



Written by [Elad Hakim](#) on May 4, 2021

Under a Proposed Amendment, Private Employers Must Wait to Inquire About an Applicant's Criminal Record

Representatives Maxine Waters (D-Calif.) and David Trone (D-Md.) recently introduced the Workforce Justice Act, a proposed amendment to the Omnibus Crime Control and Safe Streets Act of 1968. In essence, the proposed law aims to prevent private employers from asking about or investigating an applicant's criminal history/record prior to a conditional offer of employment.

In 2019, the Fair Chance Act was [passed](#) and signed into law. The law applies to federal employers and/or contractors, and bans the box that employers use to ask about arrest and conviction history on job applications. It also permits a criminal background check only after a conditional job offer is made. It does not universally apply to private-sector jobs, however.

The proposed law aims to change that. Under the proposed [law](#), for a private employer to remain eligible for a grant under the Edward Byrne Memorial Justice Assistance Grant (JAG) Program, the employer is prohibited from:

- “(A) requiring an applicant to disclose whether the applicant has a criminal record;
- “(B) inquiring about the criminal record of an applicant prior to a conditional offer of employment; and
- “(C) conducting a criminal background check on an applicant prior to a conditional offer of employment.”

What, exactly, is JAG? According to the [Department of Justice](#) website, “the JAG program is the leading source of federal justice funding to state and local jurisdictions.” It provides states, tribes, and local governments with funding to support such things as law enforcement, prosecution, indigent defense, crime prevention and education, drug treatment and enforcement, mental-health programs and related law-enforcement and corrections programs, and others.

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Stated differently, this proposed law conditions the receipt of government funding on a private employer's agreement/commitment not to inquire about an applicant's criminal history or to conduct a criminal-background check until after a conditional offer of employment is made. In a recent press



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release, [Waters](#) stated:

For previously incarcerated men and women who are doing their part to reintegrate into society, the job application process is often stressful and debilitating due to the rate at which they are denied consideration for employment because of the fact that they have served time. This legislation to ban the box would take critical steps forward to ensure that the over 70 million Americans who have an arrest or conviction record are not left behind. By prohibiting private employers from asking about the criminal history of a job applicant prior to the extension of a conditional offer of employment, like my state of California has already done, job applicants with a criminal history will be evaluated based on their qualifications alone and have a fair shot at rebuilding and reclaiming their lives.

According to [Trone](#):

Right now, far too many justice-impacted individuals, primarily people of color, aren't being given a fair shot at employment because of their criminal history. When my company banned the box and hired 500 returning citizens, we saw a higher retention rate and more dependable employees. Banning the box isn't just good for business, it's just the right thing to do and brings us one step closer to a more just society.

While someone with a prior conviction and/or criminal history should definitely be encouraged to apply for employment, this proposed law seems to penalize the employer for the applicant's "poor decision" and/or wrong-doing. Moreover, there are certain types of jobs where knowledge of the applicant's criminal history is vital.

For example, suppose that an applicant, who happens to be a pedophile, applies for a position at a preschool or at a camp. How about an applicant with multiple DUI convictions who applies to work at a liquor store or as a truck driver for a private company? What if a large public employer (i.e., a grocery store) seeks to hire a cashier, yet is unable to inquire about an applicant's prior conviction for shoplifting or embezzlement before making a conditional offer?

There is no doubt that people with a criminal history should be permitted, encouraged, and able to find gainful employment and to contribute to society. This is vital for a healthy economy and helps to better their lives. However, some studies suggest that "banning the box" actually results in undesired consequences. For example, a 2016 article in the [Atlantic](#) referenced a paper from the National Bureau of Economic Research, where the authors examined how the implementation of ban-the-box policies impacted the probability of employment for young, low-skilled, black and Hispanic men. The findings were quite intriguing:

They found that ban-the-box policies decreased the probability of being employed by 5.1 percent for young, low-skilled black men, and 2.9 percent for young, low-skilled Hispanic men.

That's because, they say, when employers cannot access an applicant's criminal history, they instead discriminate more broadly against demographic groups that are more likely to have a criminal record. The paper indicated that this type of discrimination is especially prevalent in the Northeast, Midwest, and West, where there is a larger pool of non-black



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applicants to choose from. In the South, because such a large proportion of job applicants are black, the opportunity to discriminate is reduced, the paper finds. “There is rapidly-increasing evidence that [banning the box] has unintentionally done more harm than good when it comes to helping disadvantaged job-seekers find jobs,” they write.

Some opponents of “ban the box” laws argue that employers should have the right to know up front who they are hiring. This includes the individual’s background and any criminal history. Waters appears to suggest that a person’s “qualifications” for a particular job are separate and apart from that person’s criminal history and/or background. That conclusion is debatable. For example, a person who is very strong with numbers and math could be “qualified” to work as a cashier, yet his prior conviction for embezzlement/shoplifting are clearly relevant, and should certainly be considered, when gauging his “qualifications.”

More importantly, if an employer is permitted to inquire about, and to investigate, an applicant’s criminal history/background prior to finalizing an offer for employment, the applicant’s criminal background could *still* be a major factor in the employer’s ultimate hiring decision. In other words, if an employer is not willing to hire an applicant with a criminal history, will it really matter when the employer learns about it? This is not entirely clear.

The ostensible purpose behind the “ban the box” law is commendable. Those with a criminal history should be permitted to find gainful employment and to productively contribute to society. However, given some of the potential concerns and possible setbacks, perhaps a different and more equitable approach is necessary to obtain the desired results.

Or maybe the government should get out of the business of telling private employers how to run their businesses and let them decide whom they hire, and how they hire people. This also illustrates the problem of private businesses accepting government aid: The money always comes with strings attached. As the old saying goes, “He who pays the piper, calls the tune.”



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