



## BANNING THE BOX IN NEW JERSEY: A SMALL STEP TOWARD ENDING DISCRIMINATION AGAINST EX-OFFENDERS

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### I. INTRODUCTION

The cost of recidivism bears heavily on our society. On a national level, approximately 43% of prisoners return to lockup within three years of being released.<sup>1</sup> In the last two decades, the cost of maintaining the corrections system has quadrupled to approximately \$52 billion per year across the states, thus putting an extremely large burden on taxpayers.<sup>2</sup> This reality has spurred a multitude of proposed solutions to reduce the likelihood that ex-offenders will return to a life of crime.<sup>3</sup> Ban the box legislation has been one of these solutions, and it has been adopted by lawmakers at state and local levels across the country.<sup>4</sup> In March 2015, such a law went into effect throughout the Garden State.<sup>5</sup>

The “box” in “ban the box” refers to the space frequently used on job applications where applicants are asked to indicate whether or not they have a prior criminal record.<sup>6</sup>

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<sup>1</sup> Editorial, *Recidivism's High Cost and a Way to Cut It*, N.Y. TIMES (Apr. 27, 2011), [http://www.nytimes.com/2011/04/28/opinion/28thu3.html?\\_r=0](http://www.nytimes.com/2011/04/28/opinion/28thu3.html?_r=0).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Michelle Natividad Rodriguez & Nayantara Mehta, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records*, NAT'L EMP'T. L. PROJECT 1 (Dec. 2015), <http://www.nelp.org/content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf>.

<sup>5</sup> N.J. STAT. ANN. §§ 34:6B-11–34:6B-19 (Westlaw 2015).

<sup>6</sup> 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, 921 (2013).

Ban the box legislation seeks to eliminate this question from job application forms.<sup>7</sup> The laws work under the logic that by limiting an employer's access to a prospective employee's criminal history, employers will be less likely to discriminate against ex-offenders during the initial application and interview process.<sup>8</sup> This, in turn, increases the number of ex-offenders who are ultimately hired.<sup>9</sup> Given the fact that an unemployed ex-offender is three times more likely to return to prison than one who is employed,<sup>10</sup> there is a strong argument that removing employment barriers for individuals who have served time will reduce the chance of subsequent offenses.

"For many people convicted of crimes, the most severe and long-lasting effect of conviction is not imprisonment or fine. Rather, it is being subjected to collateral consequences involving the actual or potential loss of civil rights, parental rights, public benefits, and employment opportunities."<sup>11</sup> Each week, more than 10,000 prisoners are released from U.S. prisons, amounting to approximately 650,000 each year.<sup>12</sup> Although there is no concrete estimate as to the number of Americans with criminal records, studies suggest that it was approximately sixty five million in 2010, more than a quarter of the adult population.<sup>13</sup> Thus, ban the box laws have the potential to affect one in four Americans.<sup>14</sup>

This note argues that the New Jersey Opportunity to Compete Act, the Garden State's version of ban the box legislation, is a step in the right direction toward decreasing the discrimination that ex-offenders face; however, it is only the first step of many necessary to remove barriers to employment. Part II begins with a history of ban the box legislation in the United States, reviewing efforts made at both the state and federal levels to reduce discrimination against ex-offenders. Part III highlights the most commonly cited pros and cons of ban the box legislation. Part IV examines the New

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<sup>7</sup> FAQ, BANTHEBOXCAMPAIGN.ORG, [http://bantheboxcampaign.org/?page\\_id=179](http://bantheboxcampaign.org/?page_id=179) (last visited Sept. 25, 2015).

<sup>8</sup> Garcia, *supra* note 6, at 922.

<sup>9</sup> *Id.*

<sup>10</sup> LEGAL ACTION CTR. NAT'L H.I.R.E. NETWORK, NATIONAL BLUEPRINT FOR REENTRY: MODEL POLICIES TO PROMOTE THE SUCCESSFUL REENTRY OF INDIVIDUALS WITH CRIMINAL RECORDS THROUGH EMPLOYMENT AND EDUCATION 13 (2008), [http://www.hirenetwork.org/sites/default/files/National\\_Blueprint\\_For\\_Reentry\\_o8.pdf](http://www.hirenetwork.org/sites/default/files/National_Blueprint_For_Reentry_o8.pdf).

<sup>11</sup> Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012).

<sup>12</sup> *Prisoners and Prisoner Re-Entry*, U.S. DEP'T OF JUST., [http://www.justice.gov/archive/fbci/progmenu\\_reentry.html](http://www.justice.gov/archive/fbci/progmenu_reentry.html) (last visited Sept. 25, 2015).

<sup>13</sup> Kai Wright, *Boxed In: How a Criminal Record Keeps You Unemployed for Life*, THE NATION (Nov. 5, 2013), <http://www.thenation.com/article/177017/boxed-how-criminal-record-keeps-you-unemployed-life>.

<sup>14</sup> *Id.*

Jersey Opportunity to Compete Act more closely, focusing on the exact provisions that the New Jersey Legislature has enacted. Part V analyzes the effectiveness of similar laws in other states, counties, and cites, concentrating mainly on the state of Hawaii, the county of Durham, North Carolina, and the city of Minneapolis, Minnesota. Finally, Part VI discusses the potential effects of the new law in the months and years to come, both within the State of New Jersey and beyond.

## II. HISTORY OF BAN THE BOX LEGISLATION

This section examines the conditions that have developed over the last few decades to produce a need for ban the box laws nationwide. It then discusses state responses to these issues, followed by a discussion of federal efforts to reduce discrimination against individuals with criminal histories.

### A. CHANGING CONDITIONS

Changing conditions during the last few decades have intensified the collateral consequences that ex-offenders may face in seeking employment.<sup>15</sup> One of these factors is technological advances, and particularly, the use of the Internet.<sup>16</sup> Today, hundreds of companies offer low-cost criminal background checks online, making an applicant's criminal history readily available to employers.<sup>17</sup> Additionally, the growing problem of workplace violence has increased the demand for background checks.<sup>18</sup> As the result of these factors, one survey showed that more than 90% of companies reported using criminal background checks in making their hiring decisions.<sup>19</sup>

In general, there are two types of criminal records that an individual may gather: rap sheets and court records.<sup>20</sup> Rap sheets are based on arrests and bookings and are stored with the FBI and state databases.<sup>21</sup> Historically, these records were accessible to police,

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<sup>15</sup> Steven D. Bell, *The Long Shadow: Decreasing Barriers to Employment, Housing, and Civic Participation for People with Criminal Records Will Improve Public Safety and Strengthen the Economy*, 42 W. ST. L. REV. 1, 11 (2014).

<sup>16</sup> *Id.*

<sup>17</sup> For example, Crime Smasher advertises in-state criminal record searches for only \$9.95 and nationwide searches for only \$12.95. CRIME SMASHER, <http://www.crimesmasher.com> (last visited Sept. 25, 2015).

<sup>18</sup> Bell, *supra* note 15, at 13.

<sup>19</sup> *Id.* at 14.

<sup>20</sup> Ruth Graham, *How Criminal Records Hold Americans Back*, BOS. GLOBE (Mar. 8, 2015), <http://www.bostonglobe.com/ideas/2015/03/08/how-criminal-records-hold-americans-back/bFnOmPhZKeimlafcPU5mmI/story.html>.

<sup>21</sup> *Id.*

law enforcement agencies, and a very select group of the public, such as gun dealers.<sup>22</sup> However, after September 11, 2001, the number of government agencies and private companies who have access to these records has greatly expanded.<sup>23</sup> Court records, on the other hand, have always been public, but it used to be time-consuming and expensive to obtain them.<sup>24</sup> That is no longer true today, as there are a multitude of private companies that offer criminal background checks quickly and inexpensively.<sup>25</sup>

## B. STATE LEGISLATION

In 1998, Hawaii became the first state to limit criminal background questions on initial employment applications.<sup>26</sup> The “Ban the Box” campaign formally began in 2004, initiated by “All of Us or None of Us,” a national civil rights group.<sup>27</sup> More than one hundred cities and counties have passed laws to remove barriers to employment for qualified workers with criminal histories.<sup>28</sup> Meanwhile, the number of states that have passed ban the box legislation continues to grow.<sup>29</sup> These laws have varied in such factors as what types of employers are covered (public vs. private) and what type of information a potential employer may access.<sup>30</sup>

## C. FEDERAL EFFORTS

At the federal level, there have been efforts made by the Equal Employment Opportunity Commission (EEOC), national lawmakers, and President Obama to bring attention to the discrimination that ex-offenders may experience when attempting to gain employment. These efforts are discussed in turn.

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> See sources cited, *supra* note 17.

<sup>26</sup> NAT’L EMP’T. L. PROJECT, STATEWIDE BAN THE BOX: REDUCING UNFAIR BARRIERS TO EMPLOYMENT OF PEOPLE WITH CRIMINAL RECORDS 2 (2013), [http://nelp.3cdn.net/3coae798a3c30d354e\\_jgm6beq1q.pdf](http://nelp.3cdn.net/3coae798a3c30d354e_jgm6beq1q.pdf); see HAW. REV. STAT. ANN. § 378-2.5 (Westlaw 2015).

<sup>27</sup> *About: The Ban the Box Campaign*, BANTHEBOXCAMPAIGN.ORG, <http://bantheboxcampaign.org/?p=20> (last visited Nov. 9, 2014).

<sup>28</sup> Rodriguez & Mehta, *supra* note 4, at 1.

<sup>29</sup> *Id.* As of the time of publication, nineteen states have passed ban the box measures: CA, CO, CT, DE, GA, HI, IL, MA, MD, MN, NE, NJ, NM, NY, OH, OR, RI, VA, and VT.

<sup>30</sup> *Id.* at 13-14. See *infra* Part V for information about the effectiveness of such legislation across the country.

## 1. The EEOC's Role

In the absence of a federal law that provides protection to all ex-offenders in the workplace, the EEOC has been aggressive in challenging many employer practices with respect to the use of criminal records in the hiring process.<sup>31</sup> Since criminal background screening is believed to disproportionately affect minorities, the EEOC has become vested in the issue via its implementation of the Civil Rights Act of 1964.<sup>32</sup> In past years, the EEOC has attempted to reform employers' policies by initiating legislation and otherwise utilizing its enforcement powers.<sup>33</sup>

On April 25, 2012, the EEOC issued a revised enforcement guidance about using criminal histories in making employment decisions.<sup>34</sup> This guidance marked the first time the EEOC stated that certain uses of an applicant's criminal history constitute discrimination.<sup>35</sup> Under the guidance, individuals who believe that they have been wrongfully discriminated against because of their criminal histories have legal redress.<sup>36</sup> The provision allows for individuals in this situation to go to an EEOC office to file a complaint, and the EEOC can then investigate and prosecute.<sup>37</sup>

In recent years, the EEOC has brought lawsuits against large employers such as BMW and Dollar General, based on allegations that their criminal background check policies disproportionately affect black job applicants.<sup>38</sup> In the BMW case, the EEOC alleged that the company unduly screened out black applicants from jobs and that the

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<sup>31</sup> Fred W. Alvarez et al., "Ban the Box": A Discussion of State and Local Laws Restricting Inquiries into an Applicant's Criminal History, JONES DAY (Sept. 2014), <http://www.jonesday.com/Ban-the-Box-A-Discussion-of-State-and-Local-Laws-Restricting-Inquiries-into-an-Applicants-Criminal-History-09-16-2014/?RSS=true>.

<sup>32</sup> Stewart J. D'Alessio, Lisa Stolzenberg & Jamie L. Flexon, *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, AM. J. CRIM. JUST., June 2014. Criminal history is not a protected class under Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e, et seq. (2012).

<sup>33</sup> Alvarez et al., *supra* note 31.

<sup>34</sup> See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf); Taja-Nia Henderson, *NJ Should Ban Arrests from Job Applications*, N.J. INST. FOR SOC. JUST. (May 6, 2012), <http://www.njisj.org/2012/05/nj-should-ban-arrests-from-job-applications/>.

<sup>35</sup> Henderson, *supra* note 34.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Casey Nolan, *EEOC Lawsuits Target Criminal Background Checks*, THE MODERN WORKPLACE (June 19, 2013), <http://www.themodernworkplace.com/2013/06/eeoc-lawsuits-target-criminal.html>. The BMW case was litigated under EEOC v. BMW Mfg. Co., LLC, No. 7:13-1583-HMH, 2015 WL 5431118 (D.S.C. July 30, 2015). The Dollar General case was litigated in EEOC v. Dolgencorp, LLC, No. 13-CV-04307, 2015 WL 7251947 (N.D. Ill. Nov. 17, 2015).

screening process was not job-related and consistent with business necessity.<sup>39</sup> Since 1994, BMW has enforced a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions.<sup>40</sup> The policy has no time limits in terms of convictions and, according to the EEOC, it is a “blanket exclusion without any individualized assessment of the nature and gravity of the crimes, the ages of the convictions, or the nature of the claimants’ respective positions.”<sup>41</sup>

The facts that gave rise to the claim are as follows: UTi Integrated Logistics, Inc., had served as a contractor for BMW for years but ended the contract in 2008.<sup>42</sup> As a result, UTi employees had to apply to work for a different contractor to retain their position at a BMW warehouse.<sup>43</sup> The new contractor had to adopt BMW’s screening process and, in doing so, found that several UTi employees had criminal convictions in violation of BMW’s policy.<sup>44</sup> These employees were fired, despite that fact that some had worked in the warehouse for many years.<sup>45</sup> The EEOC alleged that black applicants were screened out under the BMW policy at a rate of 80%, even though approximately 55% of the previous subcontractor’s employees were black.<sup>46</sup>

Similarly, the Chicago office of the EEOC filed a lawsuit against Dollar General based on discrimination charges filed by two black applicants.<sup>47</sup> The lawsuit alleged that the company excluded applications by using a formula that failed to consider each applicant’s individual circumstances.<sup>48</sup> As a result, the suit alleged that black candidates were rejected from employment at a rate several percentages higher than non-black applicants.<sup>49</sup> The EEOC charged that Dollar General conditioned its job offers on criminal background checks, thus resulting in a disparate impact against African-

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<sup>39</sup> Press Release, U.S. Equal Emp’t Opportunity Comm’n, EEOC Files Suit Against Two Employers for Use of Criminal Background Checks (June 11, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/6-11-13.cfm>.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Press Release, U.S. Equal Emp’t Opportunity Comm’n, *supra* note 39.

<sup>46</sup> Beth Ewen, *Ban the Box?*, FRANCHISE TIMES (Feb. 2014), <http://www.franchisetimes.com/February-2014/Ban-the-Box/>.

<sup>47</sup> Press Release, U.S. Equal Emp’t Opportunity Comm’n, *supra* note 39.

<sup>48</sup> Ewen, *supra* note 46.

<sup>49</sup> *Id.*

Americans in violation of Title VII of the Civil Rights Act of 1964.<sup>50</sup> Notably, one of the plaintiffs was fired from her job at the store although, according to the EEOC, the conviction report about her was incorrect, and she was never convicted of a felony.<sup>51</sup> Although the applicant advised the Dollar General store manager of the mistake in the criminal history report, the company did not reverse its decision to fire her.<sup>52</sup>

In 2014, the EEOC again revised its guidance on the issue of criminal background checks and job applications.<sup>53</sup> The guidance does not prohibit the use of criminal background checks, but asks employers to assess applicants on an individual basis instead of creating a blanket policy that excludes everyone.<sup>54</sup> Nevertheless, the use of criminal history is a concern to the EEOC because using criminal history as a barrier against hiring may have a disparate impact on minorities, thus violating Title VII.<sup>55</sup>

## 2. Federal Legislation

Although ban the box laws have been passed by legislatures only at the state and local levels to date, political leaders at the federal level have also expressed how the box can be a barrier to individuals with criminal histories. For example, in September 2013, U.S. Senator Rand Paul testified in front of the Senate Judiciary Committee, stating:

I know a guy about my age in Kentucky, who grew marijuana plants in his apartment closet in college. Thirty years later, he still cannot vote, cannot own a gun, and when he looks for work he must check the box, the box that basically says: “I am a convicted felon and I guess I will always be one.” . . . This is a lifelong problem then with employment. . . . It makes it very difficult . . . .<sup>56</sup>

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<sup>50</sup> Press Release, U.S. Equal Emp’t Opportunity Comm’n, *supra* note 39.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> U.S. EQUAL EMP’T OPPORTUNITY COMM’N & FED. TRADE COMM’N, BACKGROUND CHECKS: WHAT EMPLOYERS NEED TO KNOW, [http://www.eeoc.gov/eeoc/publications/upload/eeoc\\_ftc\\_background\\_checks\\_employers.pdf](http://www.eeoc.gov/eeoc/publications/upload/eeoc_ftc_background_checks_employers.pdf) (last visited Nov. 20, 2015).

<sup>54</sup> Angela Johnson, ‘Ban-the-box’ Legislation Sweeps the Nation: What Indiana Employers Should Know, 25 IND. EMP’T. L. LETTER, no. 1, Letter 3, Jan. 2015.

<sup>55</sup> *Id.* Disparate impact claims involve “employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

<sup>56</sup> *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 6-8 (2013) (statement of Sen. Rand Paul); *Voices in Support: Leaders in the Community Support Fair Chance Policies*, NAT’L EMP’T. L. PROJECT 2 (Apr. 2015), [http://www.nelp.org/page/-/SCLP/2014/Guides/NELP\\_Voices\\_in\\_Support\\_Factsheet.pdf?nocdn=1](http://www.nelp.org/page/-/SCLP/2014/Guides/NELP_Voices_in_Support_Factsheet.pdf?nocdn=1).

These comments are illustrative of the far-reaching effects that criminal history questions can have on an individual's life, even long after the crime was committed.

In the summer of 2014, Senator Paul, along with Senator Cory Booker, introduced federal legislation that would make it easier for juveniles and adult offenders to expunge charges from their record that are nonviolent in nature.<sup>57</sup> At the time, Senator Paul stated, “[t]he biggest impediment to civil rights and employment in our country is a criminal record.”<sup>58</sup> The legislation, called the REDEEM Act, would:

[E]ncourage states to raise the age of criminal responsibility to 18 years of age; expunge or seal the records of juveniles who commit non-violent crimes before they turn 15; place limits on the solitary confinement of most juveniles; and establish a system to allow eligible nonviolent criminals to petition a court to ask that their criminal records be sealed.<sup>59</sup>

These goals complement the purpose of ban the box laws across the states.

On September 10, 2015, federal ban the box legislation was introduced by a group of bipartisan lawmakers.<sup>60</sup> The Fair Chance Act would prohibit all branches of the federal government and federal contractors from asking a job applicant about his criminal history until a conditional offer of employment has been made.<sup>61</sup> The legislation would create an exception for positions related to national security and law enforcement.<sup>62</sup> The bill has been supported by Democrats and Republicans in both the U.S. House of Representatives and the U.S. Senate.<sup>63</sup>

Other currently existing legislation has limited employer access to applicants' criminal histories by restricting the information that commercial background check providers can divulge.<sup>64</sup> The Fair Credit Reporting Act (FCRA) provides that

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<sup>57</sup> S. 2567, 113th Cong. (2014).

<sup>58</sup> Graham, *supra* note 20.

<sup>59</sup> Ed O'Keefe, *Cory Booker, Rand Paul Team Up on Sentencing Reform Bill*, WASH. POST (July 8, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/cory-booker-rand-paul-team-up-on-sentencing-reform-bill/>.

<sup>60</sup> CSG Justice Center Staff, *Individuals with Criminal Records Could Receive 'Fair Chance' at Employment with New Legislation*, COUNCIL OF ST. GOV'TS JUST. CTR., <https://csgjusticecenter.org/jc/announcements/individuals-with-criminal-records-could-receive-fair-chance-at-employment-with-new-legislation/> (last visited Nov, 15, 2015).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> 15 U.S.C. § 1681c(a)(2), (a)(5) (2011).



commercial providers of criminal histories may not report arrest records that do not result in a conviction, where the arrest occurred more than seven years ago.<sup>65</sup> However, convictions may be reported indefinitely, even after a significant period of time has passed.<sup>66</sup> Despite these federal regulations, enforcement of FCRA standards have been inconsistent, and there is no way to correct or alter incorrect information given by these providers.<sup>67</sup> Therefore, it is possible that commercial providers of criminal background histories are providing false information to employers at the expense of applicants who are being excluded from hire solely on this basis.

### 3. Executive Action

On November 2, 2015, President Obama made an announcement mandating that the federal government's HR department "delay inquiries into criminal history until later in the hiring process."<sup>68</sup> The President cited recent statistics and noted that a criminal history often disqualifies an individual from fully participating in society.<sup>69</sup> "It means millions of Americans can't even get their foot in the door . . . [.] We've got to make sure Americans who paid their debt to society get a second chance," he stated.<sup>70</sup> The President also called on members of Congress to pass legislation that built on his announcement.<sup>71</sup>

## III. PROS AND CONS OF BAN THE BOX

This section highlights the arguments that have been made both for and against ban the box laws across the states by supporters and opponents of such policies. These arguments contemplate a variety of factors, such as the economy, government spending, efficiency, and workplace safety.

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<sup>65</sup> *Id.*; see also Bell, *supra* note 15, at 14.

<sup>66</sup> Bell, *supra* note 15, at 14.

<sup>67</sup> See *supra* notes 51-52 and accompanying text. An example of this occurred in the case of *EEOC v. Dolgencorp, LLC*, No. 13-CV-04307, 2015 WL 7251947 (N.D. Ill. Nov. 17, 2015).

<sup>68</sup> Ari Melber, *Obama Bans the Box*, MSNBC (Nov. 3, 2015), <http://www.msnbc.com/msnbc/obama-bans-the-box>.

<sup>69</sup> Stephanie Condon, *Obama to "Ban the Box" on Federal Job Applications*, CBS NEWS (Nov. 2, 2015), <http://www.cbsnews.com/news/obama-to-ban-the-box-on-federal-job-applications/>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

## A. PROS

Proponents of ban the box laws argue that such legislation helps the economy.<sup>72</sup> It is estimated that the reduced output of goods and services of people with prison records costs the national economy \$57 billion to \$65 billion in losses.<sup>73</sup> Allowing ex-offenders to work “increases their tax contributions, boosts sales tax, and saves money by keeping people out of the criminal justice system.”<sup>74</sup> A study conducted in Philadelphia found that hiring one hundred people that were formerly incarcerated would increase income tax contributions by \$1.9 million and boost sales tax revenue by approximately \$770,000 over the employees’ lifetimes.<sup>75</sup> A similar study in the State of Washington found that providing job training and employment to a person who was formerly incarcerated could return more than \$2,600 to taxpayers.<sup>76</sup>

Supporters have also argued that such laws are good for businesses. For example, such laws enlarge talent pools, ensuring employers that they are not missing an opportunity to compete for talented and productive employees.<sup>77</sup> It has also been noted that such laws can reduce employer-screening costs because delaying the point at which background checks can occur will substantially reduce the number of checks conducted and their associated costs.<sup>78</sup>

There are also significant benefits for the individual. The benefits to the ex-offender go beyond having a job; rather, employment can create a domino effect of positive results.<sup>79</sup> Having a job allows an individual to support his family, form new social

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<sup>72</sup> See e.g., “*Ban the Box*” Factsheet, NAT’L EMP’T. L. PROJECT, [http://nelp.3cdn.net/9950facb2d5ea29ece\\_jsm616jn8.pdf](http://nelp.3cdn.net/9950facb2d5ea29ece_jsm616jn8.pdf) (last visited Nov. 20, 2015).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> ECON. LEAGUE OF GREATER PHILA., ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 12-13 (2011), <http://economyleague.org/uploads/files/712279713790016867-economic-benefits-of-employing-formerly-incarcerated-full-report.pdf>.

<sup>76</sup> DARYL V. ATKINSON & KATHLEEN LOCKWOOD, S. COAL. FOR SOC. JUST., THE BENEFITS OF BAN THE BOX: A CASE STUDY OF DURHAM, NC (2014), [http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox\\_WhitePaper.pdf](http://www.southerncoalition.org/wp-content/uploads/2014/10/BantheBox_WhitePaper.pdf) (citing BRUCE WESTERN & BECKY PETTIT, PEW CHARITABLE TRS., COLLATERAL COSTS: INCARCERATION’S EFFECTS ON ECONOMIC MOBILITY (2010), [http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs\\_assets/2010/CollateralCosts1pdf.pdf](http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2010/CollateralCosts1pdf.pdf)).

<sup>77</sup> *Opportunity to Compete Act: Encouraging Fair Employment Application Practices for People with Criminal Histories*, N.J. INST. FOR SOC. JUST., [http://www.njisj.org/wp-content/uploads/2014/03/1\\_Opportunity-to-Compete-Act-Explanatory-Materials-Summary-Myths-Realities.pdf](http://www.njisj.org/wp-content/uploads/2014/03/1_Opportunity-to-Compete-Act-Explanatory-Materials-Summary-Myths-Realities.pdf) (last visited Nov. 15, 2015).

<sup>78</sup> *Id.*

<sup>79</sup> Aaron F. Nadich, Comment, *Ban the Box: An Employer’s Medicine Masked as a Headache*, 19 ROGER WILLIAMS U. L. REV. 767, 795 (2014).

relationships within the workplace, distance himself from criminal relationships, and feel a sense of accomplishment.<sup>80</sup>

Furthermore, the concerns that cause employers to deny jobs to ex-offenders may be partially unfounded. An individual that has a criminal record is less likely to commit a crime in the workplace than an employee who has never faced a conviction.<sup>81</sup> Workplace violence is most often perpetrated by non-employees.<sup>82</sup> In fact, studies suggest that there are benefits to hiring individuals with a previous criminal conviction. On average, employees with criminal backgrounds are approximately 1% to 1.5% more productive on the job than co-workers who do not have a previous criminal conviction.<sup>83</sup>

Supporters may also ease concerns of employers by emphasizing what ban the box laws do not do. Ban the box laws do not require employers to hire individuals with previous criminal convictions.<sup>84</sup> These laws do not forbid employers from performing background checks on applicants.<sup>85</sup> Ban the box laws merely put off the criminal history question until the candidate is deemed to be otherwise qualified for the position.<sup>86</sup>

## B. CONS

On the other hand, critics of the ban the box movement argue that such legislation places employers in a no-win situation.<sup>87</sup> While the common law encourages employers to conduct background checks on prospective employees to reduce foreseeable risk of injury, ban the box laws can limit the information that employers have access to.<sup>88</sup> Thus, employers face liability for not only refusing to hire ex-offenders, but also for hiring ex-offenders who later break the law.<sup>89</sup>

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<sup>80</sup> *Id.*

<sup>81</sup> D'Alessio, Stolzenberg & Flexon, *supra* note 32.

<sup>82</sup> *Id.* (citing DETIS T. DUHART, U.S. DEP'T OF JUST., BUREAU OF JUST. STATS., VIOLENCE IN THE WORKPLACE, 1993-99 (2001)).

<sup>83</sup> ATKINSON & LOCKWOOD, *supra* note 76 (citing Eamon Javers, *Inside the Wacky World of Weird Data: What's Getting Crunched*, CNBC (Feb. 12, 2014), <http://www.cnbc.com/id/101410448>).

<sup>84</sup> Brent Staples, Opinion, *What it Means to 'Ban the Box'*, N.Y. TIMES (Oct. 30, 2013), <http://takingnote.blogs.nytimes.com/2013/10/30/what-it-means-to-ban-the-box/>.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Garcia, *supra* note 6, at 923.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

For example, consider a situation in which an employer in a state that has adopted a ban the box law is considering an applicant.<sup>90</sup> Under this particular state's law, an employer is only able to review the applicant's criminal history from the last three years and, in doing so, does not discover any prior convictions.<sup>91</sup> However, a more exhaustive background check would have revealed several prior convictions for aggravated assault.<sup>92</sup> After the new hire assaults a fellow employee, that employee brings suit against the employer, arguing that the employer was negligent in the hiring process.<sup>93</sup> Additionally, through press coverage of the incident, an employer's good name may be tarnished; if the case goes to trial and the jury finds in favor of the plaintiff, the employer may be liable for a substantial award of damages.<sup>94</sup> Although no state has adopted a law exactly like the one described in this hypothetical, it is illustrative of the concerns that employers face.

Critics also argue that ban the box legislation ultimately wastes the time and resources of the job applicant and the employer.<sup>95</sup> If employers still make decisions based on whether the applicant has a criminal conviction, these laws are only delaying the process.<sup>96</sup> The employer must read through initial applications or conduct initial interviews only to later deny the applicant the job based on information that they may have acquired at the onset had these laws not existed.<sup>97</sup>

Others have argued that the "ban the box" title is deceiving because "[i]n reality, the scope of most of these laws goes well beyond the check box on the job application. Ban the box has become a platform for enacting all sorts of restrictions on employers, raising the stakes for potential litigation, fines, and penalties."<sup>98</sup> For these reasons, employers may view the legislation as a potential liability rather than a positive measure that may ultimately lead to a more talented workforce.

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<sup>90</sup> See Eugene Connor & Meghan Offer, *'Ban the Box' Legislation; The Dangers to U.S. and Worldwide Employers*, 19 L. J. NEWSLS., no. 8, Dec. 2011.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Rhonda Smith, *Employer Concerns About Liability Loom As Push for Ban-the-Box Policies Spreads*, BLOOMBERG BNA (Aug. 18, 2014), <http://www.bna.com/employer-concerns-liability-n17179893943/>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> Angela Preston, *The Problem(s) with Ban the Box*, EMPLOYEESCREENIQ (July 16, 2014), <http://www.employeescreen.com/iqblog/the-problem-with-ban-the-box/>.

Criticism of ban the box legislation has also come from those who believe that such laws do not go far enough to protect ex-offenders.<sup>99</sup> Such critics have cited studies which suggest that, in the absence of information about criminal history, some employers will assume that certain applicants, specifically black men, have a criminal history and will exclude them from the hiring process.<sup>100</sup> For these reasons, advocates of ex-offender rights have called for anti-discrimination statutes which would make individuals with criminal histories a protected group.<sup>101</sup>

Others have argued that such legislation will actually encourage more employers to conduct criminal background checks.<sup>102</sup> Since the laws do not ban background checks altogether, employers may be more likely to conduct them since they are unable to ask up front about an individual's criminal history.<sup>103</sup> If this is true, ban the box legislation may actually work against its purpose and create a greater barrier for those attempting to enter the job market with a criminal record.

At least one commentator has suggested a more sweeping reform that would mirror the system that currently exists in the United Kingdom.<sup>104</sup> Under this system, an offense is "spent" after seven to ten years of good behavior.<sup>105</sup> This means that the offense is no longer mentioned in public records, although the record still exists so that employers in national security, law enforcement, and childcare can still access them.<sup>106</sup> Records of more serious crimes, those that require prison sentences of more than two and a half years, follow the offender for life.<sup>107</sup> Barring these circumstances, previous offenses are erased from the public record.<sup>108</sup>

These varying arguments suggest that there is a large divide regarding the merits of ban the box legislation. Proponents and critics disagree as to the effect of such laws on the applicant, the employer, and society at large.

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<sup>99</sup> See generally Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261 (2014).

<sup>100</sup> *Id.* at 283 (citing Michael A. Stoll, *Ex-Offenders, Criminal Background Checks and Racial Consequences in the Labor Market*, 1 U. CHI. LEGAL F. 381, 400-07 (2009)).

<sup>101</sup> *Id.*

<sup>102</sup> Eli Lehrer, *'Ban the Box' Goes Too Far . . . and Not Far Enough*, HUFFINGTON POST (Feb. 26, 2014), [http://www.huffingtonpost.com/eli-lehrer/ban-the-box-goes-too-fara\\_b\\_4508127.html](http://www.huffingtonpost.com/eli-lehrer/ban-the-box-goes-too-fara_b_4508127.html).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> Lehrer, *supra* note 102.

#### IV. THE NEW JERSEY OPPORTUNITY TO COMPETE ACT

This section explores the circumstances and events that led to the passage of New Jersey's ban the box law. It then describes the provisions of the law as enacted by the Legislature, as well as aspects of the bill that were modified throughout the legislative process.

##### A. THE NEED FOR A BAN THE BOX LAW

In the early 2000s, New Jersey was one of a small group of states making progress in reducing recidivism rates.<sup>109</sup> The state was able to reduce the rate by 11.4% between 1999 and 2007.<sup>110</sup> During this time, both crime rates and incarceration rates decreased.<sup>111</sup> The state's recidivism rate, 42.7%, was below the national average of 43.3%.<sup>112</sup> Reduced rates are important because it costs the state more than \$46,000 per year to incarcerate an individual.<sup>113</sup>

Yet, as in many other states across the country, New Jersey has struggled with high recidivism rates in recent years.<sup>114</sup> A high level review conducted by the Christie Administration revealed that the state budget was being drained by jailing the same people over and over again.<sup>115</sup> The report indicated that close to 60% of New Jersey inmates are arrested again within three years of being released.<sup>116</sup> The report concluded that the state corrections system is in dire need of reform, and that one of the best methods of reform involves connecting former inmates with jobs so that they do not return to crime.<sup>117</sup> The report recognized that employment "provides individuals with the funding to pay for necessities and, equally important, dignity and hope."<sup>118</sup>

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<sup>109</sup> Press Release, Drug Pol'y All., New Report Finds New Jersey a National Leader in Reducing Recidivism (Apr. 14, 2011), <http://www.drugpolicy.org/news/2011/04/new-report-finds-new-jersey-national-leader-reducing-recidivism>. Other states in this group include KS, LA, MI, OR, and UT. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See Chris Megerian, *Repeat Offenders in N.J. Prison System are Draining State Budget, Report Finds*, NJ.COM (Mar. 3, 2011), [http://www.nj.com/news/index.ssf/2011/03/nj\\_prison\\_system\\_jails\\_same\\_cr.html](http://www.nj.com/news/index.ssf/2011/03/nj_prison_system_jails_same_cr.html).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Ban the box legislation is one way to provide ex-offenders with a fair chance at employment opportunities.<sup>119</sup> Advocacy campaigns, such as Ban the Box NJ, formed to support the Opportunity to Compete Act, New Jersey's version of ban the box legislation.<sup>120</sup> This campaign promoted the idea that such a law would, in turn, enhance the economy, improve public safety, and lead the government to spend less money on corrections and law enforcement.<sup>121</sup>

The bill was first introduced on February 7, 2013 by State Senators Sandra Bolden Cunningham, M. Teresa Ruiz, and Raymond J. Lesniak.<sup>122</sup> In introducing the bill, Senator Ruiz stated, "People who are unemployed already face a number of barriers when it comes to finding a job. For those who have a criminal conviction in their background, obtaining gainful employment is that much more difficult."<sup>123</sup> Senators Ruiz and Lesniak noted that an individual should be able to show his qualifications for a position and explain his criminal history before being rejected for a job.<sup>124</sup> This is especially true since a criminal record can reduce an individual's chance of receiving a callback or offer by more than 50%.<sup>125</sup> The Senators also noted that urban and minority communities tend to be disproportionately affected by unfair hiring practices that keep ex-offenders out of the workforce.<sup>126</sup>

The Opportunity to Compete Act found support amongst a wide array of groups, including college students.<sup>127</sup> For example, a group of students at Princeton University rallied and attempted to gain support from classmates by indicating how questions about criminal history on employment applications can affect them in the future.<sup>128</sup> One student recognized that, especially on college campuses, young people can be charged

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<sup>119</sup> *Ban the Box*, *supra* note 4, at 1.

<sup>120</sup> Press Release, New Jersey Institute for Social Justice, Ban the Box Rally Press Release (Apr. 26, 2013), <http://www.njisj.org/2013/04/ban-the-box-rally-press-release/>.

<sup>121</sup> *Id.*

<sup>122</sup> *Senators Cunningham, Ruiz & Lesniak Introduce Legislation To Ban The Box, Remove Unfair Barriers To Employment*, POLITICKER NJ (Feb. 7, 2013, 5:03 PM), <http://politickernj.com/2013/02/senators-cunningham-ruiz-lesniak-introduce-legislation-to-ban-the-box-remove-unfair-barriers-to-employment/>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Wendy Plump, *Princeton University Students Rally Support for "Ban the Box" Legislation*, NJ.COM (Apr. 21, 2013, 7:32 AM), [http://www.nj.com/mercer/index.ssf/2013/04/princeton\\_university\\_students\\_3.html](http://www.nj.com/mercer/index.ssf/2013/04/princeton_university_students_3.html).

<sup>128</sup> *Id.*

with disorderly conduct as the result of underage drinking.<sup>129</sup> Student Ray Chao noted, “A lot of these offenses were committed in college when they were young. Drunk in public and disorderly conduct that happened when they were 19 years old.”<sup>130</sup>

Without ban the box legislation, these individuals may be forced to reveal this charge when filling out an initial employment application for the rest of their lives.<sup>131</sup> Students argued that such charges are not necessarily indicative of an individual’s character or the type of worker an individual would be.<sup>132</sup> These arguments carry additional urgency in light of reports that one in three young Americans will be arrested by the age of twenty-three.<sup>133</sup> Some have argued that this will have the effect of creating “a permanent underclass of the young, giving rise to depressed local economies and increasing strains on already overstretched local budgets and tax bases.”<sup>134</sup>

## B. THE DETAILS OF THE ACT

As a result of these campaigns, on August 11, 2014, New Jersey Governor Chris Christie signed the Opportunity to Compete Act into law.<sup>135</sup> The law became effective on March 1, 2015.<sup>136</sup> New Jersey was the sixth state to enact a ban the box law that includes both public and private employers.<sup>137</sup> The intent and purpose of passing the Opportunity to Compete Act was to “improve the economic viability, health, and security of New Jersey communities and to assist people with criminal records to reintegrate into the community, become productive members of the workforce, and to provide for their families and themselves.”<sup>138</sup>

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<sup>129</sup> *Id.*

<sup>130</sup> Kevin McArdle, *Ban the Box Rally Held at the Statehouse*, N.J. 101.5 (May 2, 2013 5:19 AM), <http://nj1015.com/ban-the-box-rally-held-at-the-state-house-audio/>.

<sup>131</sup> Plump, *supra* note 127.

<sup>132</sup> *Id.*

<sup>133</sup> Henderson, *supra* note 34.

<sup>134</sup> *Id.*

<sup>135</sup> Joel Barras, *N.J. Latest State to Limit Employer’s Ability to Ask if Job Applicant Has Criminal Record*, FORBES (Aug. 12, 2014 2:42 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/08/12/new-jersey-becomes-latest-to-ban-the-box-prohibiting-employers-from-inquiring-about-applicants-criminal-record-during-initial-application-process/>.

<sup>136</sup> *N.J. STAT. ANN. §§ 34:6B-11–34:6B-19* (Westlaw 2015).

<sup>137</sup> Pete Brush, *NY Employers Likely To Respect NJ’s New ‘Ban The Box’ Law*, LAW360 (August 13, 2014, 6:42 PM), <http://www.law360.com/articles/566806/ny-employers-likely-to-respect-nj-s-new-ban-the-box-law>. The other five states to apply ban the box laws to public and private employers prior to NJ were HI, IL, MA, MN, and RI. OR has since passed a similar law. Rodriguez & Mehta, *supra* note 4, at 1.

<sup>138</sup> § 34:6B-15(j).



In passing this law, the New Jersey Legislature recognized that criminal background checks have increased dramatically in recent years, with estimates of up to 90% of large employers in the U.S. now conducting background checks during the hiring process.<sup>139</sup> Further, it recognized that barriers to employment based on criminal records stand to affect an estimated 65 million adults in the U.S. who have criminal records.<sup>140</sup> Moreover, the Legislature found that employment advertisements in the state frequently include language regarding criminal records that either explicitly precludes or strongly dissuades people from applying, and that individuals with criminal records represent a group of job seekers ready and able to contribute and add to the workforce of the state.<sup>141</sup>

The Act applies to employers in New Jersey that employ fifteen or more individuals over twenty calendar weeks.<sup>142</sup> This includes interns and apprentices but excludes domestic services employees, independent contractors, directors, and trustees.<sup>143</sup> The law prohibits an employer from inquiring about an applicant's criminal record until after the employer has conducted an interview, determined that the applicant is qualified for the position, and selected the applicant for the first choice to fill the position.<sup>144</sup> However, employers may perform criminal background checks prior to extending a formal offer to the applicant.<sup>145</sup>

The Act prohibits an employer from knowingly or purposefully publishing an advertisement that solicits applicants for employment where the advertisement explicitly states that the employer will not consider any applicant who has been arrested or convicted of a crime.<sup>146</sup> The Act provides exemptions for positions in law enforcement, the judiciary, homeland security, or emergency management.<sup>147</sup> There is also an exemption if the employment sought is for a position where the criminal history background check is required by law.<sup>148</sup> Employers who violate the Act are subject to a civil penalty of \$1,000 for the first

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<sup>139</sup> § 34:6B-15(b).

<sup>140</sup> § 34:6B-15(c).

<sup>141</sup> § 34:6B-15(d).

<sup>142</sup> § 34:6B-13; see also Jeffrey A. Gruen, *Update on New Jersey's 'Ban-the-Box' Law*, N.J. EMP. L. LETTER, Oct. 2012.

<sup>143</sup> § 34:6B-13.

<sup>144</sup> Barras, *supra* note 135.

<sup>145</sup> *Id.*

<sup>146</sup> § 34:6B-15.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation.<sup>149</sup> The law does not provide for a private cause of action.<sup>150</sup>

In response to concerns from business leaders, the bill was modified substantially before being introduced.<sup>151</sup> For example, an earlier draft of the bill provided that the law would apply to employers with five or more employees; the number was later increased to fifteen.<sup>152</sup> This change, in effect, reduced the number of employers required to ban the box. Other changes eliminated the possibility of employer liability by expressly precluding any job applicant's ability to file a lawsuit and raising the negligent hiring standard to "gross negligence."<sup>153</sup> Finally, the modifications eliminated the obligation of employers to explain why a criminal record rendered an applicant inappropriate for a particular job.<sup>154</sup>

As the result of lobbying from business and industry groups, a number of provisions of the law were omitted from the final statute.<sup>155</sup> Besides those provisions previously mentioned, the final law lacks a prohibition on considering certain types of criminal histories, including conviction records after a certain number of years and a requirement that an employer make a good faith effort to discuss the applicant's criminal record if it is of concern.<sup>156</sup>

The Opportunity to Compete Act preempts any local ordinances regarding criminal histories in the employment context adopted prior to the effective date of the Act.<sup>157</sup> For example, Atlantic City passed an ordinance in December 2011 which applied to the City and its vendors.<sup>158</sup> The ordinance provided that a background check could be performed only after a conditional offer of employment was given to an applicant.<sup>159</sup> In September

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<sup>149</sup> § 34:6B-19.

<sup>150</sup> Gruen, *supra* note 142.

<sup>151</sup> *The New Jersey Opportunity to Compete Act: Myths and Realities*, N.J. INST. FOR SOC. JUSTICE, [http://www.njsj.org/wp-content/uploads/2014/03/1\\_Opportunity-to-Compete-Act-Explanatory-Materials-Summary-Myths-Realities.pdf](http://www.njsj.org/wp-content/uploads/2014/03/1_Opportunity-to-Compete-Act-Explanatory-Materials-Summary-Myths-Realities.pdf).

<sup>152</sup> *Id.* at 18.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> Todd A. Berger, *Special Interests Succeed in Watering Down N.J. Opportunity to Compete Act*, COLLATERAL CONSEQUENCES RES. CTR. (Nov. 30, 2014), <http://ccresourcecenter.org/2014/11/30/special-interests-succeed-watering-nj-opportunity-compete-act/>.

<sup>156</sup> *Id.*

<sup>157</sup> *N.J. STAT. ANN.* § 34:6B-17.

<sup>158</sup> *Ban the Box Resource Guide*, Nat'l Emp't. L. Project 17 (July 2014), <http://www.nelp.org/content/uploads/2015/03/Bantheboxcurrent.pdf>.

<sup>159</sup> *Id.*

2012, Newark's City Council passed what was at the time the most comprehensive ban the box ordinance in the nation.<sup>160</sup> The ordinance applied to the City, private employers, local licensing, and housing.<sup>161</sup> Under the ordinance, an employer could not inquire into an applicant's criminal history until a conditional offer of employment was made.<sup>162</sup> The ordinance provided a limited "look back" period for offenses, ranging from eight years for indictable offenses to five years for disorderly persons or municipal ordinance convictions.<sup>163</sup> Thus, while the new legislation will have the effect of providing protection to the many municipalities and counties that have not adopted such legislation, the Opportunity to Compete Act actually has reduced the protections that were once afforded under Newark's comprehensive plan.

The New Jersey Department of Labor and Workforce Development has submitted proposed rules for the Opportunity to Compete Act.<sup>164</sup> These rules aim to define key terms used in the text of the law and to clarify any confusion that may result. Notably, the proposed rules provide a definition for the term "criminal record."<sup>165</sup> The proposed rules also provide a definition for the term "initial employment application process."<sup>166</sup>

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<sup>160</sup> *Id.* at 18.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> New Jersey Department of Labor and Workforce Development, 47 N.J.R. 601(a) (proposed Mar. 16, 2015) (to be codified at N.J.A.C. 12:68). Advocates of the Opportunity to Compete Act expressed frustration that rules for the new law were not adopted in a more timely fashion. See Matt Friedman, *Christie Administration Dragging its Feet on Convict Employment 'Second Chance' Law*, *Advocates Say*, NJ.COM (Feb. 27, 2015, 8:15AM), [http://www.nj.com/politics/index.ssf/2015/02/christie\\_administration\\_dragging\\_its\\_feet\\_on\\_law\\_b.html](http://www.nj.com/politics/index.ssf/2015/02/christie_administration_dragging_its_feet_on_law_b.html).

<sup>165</sup> *Id.* "Criminal record" is defined as

information collected from criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, release or conviction, including, but not limited to, any sentence arising from a verdict or plea of guilty or nolo contendere, including a sentence of incarceration, a suspended sentence, a sentence of probation, or a sentence of a criminal discharge.

*Id.*

<sup>166</sup> *Id.* "Initial employment application process" refers to

the period beginning when an applicant for employment first makes an inquiry to an employer about a prospective employment position or job vacancy or when an employer first makes an inquiry to an applicant for employment about a prospective employment position or job vacancy, and ending when an employer has conducted a first interview of

The regulations also make clear some issues that may be unclear from the text of the statute. For example, the proposed regulations state that if an applicant voluntarily discloses any information regarding his or her criminal record, this allows the employer to make inquiries to the applicant, or anyone else, about the applicant's criminal record during the initial interview process.<sup>167</sup>

## V. THE EFFECTIVENESS OF BAN THE BOX ACROSS THE COUNTRY

Although it would be almost impossible to predict the exact results of this new piece of legislation, insight may be gained into the possible effectiveness of the Opportunity to Compete Act by examining how successful similar laws have been in other locations. Three laws that have been studied include the ones enacted in the state of Hawaii; the County of Durham, North Carolina; and the City of Minneapolis, Minnesota. This section examines these case studies in turn.

### A. HAWAII

As previously mentioned, Hawaii became the first state to adopt a fair chance law for both public and private employers in 1998.<sup>168</sup> Haw. Rev. Stat. § 378-2.5 prevents employers from asking about an applicant's previous criminal history until after a conditional offer of employment has been made.<sup>169</sup> The employer's offer may be withdrawn if there exists a "rational relationship" between the conviction and the duties of the position sought.<sup>170</sup> Employers may only consider conviction records from the past ten years, excluding periods of incarceration.<sup>171</sup>

A study of the effects of this law yielded promising results.<sup>172</sup> This study examined data from the State Court Processing Statistics for Hawaii and determined that the ban

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an applicant for employment, whether the interview has been conducted in person or by any other means.

*Id.*

<sup>167</sup> *Id.*

<sup>168</sup> Rodriguez & Mehta, *supra* note 4, at 8.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> JoAnn Adkins, *Minor Tweak to Job Applications Could Reduce Crime, Researchers Find*, FIU NEWS (Jul. 30, 2014, 11:46 AM), <http://news.fiu.edu/2014/07/minor-tweak-to-job-applications-could-reduce-crime-researchers-find/79818>.

the box law led to a reduction in repeat offending.<sup>173</sup> The team of researchers found that criminal defendants prosecuted in Honolulu County for a felony were 57% less likely to have a prior criminal conviction after the ban the box law was implemented.<sup>174</sup> This statistic suggests that ban the box laws can reduce repeat offending by helping ex-offenders obtain employment.<sup>175</sup> However, the authors of the study noted that the research should be expanded as data availability restricted the study to a single county in Hawaii.<sup>176</sup>

## B. DURHAM COUNTY, NORTH CAROLINA

A ban the box law has been effective in Durham County, North Carolina since October 1, 2012.<sup>177</sup> As a result of the law, the County does not make an inquiry about an applicant's criminal history on initial employment applications unless a background check is required by law.<sup>178</sup> Employers may make this inquiry after the credentials of an applicant have been reviewed, the employer has determined that the applicant is qualified for the position, and the applicant has been recommended for hire by the department where there is a vacancy.<sup>179</sup> Expunged records of criminal arrests, dismissals, or convictions may not be used.<sup>180</sup> The administrative policy adopts language from the 2012 EEOC guidance and calls for the opportunity for an individualized assessment.<sup>181</sup>

A study of the law found that since the legislation took effect, the proportion of individuals with criminal records hired by the City of Durham has increased nearly seven fold.<sup>182</sup> In the County of Durham, the number of people with criminal records hired by the county government has increased three times.<sup>183</sup> Additionally, 96% of

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *North Carolina's Fair Chance Law*, VERIFYPROTECT.COM, <http://www.verifyprotect.com/ban-the-box/north-carolina/> (last visited Mar. 8, 2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> ATKINSON & LOCKWOOD, *supra* note 76, at 6.

<sup>183</sup> *Id.*

applicants with criminal records who were recommended for hire before the criminal check were ultimately hired for the position, even after the criminal background check was conducted.<sup>184</sup> The study noted that this effect was achieved without compromising public safety, as there has been no increase in workplace violence since the time the ban the box law went into effect.<sup>185</sup> These results would suggest that the County was successful in accomplishing the goals that it set out to achieve when enacting the ban the box law.

### C. MINNEAPOLIS, MINNESOTA

The City of Minneapolis, Minnesota passed a ban the box ordinance in December 2006.<sup>186</sup> In addition to banning the box, the resolution also requires employers to make a good faith determination of which positions require a criminal background check.<sup>187</sup> The resolution also states that employers may perform background checks only after applicants have been determined to be otherwise qualified.<sup>188</sup>

Reports show that the legislation resulted in the employment of more than half of the applicants who had a criminal conviction.<sup>189</sup> Additionally, after the initiative was instituted in 2007, city officials reported that transactional work associated with the hiring process decreased, and it did not slow down the hiring process.<sup>190</sup> Thus, these studies suggest that ban the box laws have been a success in other parts of the country.

## VI. WILL THE OPPORTUNITY TO COMPETE ACT WORK?

This section analyzes the potential effectiveness of New Jersey's ban the box law by comparing it to laws enacted in other states. Of course, it is impossible to predict every outcome of a new law; only time will tell its true effects. However, some insight may be gained by examining how the New Jersey law compares to others like it. Additionally, this section examines how the Act may impact employers outside of the Garden State.

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<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 7.

<sup>186</sup> *Ban the Box Resource Guide*, *supra* note 158, at 18.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Michelle Natividad Rodriguez, *Ban the Box Research Summary*, NAT'L EMP'T. L. PROJECT, [http://www.nelp.org/page/-/SCLP/2014/Guides/NELP\\_Research\\_Factsheet.pdf?nocdn=1](http://www.nelp.org/page/-/SCLP/2014/Guides/NELP_Research_Factsheet.pdf?nocdn=1) (last visited Jan. 15, 2015) (citing Christy Visser, Sara Debus, and Jennifer Yahner, *Employment After Prison: A Longitudinal Study of Releases in Three States*, URB. INST. (2008), [http://www.urban.org/UploadedPDF/411778\\_employment\\_after\\_prison.pdf](http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf)).

<sup>190</sup> *Id.*

## A. A COMPARISON TO OTHER STATES

When compared to similar legislation passed in other states, the Opportunity to Compete Act is less comprehensive in a few key ways. First, there is no limit to the screening that may be conducted, although such restrictions are in place in other states.<sup>191</sup> For example, in Colorado, the employer is asked to consider whether there is a “direct relationship” between the conviction and the job.<sup>192</sup> In Connecticut, employers are similarly asked to consider the nature of the crime and the relationship to the job.<sup>193</sup> In New Jersey, there is no explicit provision of the law that requires employers to consider the nature of the crime as compared to the job. Therefore, it is possible for applicants to be denied a position even though they committed a crime that is completely unrelated to the position for which they are applying.

While the New Jersey law limits the information that an employer may receive by excluding records that have been erased or expunged, other states have taken additional measures to limit the information that an employer may consider during the hiring process.<sup>194</sup> For example, states such as California and Massachusetts place time limits on the conviction history that may be considered by employers.<sup>195</sup> These limited “look-back” periods provide additional protections to ex-offenders.<sup>196</sup> The Opportunity to Compete Act lacks this protection and allows employers to review criminal histories that occurred decades before the applicant ever applied for the job. This seems especially problematic when an individual commits a crime early in his adulthood and the conviction follows him for the rest of his adult life.

Other states have taken additional measures that go beyond the average ban the box legislation. For example, in addition to its ban the box law, Minnesota recently passed an additional law targeted at improving the employment chances of ex-offenders, which became effective January 1, 2015.<sup>197</sup> The new “Second Chance” law provides for broader and more effective expungements of criminal records.<sup>198</sup> The enactment of this law after the ban the box legislation may suggest that the NJ Opportunity to Compete Act can only be the first step in ending employment discrimination against former offenders in

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<sup>191</sup> *Ban the Box Resource Guide*, *supra* note 158, at 15.

<sup>192</sup> COLO. REV. STAT. § 24-5-101(4)(b) (Westlaw 2015).

<sup>193</sup> CONN. GEN. STAT. § 46a-80(c)(1) (Westlaw 2015).

<sup>194</sup> *See generally Ban the Box Resource Guide*, *supra* note 158.

<sup>195</sup> *Id.* at 15.

<sup>196</sup> *Id.*

<sup>197</sup> Dean LeDoux, *Minnesota’s New Expungement Law: A Second Step to a Second Chance for Some Potential Employees?*, MODERN WORKSHOP (Jan. 13, 2015), <http://www.themodernworkplace.com/2015/01/minnesotas-new-expungement-law-second.html>.

<sup>198</sup> *Id.* An expungement seals an individual’s criminal record through a court order.

the state. Legislators in New Jersey may consider an expungement law like this one to further address the goals and purposes that the ban the box law has set out to accomplish.

In addition, enforcement attempts in other states suggest that the Garden State is likely to hit a few road bumps, especially in the early years of the law's enforcement. For example, after the enactment of a ban the box law in Minnesota, the Minnesota Department of Human Rights investigated complaints that involved the job applications of more than fifty companies in the state.<sup>199</sup> Most companies responded favorably to notification letters that were sent to them by the Department.<sup>200</sup> Among those companies fined was a trucking company in the southern part of the state.<sup>201</sup> The company simply stated that it was not aware that the law had changed and was surprised by the fine.<sup>202</sup>

This example suggests that it may take a while for all New Jersey employers, and especially small employers, to become aware of the law and to come into compliance with it. Small businesses may not have the time, resources, or knowledge to pay particular attention to the changing laws in this area. Other employers may rely on old application forms that fail to correct for the changes that this law brings.

The Minnesota example also suggests that the effectiveness of the law may depend on whether applicants come forward to the New Jersey Department of Labor and Workforce Development to report violations of the law.<sup>203</sup> If applicants do not report violations, employers may continue to ask criminal history questions on initial applications without facing reprimand. Therefore, in addition to employer knowledge of the law, the success of the Opportunity to Compete Act will hinge on applicants knowing the law and recognizing when a violation has occurred. This may be a problem. It seems unlikely that the average job applicant would be aware of her rights under the new law and may think nothing of the criminal history question, since it has become commonplace on job applications in recent years. Thus, it is difficult to gauge whether violations will actually be reported in a way that will allow the state to address them.

As pointed out in the Hawaii study, the effectiveness of ban the box laws also turn on employers' compliance with the law.<sup>204</sup> Due to fear of potential civil lawsuits, employers have reason to ignore these laws.<sup>205</sup> A small, informal study of twenty employers in

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<sup>199</sup> Jennifer Bjorhus, *New 'Ban the Box' Law Tripping up Minnesota Employers*, TRIBUNE (Nov. 17, 2014, 11:15 AM), <http://www.startribune.com/local/282888141.html>.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Jill R. Cohen, *Answering Your Questions on NJ's 'Ban the Box' Law*, LAW360 (Sept. 12, 2014, 10:43 AM), <http://www.law360.com/articles/571604/answering-your-questions-on-nj-s-ban-the-box-law>.

<sup>204</sup> D'Alessio, Stolzenberg & Flexon, *supra* note 32, at 7.

<sup>205</sup> *Id.*



Hawaii showed that only four of the employers were complying with the law by not asking about criminal records on applications.<sup>206</sup> If compliance is minimal, as this informal survey would suggest, it is unlikely that the laws will have the desired effect.<sup>207</sup> Thus, the success of the Opportunity to Compete Act depends, at least partially, on employers' willingness to comply with the law throughout the state. This is especially important considering that the average applicant may not be aware of the law, recognize violations, and report these violations to the proper authority.

The proposed rules for the Opportunity to Compete Act state that if an individual voluntarily offers information about her criminal history during the initial application process, then the employer is able to inquire further into the matter.<sup>208</sup> It is quite possible that criminal history can come up during a first interview, even if the employer does not mean to ask about it directly. For example, an employer may ask about large gaps in employment that are evidenced on the applicant's resume. If these gaps are due to periods of incarceration, the applicant may reveal this information, which can lead to further questioning on the matter. A situation like this would not run afoul of the Opportunity to Compete Act, although it would result in the employer learning about the employer's criminal history during the initial interview.

## B. EFFECTS BEYOND NEW JERSEY

If successful, it is quite possible that the statute will have effects beyond the Garden State. For example, experts projected that New York would be likely to follow New Jersey's lead in enacting ban the box legislation.<sup>209</sup> This is because the Opportunity to Compete Act had the potential to affect New York employers, especially those with operations both in New York City and in New Jersey.<sup>210</sup> This prediction proved to be true. In June 2015, the New York City Council passed the Fair Chance Act, which prohibits all public and private employers in the city from asking about an applicant's conviction record until the end of the hiring process.<sup>211</sup> A few months later, in September 2015, Governor Cuomo announced that New York State agencies would adopt fair chance hiring practices as well.<sup>212</sup>

As more and more ban the box laws are enacted, it may become difficult for employers, especially multijurisdictional employers, to keep track of which areas are

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> New Jersey Department of Labor and Workforce Development, *supra* note 164.

<sup>209</sup> Brush, *supra* note 137.

<sup>210</sup> *Id.*

<sup>211</sup> Rodriguez & Mehta, *supra* note 4, at 31.

<sup>212</sup> *Id.* at 11.

covered by such laws. For these reasons, it may be generally a wise idea for large employers to begin to comply with these laws regardless of whether they currently have an obligation to do so. Taking such steps may relieve future headaches and make compliance easier later on.

Indeed, some large employers have already begun to take these steps. In 2013, Target, one of the nation's largest retail employers, announced that it would remove questions about previous criminal history from its employment applications.<sup>213</sup> This decision came after Minnesota, Target's state of incorporation, passed a ban the box law.<sup>214</sup> Walmart similarly removed the criminal history box from its applications in 2010.<sup>215</sup> Perhaps other employers will follow in their footsteps in order to avoid creating different application forms for different locations and to make future violations less likely. This would certainly be advisable for companies that operate on a national level.

Since the time New Jersey has banned the box, the movement has continued to grow throughout the country. For example, the year 2015 saw the adoption of ban the box laws in Georgia, New York, Ohio, Oregon, Vermont, and Virginia.<sup>216</sup> It seems likely that the momentum will continue to gather in the months to come.

## VII. CONCLUSION

Ban the box laws have emerged nationwide in order to combat the problem of recidivism and to protect individuals with criminal histories from discrimination during the initial job application process. These laws have been passed at the state and local levels in various forms and with various protections for the individuals that they aim to protect. Although no federal statute has been passed on the matter to date, the discrimination associated with criminal history questions has been recognized by the EEOC, Congress, and the President. The laws have gained a wide range of supporters and opponents, some who argue that the laws go too far and others who argue that the laws do not go nearly far enough.

While it is impossible to know just how effective the Opportunity to Compete Act will be, a few predictions may be drawn from other cases. Hopefully, as in Hawaii, the New Jersey law will lower recidivism rates throughout the state. However, it seems as though this success is dependent partially on how willing employers are to comply and how often applicants report violations. The case from Minnesota suggests that it will take some time for employers, and especially for smaller employers, to become familiar with the law. The case also suggests that the Opportunity to Compete Act may be the

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<sup>213</sup> Brent Staples, *Target Bans the Box*, N.Y. TIMES (Oct. 29, 2013 3:18 PM), [http://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box/?\\_r=0](http://takingnote.blogs.nytimes.com/2013/10/29/target-bans-the-box/?_r=0).

<sup>214</sup> *Id.*

<sup>215</sup> *Voices in Support: Fair Chance Gains Support Across the Spectrum 2*, NAT'L EMP'T. L. PROJECT, <http://www.nelp.org/content/uploads/Voices-in-Support-Factsheet.pdf>.

<sup>216</sup> Rodriguez & Mehta, *supra* note 4, at 1.

first of many steps aimed at preventing discrimination against ex-offenders in the Garden State. It may be necessary to adopt further laws that complement the Act's purpose, such as additional legislation aimed at effective expungement of previous convictions. On a larger scale, it is possible that this law will make employers in other states begin to reconsider their application processes in anticipation that ban the box measures will grow nationally in the coming years. Likewise, national employers may consider changing their applications now in order to prevent headaches in the future.

Overall, the law demonstrates that the New Jersey State Legislature has acknowledged that recidivism is a major issue in the state that needs to be addressed by government action. The Opportunity to Compete Act is a step in the right direction in terms of ending employment discrimination in New Jersey, but it is likely only the first step of many necessary to protect individuals with criminal histories from unfair treatment in the workplace.