC has encouraged employers to consider the impact of their practices, regardless of whether fair chance laws exist in their jurisdiction.<sup>89</sup>

There have been two notable legal trends because of the EEOC's 2012 guidance. First, the EEOC has managed to negotiate settlements with companies. This occurred with, for example, Dollar General, whose use of applicants' criminal histories had a disparate impact on certain minority job applicants under Title VII.<sup>90</sup> In addition to these types of settlements orchestrated by the EEOC, more plaintiffs have brought class actions lawsuits alleging Title VII violations.<sup>91</sup> For instance, in July 2021, a class of Black and

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83. See Iowa Ass'n of Bus. & Indus., 961 N.W.2d at 470.

84. *Id.* at 470–71.

85. *Id.* at 476.

86. *Id.* at 474, 476.

87. Barthel, *supra* note 73.

88. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 48.

89. See *id.*

90. Rod M. Fliegel & Allen Lohse, *The EEOC Continues to Press Litigation Under Title VII Concerning Employer Criminal Records Checks*, LITTLER (Dec. 21, 2017), <https://www.littler.com/publication-press/publication/eeoc-continues-press-litigation-under-title-vii-concerning-employer>; see also EEOC v. Dolgencorp LLC, 249 F. Supp. 3d 890–91 (N.D. Ill. 2017).

91. Rod M. Fliegel & Garrick Chan, *The Dust Hasn't Settled Yet: Employers Must Continue to Be Thoughtful About Criminal Record Screening Policies*, LITTLER (July 6, 2021), <https://www.littler.com/publication-press/publication/dust-hasnt-settled-yet-employers-must-continue-be-thoughtful-about>; see also Rod M. Fliegel, *Criminal Record Screening Policies Continue to Raise Important Compliance Issues*, LITTLER ASAP (Apr. 6, 2018), <https://www.littler.com/publication-press/publication/criminal-record-screening-policies-continue-raise-important-compliance>; Tiffany R. Nichols, Note and Comment, *Where There's*

Latinx job applicants sued Walmart for discriminating against them in its background check policy by denying employment to those with prior criminal records, thereby disparately impacting groups statistically more likely to have criminal records.<sup>92</sup>

Second, since the EEOC's 2012 guidance, litigants have challenged the EEOC's ability to impose its guidance on employers around the country. The State of Texas, a state currently lacking fair chance laws, sued the EEOC in 2014, arguing that "the Guidance interfered with the State's authority and discretion to limit the hiring of felons into public sector jobs."<sup>93</sup> Ultimately, the case reached the Fifth Circuit, and the appellate court upheld an injunction preventing the EEOC from enforcing its 2012 Guidance against Texas.<sup>94</sup> Cases like these highlight the importance of clear fair chance laws that provide uncontested guidelines for employers to follow. Alternatively, such cases may suggest that the EEOC needs more authority to enforce its rules on states.<sup>95</sup> In particular, given the recent setback in the Fifth Circuit, the EEOC and plaintiffs may be reluctant to rely on the EEOC guidance to bring lawsuits, even if Title VII claims could otherwise be pursued.<sup>96</sup>

Given the number of recent class action lawsuits and related non-discrimination regulations, employers must be prepared to comply with fair chance laws or face legal challenges.

#### IV. IMPLICATIONS OF FAIR CHANCE EXPANSION ON EMPLOYERS AND EMPLOYEES

For many employers, the landscape of hiring laws is changing monthly based on legislative action, court action, and agency action. Applicants and employees with criminal records should remain hopeful that increased employer and government attention to fair chance laws will boost their employment opportunities. However, these laws may not be a panacea, and deeper societal change is likely required to better assist with individuals' re-entry after incarceration.

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*Smoke, There's Fire?: The Cloud Of Suspicion Surrounding Former Offenders and the EEOC's New Enforcement Guidance On Criminal Records Under Title VII*, 30 GA. ST. U.L. REV. 591, 632-34 (2014).

92. Complaint at 2-3, *Ramos v. Walmart, Inc.*, No. 2:21-cv-12837 (D.N.J. July 19, 2021).

93. Rod M. Fliegel & Molly Shah, *Fifth Circuit Deals a Blow to EEOC's Criminal Record Guidance*, LITTLER ASAP (Aug. 6, 2019), <https://www.littler.com/publication-press/publication/fifth-circuit-deals-blow-eeocs-criminal-record-guidance>; see *Texas v. EEOC*, 933 F.3d 433 (5th Cir. 2019).

94. Fliegel & Chan, *supra* note 91.

95. O'Connell, *supra* note 15, at 2832. The EEOC's authority would be given added force if federal courts increased the degree of deference afforded to EEOC Guidance. Weissert, *supra* note 78, at 1545.

96. Fliegel & Shah, *supra* note 93.

### A. Implementation Concerns for Employers

Despite the positive impact that fair chance laws can have on the many individuals living in the U.S. with criminal records, critics suggest that the task of implementing these laws will present several challenges for employers that they should be prepared to navigate.<sup>97</sup>

#### 1. Problems with Complying

At the most fundamental level, fair chance laws may be extremely varied in substance.<sup>98</sup> As such, employers operating in multiple states or jurisdictions with differing fair chance laws may have difficulty complying with the various regulations.<sup>99</sup> Employers must not only keep federal laws like Title VII in mind when conducting their hiring process, but also fair chance laws at the state and local levels.<sup>100</sup>

Second, employers may be concerned that fair chance laws put them at risk for negligent hiring, meaning increased liability if one of their employees commits a crime in the employment setting.<sup>101</sup> Navigating the voluminous and varied fair chance laws *and* negligent hiring laws is creating uncertainty and “increased compliance and litigation costs,” particularly for employers operating in multiple jurisdictions.<sup>102</sup> Even for employers operating solely within one jurisdiction, potential litigation related to negligent hiring can be costly, and small and mid-size employers may be more concerned with this financial risk.<sup>103</sup> In this regard, some employers may perceive that they are in an “unwinnable situation” in which employers are in a “minefield of liability concerns.”<sup>104</sup>

#### 2. Problems with Not Complying

In addition to the number of costs employers may face to comply with the various fair chance laws, employers may lack clarity regarding both the applicable standards for the fair chance laws and the consequences for not complying with such laws.<sup>105</sup> While some fair chance laws are “narrowly tailored” to precisely the type of criminal records that may be considered and when, other states do not define certain words, such as “conviction,” or omit any

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97. Leacock, *supra* note 46, at 390, 395–96.

98. Adriel Garcia, Comment, *The Kobayashi Maru of Ex-Offender Employment: Rewriting the Rules and Thinking Outside Current “Ban the Box” Legislation*, 85 TEMP. L. REV. 921, 929 (2013).

99. O’Connell, *supra* note 15, at 2803.

100. *Id.* at 2831.

101. Garcia, *supra* note 98, at 922–23. Negligent hiring is a cause of action whereby an employer is liable for torts that an employee commits, even outside the scope of employment, when an employer does not exercise due care in their hiring process may be held liable. *Id.* at 931–32.

102. *Id.* at 923.

103. *Id.* at 939.

104. *Id.* at 940–41.

105. Leacock, *supra* note 46, at 396.

reference to the timing of the checks.<sup>106</sup> Some fair chance laws incorporate standards, such as Hawaii's "rational relationship" between the position and the criminal record, that employers must apply when determining whether or not to rule out an applicant with a criminal record.<sup>107</sup> In a few circumstances, these standards have been litigated such that caselaw provides insight into what constitutes a "rational relationship," though smaller companies without legal teams may not be aware of this information.<sup>108</sup>

Lack of clarity within the text of fair chance laws can create confusion for employers in determining whether or not they are complying with these laws.<sup>109</sup> In addition, since jurisdictions greatly vary in how to enforce ban the box laws, employers may not understand the likelihood that they could be found in violation of a law and, if so, what the penalty would be for a violation.<sup>110</sup> At least seven state fair chance laws omit information about what agency or mechanism exists to enforce the new legislation.<sup>111</sup> Further, courts have yet to opine on whether or how "differing and unclear" fair chance enforcement mechanisms may be ineffective at preventing discrimination against applicants with criminal histories.<sup>112</sup>

### B. Consequences for Employees

Despite the good intentions of fair chance policies, some recent studies have indicated that the laws may disproportionately and negatively impact the people whom the policies are meant to help.<sup>113</sup> Specifically, researchers have suggested that employment rates among young, often non-college-educated, Black and Hispanic men have decreased because employers are "using statistical discrimination as a stand-in for the criminal history questions on applications."<sup>114</sup> As such, employers may be refusing Black and Hispanic

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106. *Id.* at 396–97.

107. *Id.* at 399; see *Wright v. Home Depot U.S.A.*, 142 P.3d 265, 267, 276 (Haw. 2006) (holding that whether plaintiff's drug conviction was rationally related to his duties and responsibilities as an associate sales clerk at Home Depot is an issue within the province of the trier of fact and not for the court to decide as a matter of law).

108. Leacock, *supra* note 46, at 399.

109. *Id.* at 398.

110. O'Connell, *supra* note 15, at 2828.

111. *Id.* at 2826.

112. *Id.*

113. Alana Semuels, *When Banning One Kind of Discrimination Results in Another*, THE ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/business/archive/2016/08/consequences-of-ban-the-box/494435/>; see Flake, *supra* note 58, at 1094; see also Rebecca Beitsh, 'Ban the Box' Laws May Be Harming Young Black Men Seeking Jobs, STATELINE (Aug. 22, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/08/22/ban-the-box-laws-may-be-harming-young-black-men-seeking-jobs>; see also Stacy & Cohen, *supra* note 21, at 13.

114. Hartman, *supra* note 8, at 2; see Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of Ban the Box: Statistical Discrimination and Employment Outcomes when Criminal Histories are Hidden*, 38(2) J. LABOR ECON. 321, 324 (2018).

applicants because of the possibility that they might have criminal records.<sup>115</sup> In contrast, the opportunities for white applicants with criminal histories can be bolstered by fair chance laws because “when employers lack individualized information, they tend to generalize that black applicants, but not white applicants, are likely to have records.”<sup>116</sup> If it is the case that “[w]hen employers have less information about an applicant, they discriminate against minorities,” then the helpfulness of fair chance laws may be dubious at best.<sup>117</sup> Nonetheless, even if the laws themselves are not intrinsically flawed, it is difficult to change employers’ deeply-rooted biases unless the United States is able to face its overincarceration of minorities, particularly Black Americans, and overcriminalization.<sup>118</sup>

#### CONCLUSION

Since Hawaii began the trend in 1998, numerous states, cities, and counties have consistently passed fair chance laws aimed at lowering the barriers to employment for millions of Americans with criminal records. Yet, when these laws lack specificity or leave important aspects up to the interpretation of employers, employers face challenges in how and whether to comply with these laws—even more so when the employers operate in jurisdictions with differing laws. As more studies explore the impact of fair chance laws on the people the laws are aimed to help, it is important for policymakers to continue evaluating how employers can more easily and better comply to make sure the laws are working as intended.

With many U.S. employers currently facing higher than usual employee turnover that some have labeled “The Great Resignation,” new hiring strategies and methods of retaining employees have become popular subjects of discussion.<sup>119</sup> Fair chance hiring is one such way to encourage a diverse set of applicants, reduce continuously high unemployment rates among formerly incarcerated individuals, and promote equality in the workplace.<sup>120</sup>

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115. Doleac & Hansen, *supra* note 114.

116. Amanda Y. Agan & Sonja B. Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, 133 Q. J. OF ECON., 191, 195 (2018).

117. Semuels, *supra* note 113.

118. *Id.*

119. See Linda Shaffer, *DEI is key to avoiding the Great Resignation: How fair chance hiring can help*, BENEFITSPRO (Oct. 20, 2021), <https://www.benefitspro.com/2021/10/20/dei-is-key-to-avoiding-the-great-resignation-how-fair-chance-hiring-can-help/?slreturn=20210924125312>.

120. *Id.*

