

## States Adopt Fair Hiring Standards Reducing Barriers to Employment of People with Criminal Records

Nationwide, [over 40 cities and counties](#)—including New York City—have now taken the critical step of removing unfair barriers to employment in their hiring policies. Several states have followed suit, building on the successful track record of local hiring initiatives. Widely known as “ban the box,” these initiatives typically remove the question on the job application about an individual’s conviction history and delay the background check until later in the hiring process.<sup>1</sup> The purpose of this reform is to provide applicants a better chance of being evaluated based on their qualifications. Many jurisdictions have also adopted hiring policies modeled on federal civil rights protections that require the employer to show that the criminal records restrictions are directly related to the job.<sup>2</sup>

From 2009-2010, four states (Connecticut, Massachusetts, Minnesota, and New Mexico) passed legislation featuring ban the box and to date, 2009-2010, represents the most significant increase in successful legislation. Since then, Colorado has also passed a ban the box bill. Seven states in 2012 introduced measures to adopt or expand this hiring protection. Although these states have not passed this reform yet, advocates have laid the foundation for future efforts. In sum, there are currently seven states with statewide ban the box (six states with statutes and one state with an administrative directive in place).

### Successful Fair Hiring Legislation in 2012

#### **Colorado House Bill 1263 (2012) (applies to state employment and licensing; job-related factors)**

Signed on May 29, 2012 by Governor John Hickenlooper (D), [HB 1263](#) prohibits state agencies and licensing agencies from performing a background check until the agency determines that the applicant is a finalist for the position or receives a conditional offer. In determining whether a conviction disqualifies an applicant, the state or licensing agency must consider (1) nature of the conviction; (2) direct relationship of the conviction to the job; (3) rehabilitation and good conduct; and (4) time elapsed since conviction. The law further prevents agencies from using arrests not leading to conviction in deciding whether to deny or withdraw an offer. Agencies may not disqualify

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<sup>1</sup> National Employment Law Project, *Major U.S. Cities and Counties Adopt Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*, Feb. 16, 2010, available at <http://www.nelp.org/page/-/SCLP/CityandCountyHiringInitiatives.pdf>

<sup>2</sup> Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, U.S. Equal Employment Opportunity Commission, April 25, 2012, available at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

an applicant based on an expunged, sealed, or pardoned conviction or charges dismissed pursuant to a deferred judgment, unless the agencies first consider the four factors listed above.

This law does not apply where a statute bars licensing based on criminal convictions nor to certain public safety or correction-related jobs. Consideration of criminal history information that the applicant voluntarily provides is permitted. The law addresses blanket bans in job ads by prohibiting the advertisement of a position with a statement that a person with a criminal record may not apply. The legislation was supported by the [Colorado Criminal Justice Reform Coalition](#). Introduced by Rep. Claire Levy (D), see [bill information](#).

*Commentary:* Prior to the bill, Colorado state employment applications omitted any inquiries about applicants' convictions or arrests. Thus, unlike the typical ban the box legislation, this bill does not include language that requires removing the question about convictions on the application.

## Current Statewide Fair Hiring Standards

**California (2010) (administrative directive applies to state employment)** Under Governor Schwarzenegger (R), the California State Personnel Board revised the State Examination/Employment Application for state employees by removing questions asking about criminal convictions ([SPB Memo](#)). The new employment application ([Std. 678 Form](#)) does not ask applicants to provide conviction history information. The exception is that if an applicant is applying for a classification or position "to which a criminal record is pertinent," the applicant is required to complete the [Criminal Record Supplemental Questionnaire](#). Importantly, not all examinations or applications require the completion of this questionnaire. The questionnaire restricts inquiries to felonies and domestic violence misdemeanors.

*Commentary:* The administrative directive's exception of requiring a Criminal Record Supplemental Questionnaire for a classification or position "to which a criminal record is pertinent" is the most lenient standard of any of the states.

**Connecticut House Bill 5207 (2010) (applies to state employment; job-related factors; limits on information)** Connecticut's [House Bill 5207](#) to ban the box unanimously passed both the house and senate, but was vetoed by the Governor. Nonetheless, legislators overrode the veto. Taking effect on October 1, 2010, the law prohibits applicants from being disqualified for licensure or employment by state agencies solely because of a conviction, unless otherwise disqualified. State employers and licensing agencies must wait until an applicant has been deemed otherwise qualified for the position before obtaining a criminal background report.

Existing law (§ 46a-80) required that the employer or licensing agency consider (1) the nature of the crime and its relationship to the job or occupation; (2) rehabilitation information; and (3) the time elapsed since the conviction or release before making an employment or licensure determination. The law further required that the employer or licensing agency provide an applicant with a written letter of rejection specifically stating the evidence presented and reasons for rejection if the applicant is disqualified. It also prohibited the use, distribution, or dissemination of records of arrests that did

not lead to conviction, or records of convictions that have been erased. *Introduced by:* Labor and Public Employees Committee, see [bill information](#).

*Commentary:* Laying the foundation for the bill's sweeping support, advocates formed a coalition (including [A Better Way Foundation](#)) that won ban the box locally in Norwich, Hartford, and New Haven in 2009.

**Hawaii House Bill 3528 (1998) (applies to public and private employment; limits on information)** In 1998, Hawaii became the first state to ban the box as applied to both public and private employment. Adding [HRS § 378-2.5](#), the bill prohibits employers from inquiring into an applicant's criminal history until after a conditional offer of employment has been made. The offer may be withdrawn if the applicant's conviction bears a "rational relationship" to the duties and responsibilities of the position sought. Under the law, employers may only consider an employee's conviction record within the most recent ten years, excluding periods of incarceration. Prior to HB 3528, the definition of unlawful discriminatory practices (§ 378-2) included "arrest and court record" as an impermissible reason for an employer to "refuse to hire or employ or to bar or discharge from employment, or otherwise to discriminate against any individual."

*Commentary:* Prohibiting employers from inquiring into a criminal history until after a conditional offer provides one of the strongest worker protections.

**Massachusetts Senate Bill 2583 (2010) (applies to public and private employment; limits on information)** Governor Deval Patrick (D) signed [Chapter 256 of the Acts of 2010](#) on August 6, 2010. Senate Bill 2583 was supported by a broad coalition (including [Massachusetts Law Reform Institute](#) and [Boston Workers Alliance](#) (BWA)). Employers can no longer use an initial written employment application to ask whether an applicant has been convicted unless a legal restriction applies to the specific job or occupation. Effective May 4, 2012, the law requires that applicants receive a copy of their criminal history report prior to being questioned about their history and if an adverse decision is made based on the report. As a self-auditing mechanism, individuals are able to determine if the report was run. Criminal records may only contain (1) felony convictions for 10 years following disposition; (2) misdemeanor convictions for 5 years following disposition; and (3) pending criminal charges. See [bill information](#), [MCAD factsheet](#), and [BWA factsheet](#).

*Commentary:* The bill uniquely tackles the issue of inaccurate commercial background screeners by creating an incentive for employers to use the state's criminal history database, which then limits the length of time that criminal history information is available. It also ensures that a denied applicant receives a copy of his or her record, paralleling one component of the federal consumer protection law, the [Fair Credit Reporting Act](#), which applies to commercially-prepared background checks.

**Minnesota House File 1301 (2009) (applies to public employment; job-related factors; limits on information)** In May 2009, Governor Tim Pawlenty (R) signed [HF 1301](#) adding section 364.021 to [Minn. Stat. § 364 et seq.](#) The amendment prohibits public employers from inquiring into or considering an applicant's criminal history until after the applicant has been selected for an interview by the state, its agency, or political subdivision. The [Council on Crime and Justice](#), with [Minnesota Second Chance Coalition](#), advocated for the bill. Longstanding statutory protections preceding the bill,

dating back to 1974, include a prohibition against disqualifying applicants from public employment or licensure unless the conviction is “directly related” to the position of employment or occupational license sought and a requirement that job-related factors be considered. Records of arrest not followed by valid conviction, annulled or expunged convictions, and misdemeanor convictions for which no jail sentence can be imposed may not be used when evaluating applicants for public employer or licensure. Introduced by Rep. Debra Hilstrom (D), see [bill information](#)

*Commentary:* Enacted in 1974, Minnesota’s statutory protections for people with criminal records provided a detailed description of what qualifies as sufficient evidence of rehabilitation. Importantly, a person may not be disqualified because of a criminal record if the person can show sufficient evidence of rehabilitation and fitness to perform the job.

**New Mexico Senate Bill 254 (2010) (applies to public employment; limits on information)** On March 8, 2010, Governor Bill Richardson (D) signed this [measure](#) into law adding [N.M. Stat. § 28-2-3](#) to the existing “Criminal Offender Employment Act” (1974). It prohibits state agencies from inquiring into an applicant’s conviction history on an initial employment application until an applicant has been “selected as a finalist.” The law permits convictions to be considered when determining eligibility for public employment or licensure, but convictions “may not operate as an automatic bar.” The law further prohibits the use of records of arrest not leading to conviction and misdemeanor convictions not involving moral turpitude. Introduced by Sen. Clinton D. Harden (R), see [bill information](#).

*Commentary:* The bill amended existing law, which permits a conviction that “directly relates” to employment to be the basis for denial. It also includes a provision requiring a written statement to the applicant of the reasons for denial and provides the parameters for a presumption of rehabilitation (§ 28-2-4).

## Fair Hiring Legislation Introduced in 2012

**California Assembly Bill 1831 (would have applied to city and county employment)** [AB 1831](#) would have required city and county agencies to delay consideration of an applicant’s criminal history until after the agency determines that the applicant is minimally qualified for the position. The bill exempts agencies that were required by law to run a criminal background check and all positions within a criminal justice agency. After passing through the Assembly, the bill was held in the Senate Committee on Governance and Finance. On the day of the hearing, an influential local newspaper supported the bill with an [editorial](#). Introduced by Asm. Roger Dickinson (D), see [bill information](#).

*Commentary:* Nine cities and counties in California implement some form of ban the box, which makes California the state with the most ban the box local jurisdictions without statewide legislation.

**Illinois House Bill 1210, House Committee Amendment No. 1 (would have applied to state employment)** A prior version of [HB 1210](#) was passed out of the legislature but vetoed by former Governor Rod Blagojevich (D). With the addition of [House Committee Amendment No. 1](#), which offers stronger protections than HB 1210, the bill will likely be considered in the months to come. It would prohibit state employers from asking on job applications whether an applicant was convicted. The threshold for inquiry into an applicant's criminal background is after the interview or conditional

offer for a position. If federal or state law disqualifies a person from holding a position or if an applicant is applying to be a peace officer, then the positions are exempted. Introduced by Rep. La Shawn Ford (D), see [bill information](#).

*Commentary:* As legislation is being considered, advocates are exploring administrative options. The [Illinois Commission on the Elimination of Poverty](#) and groups such as [Safer Foundation](#) and [Heartland Alliance](#) are supporting the efforts.

**Maryland Senate Bill 671/House Bill 800 (would have applied to state employment)** [SB 671/HB 800](#) was introduced for the third year. It would have prohibited the branches of the state government from inquiring into the criminal history of an applicant for employment until the applicant is selected for an interview. The bill exempts public safety and corrections positions, positions for which a criminal history records check is statutorily required, and certain positions determined by the Secretary of the State Personnel Management System. The latter's exceptions must be reported to the legislature. The bill passed the Senate Finance Committee but was stalled in House Appropriations. Introduced by Sen. Catherine Pugh (D) see [bill information](#).

*Commentary:* As [noted](#) by the [Job Opportunities Task Force](#), the bill had bipartisan support and went further this year than prior attempts.

**Minnesota House File 1448/Senate File 1122 (would have applied to private employment)** [HF 1448/SF 1122](#) would have prohibited private employers from inquiring into or considering the criminal history of an applicant until the applicant has been selected for an interview. The bill exempts those employers who have a statutory duty to conduct a criminal background check or consider the criminal records of applicants during the hiring process. The bill stalled in committee. Introduced by Rep. Carol McFarlane (R), see [bill information](#).

*Commentary:* Advocates from the [Second Chance Coalition](#) are continuing efforts at the local level to expand ban the box to private employers.

**New Jersey Assembly 2300 (would have applied to public and private employment; job-related factors; limits on information)** This [bill](#) would have prohibited employers from requesting information about criminal records on job applications unless certain convictions legally disqualify an applicant. An employer is permitted to inquire about convictions during an interview, but the employer cannot deny employment on the basis of a criminal record unless there is a direct relationship between the conviction and the employment sought (factors are specified), or if granting the employment would involve an unreasonable risk to property or safety. Time limits for certain convictions to be considered are specified. Written notice of denial and opportunity to appeal are provided. The penalty for violation is \$10,000 for a first offense and not more than \$20,000 for a second offense. Introduced by Asm. Bonnie Watson Coleman (D), see [bill information](#).

*Commentary:* Advocates are hopeful that a new version of the bill will be introduced in the coming months. Meanwhile, advocates such as the [New Jersey Institute for Social Justice](#) have sought to educate the private employer community on these issues through business roundtables.

**Rhode Island House Bill 7760/Senate Bill 2411 (would have applied to public and private employment and licensing; job-related factors)** Building on prior years' efforts, [HB7760/SB2411](#) would have prohibited licensing and public agencies, and private employers from denying an applicant because of prior convictions, unless (1) there is a "direct causal relationship" between the offense and the license or employment (an analysis that includes consideration of rehabilitation); (2) the employment is in law enforcement or corrections; (3) the individual is not bondable; or (4) issuing a license or granting employment would involve unreasonable risk to property or safety. It also prohibits conviction inquiries on applications, subject to exceptions. By request, denied applicants may be provided reasons for denial. The bill was held in committee for further study. Efforts are supported by [Direct Action for Rights and Equality](#). Introduced by Rep. Scott Slater (D), see [bill information](#).

*Commentary:* Of note, the factors to determine whether a "direct causal relationship" exists includes (1) the public policy to encourage people with records to find employment and (2) specifies that a "lack of good moral character" based solely on convictions is not sufficient for denial.

**Vermont House 717 (would have applied to public and private employment)** Introduced in Vermont for the first time, this [measure](#) would have prohibited employers from inquiring into an applicant's criminal history unless the inquiry took place during an interview or the applicant was found otherwise qualified for the position. The bill exempts positions that have mandatory or presumptive disqualifications under law. The bill also provides that employers could be fined up to \$100.00 for each violation. The bill stalled in the House committee. Introduced by Rep. Mark Woodward (D), see [bill information](#).

*Commentary:* Although the fine is minimal, it provides an example of enforcement.

## **Related Fair Hiring Standards: Laws Prohibiting Discrimination Based on a Criminal Record**

Several states have limited how and under what circumstances an employer may consider an applicant's criminal record, without delaying background check inquiries in the hiring process.<sup>3</sup> These laws make it illegal for an employer to discriminate against a person with a criminal record unless the conviction is job-related. The laws build on federal law such as [Title VII of the Civil Rights Act of 1964](#), which prohibits employers from banning people with criminal records from employment.

**New York (1977) (applies to private and public employment; job-related factors)** New York law ([NY Corr. Law § 752](#)) prohibits "[u]nfair discrimination against persons previously convicted of one or more criminal offenses" in public and private employment and licensing. Recently, the law has been aggressively enforced by the state's Attorney General, resulting in settlements against RadioShack and Choicepoint (one of the nation's largest screening firms). The law prohibits the disqualification of applicants from employment or licensure solely or in part on the applicant's criminal history or because of a lack of "good moral character" based solely on a criminal offense, unless there is a "direct relationship" between the conviction and the employment or license sought, or the issuance

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<sup>3</sup> See LAC, *Enforce Anti-Discrimination Laws*, available at [http://www.lac.org/toolkits/titlevii/title\\_vii.htm#how](http://www.lac.org/toolkits/titlevii/title_vii.htm#how).

of a license or employment would involve an unreasonable risk to property or to the safety or welfare of an individual or the general public. The law ([§ 753](#)) includes a list of factors to be considered when making employment decisions relating to an applicant's criminal history, including that certificates of good conduct create a presumption of rehabilitation.

**Pennsylvania (1979) (applies to private employment and licensing; limits on information)**

Pennsylvania law ([Title 18 Cons. Stat. § 9125](#)) prohibits private employers from considering conviction records that “do not relate to the applicant's suitability for employment.” Employers must provide written notification if denial was based in whole or in part on the applicant's criminal history. The law ([§ 9124](#)) also allows state agencies to consider conviction records when determining licensure. However, it prohibits consideration of arrests not leading to a conviction; annulled, expunged, or pardoned convictions; convictions of summary offenses; and convictions that do not relate to the applicant's suitability for the license.

**Wisconsin (1981) (applies to public and private employment and licensing; job-related factors)**

Wisconsin Statute §§ [111.321](#), [111.322](#) prohibit employment discrimination in both public and private sector employment on the basis of either an arrest or conviction record. Specifically, the law ([§111.335](#)) provides that an applicant may not be denied employment based on a conviction history unless the conviction “substantially relate[s]” to the circumstances of the particular job or licensed activity, or is not bondable. The recently introduced Wisconsin [Senate Bill 207](#) (2011) sought to roll back this anti-discrimination law. Fortunately, the bill did not pass.

### Comparison of Selected Statewide Fair Hiring Standards

State (Year reform was adopted)	Relevant Statutes	Reform: Ban the box or Anti- discrimination	Employers: Private and Public (State: S, Licensing: L, Cities and Counties: C)		Job-Related Screening Test	Limit criminal record information (Arrests not leading to convictions: “Arrests;” Expunged or similar: “Expunged;” Time limit on criminal record: “Time limit”)	Other protections (Notification of denial: “Notification;” Copy of record; “Copy”)
California (2010)	—	Ban the Box	—	Public (S)	—	Arrests, Expunged, Time Limit**	—
Colorado (2012)	C.R.S. § 24-5-101	Ban the Box	—	Public (S, L)	Whether there is “direct relationship” between conviction and job	Arrests, Expunged, Other	—
Connecticut (2010)	Conn. Gen. Stat. § 46a-80	Ban the Box	—	Public (S, L*)	Consider nature of crime and relationship to the job	Arrests, Expunged	Notification, Copy
Hawaii (1998)	HRS §§ 378-2, 378-2.5	Ban the Box; Anti- discrimination	Private	Public (S, C)	Conviction bears “rational relationship” to position	Time limit	—
Massachusetts (2010)	M.G.L. Ch. 6 §§ 151B, 168-173	Ban the Box	Private	Public (S, L*, C)	—	Time limit	Notification, Copy
Minnesota (2009)	Minn. Stat. § 364	Ban the Box	—	Public (S, L*, C)	Determine if conviction “directly relates” to position	Arrests, Expunged, Other	Notification
New Mexico (2010)	N.M. Stat. §§ 28- 2-1 to 28-2-6	Ban the Box	—	Public (S, L*, C)	Conviction “directly relates” to employment	Arrests, Other	Notification
New York (1977)	N.Y. Corr. Law §§ 750-755; N.Y. Exec. Law § 296	Anti- discrimination	Private	Public (S, L, C)	“Direct relationship” between offense and employment	Arrests	Notification
Pennsylvania (1979)	18 Pa. Cons. Stat. §§ 9124, 9125	Anti- discrimination	Private	Public (S, L, C)	Record has to “relate” to suitability for job sought	Arrests, Expunged, Other	—
Wisconsin (1981)	Wisc. Stat. §§ 111.321, 111.335	Anti- discrimination	Private	Public (S, L, C)	Whether circumstances are “substantially related”	Arrests	—

\*Only some of the protections listed in this chart apply to licensing. For example, removal of conviction inquiry from the licensing application is not required.

\*\*These limitations are included in statutes that preceded the ban the box administrative directive.