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Ban the Box: A Call to the Federal Government to Recognize a New Form of Employment Discrimination

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BAN THE BOX: A CALL TO THE FEDERAL GOVERNMENT TO RECOGNIZE A NEW FORM OF EMPLOYMENT DISCRIMINATION

Christina O'Connell*

As the number of Americans with criminal histories grows significantly, states and cities across the nation have reacted by adopting ban-the-box laws. Ban-the-box laws received their name because they ban the criminal history box on initial hiring documents. The goal of the ban-the-box movement is to promote job opportunities for persons with criminal records by limiting when an employer can conduct a background check during the hiring process and encouraging employers to take a holistic approach when assessing an applicant's fit for a position.

There is no federal ban-the-box law, but states have taken varying approaches to adopting ban-the-box statutes. States have diverged on whether an employer can conduct a background check, the type of information an employer may consider, and enforcement techniques. The various state approaches, however, can potentially lead to compliance issues for employers that operate their businesses in multiple states.

This Note proposes that the federal government adopt a federal ban-the-box law, which would create a uniform framework for employer compliance. This new federal law should task the U.S. Equal Employment Opportunity Commission with enforcement responsibilities, because the agency has consistently proven capable of enforcing employment discrimination statutes.

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INTRODUCTION

Bernard Glassman, an accomplished aeronautical engineer with a doctorate in applied mathematics, wanted to help the low-income families in his neighborhood.¹ After deciding that steady employment would best help the members of the community, he started Greystone Bakery.² Referring to his hiring policy, Glassman said: “We did not do any checks on backgrounds. If they did a good job, they’d remain. If not, they’d go.”³ Giving many of these people—whose backgrounds would have denied them employment elsewhere—a chance to prove themselves made Glassman’s business model a success. Greystone Bakery’s commitment to the social good sparked the interest of the ice cream company Ben & Jerry’s, and soon Greystone became Ben & Jerry’s supplier of brownie wafers.⁴

In their book, *A Path Appears: Transforming Lives, Creating Opportunities*, Nicholas Kristof and Sheryl WuDunn discuss how businesses like Greystone Bakery had—and continue to have—a huge impact on the lives of their employees (many of whom have criminal records) and how these businesses use their resources to overcome many of the challenges facing the unemployed in our communities.⁵ For example, the book details how one ex-convict, Dion Drew, had the chance for a fresh start through his employment at Greystone.⁶ After four years in prison, Drew struggled to find a job because “employers would look at his criminal

1. NICHOLAS D. KRISTOFF & SHERYL WUDUNN, *A PATH APPEARS: TRANSFORMING LIVES, CREATING OPPORTUNITY* 203 (2014).

2. *Id.*

3. *Id.*

4. *Id.* at 206.

5. *See id.* at 207.

6. *Id.* at 206.

record and turn away.”⁷ Drew started out packing boxes at the bakery during the night shift, and he is now head of the research and development department.⁸ According to his employer, Drew is a model employee— “[h]e is never late, has had no absences, and gets bonuses for good work.”⁹ Drew has been able to start a college account for his daughter and contribute to his family.¹⁰ Drew is one example of the many employees at Greystone who come from diverse backgrounds, including drug addicts, ex-convicts, and the homeless.¹¹ Greystone serves as a shining example of how reducing employment barriers and hiring those with criminal records can have far-reaching positive effects on society without compromising the success of a business.¹²

Two-thirds of companies use criminal background checks.¹³ At the same time, over 65 million Americans have criminal records, causing issues for those who apply to employers who discriminate on the basis criminal histories.¹⁴ Many states have attempted to deal with this problem by adopting “ban-the-box” laws.¹⁵ However, because state laws vary, employers with offices in more than one state face difficulties complying with each state’s unique regulation. One solution consistent with the goals of the ban-the-box movement is for the federal government to adopt a ban-the-box law. This law would provide a national framework for employer compliance and best balance employers’ concerns over controlling their hiring process with an applicant’s desires of gaining employment.

This Note addresses the recent movement of states in adopting ban-the-box legislation. Part I provides the necessary context, discussing the history of these newly adopted state laws, as well as federal laws that may potentially preempt state ban-the-box legislation. Part II analyzes the main variations among state ban-the-box laws, focusing on six significant differences: (1) which employers are covered; (2) when background checks can be conducted; (3) what types of information an employer can use in making its employment decision; (4) what factors should be used to guide an employer’s consideration of a criminal background check; (5) what the employer’s duties are once a check has been completed; and (6) how these

7. *Id.*

8. *Id.* at 207.

9. *Id.*

10. *See id.*

11. *See id.*

12. *See id.* at 206.

13. *See Background Checking—The Use of Criminal Background Checks in Hiring Decisions*, SOC’Y FOR HUMAN RES. MGMT. (July 19, 2012), <http://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx> (finding that over 69 percent of employers conduct background checks before hiring an applicant).

14. MICHELLE RODRIGUEZ & MAURICE EMSSELLEM, NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY” 1, 3 (2011), *available at* http://www.nelp.org/page/-/65_million_need_not_apply.pdf?nocdn=1; *see also id.* at 27 n.2 (describing NELP’s methodology for estimating adults with criminal records).

15. “Ban-the-box” laws ban employers from asking whether an applicant has ever been arrested or convicted of a crime in the initial hiring materials. *See* MICHELLE RODRIGUEZ, NAT’L EMP’T LAW PROJECT, BAN THE BOX 3 (2014), *available at* <http://www.nelp.org/page/-/SCLP/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf?nocdn=1>.

laws are enforced. Part II then examines ban-the-box legislation that was introduced during the past two years in a number of states, as well as legislation in states that have not yet adopted ban-the-box laws but have similar laws relating to an employer's consideration of an applicant's criminal history. Part II concludes with a discussion of the major arguments for and against a state-by-state legislative approach to protecting persons with criminal backgrounds. Lastly, Part III proposes a uniform approach to the problem of unemployment among ex-offenders. The proposal focuses on creating a model federal ban-the-box law that the U.S. Equal Employment Opportunity Commission (EEOC) will enforce.

I. HISTORY OF BAN THE BOX AND ITS INTERACTION WITH FEDERAL LAWS

This part addresses the history of ban-the-box legislation and its development nationwide. It also addresses how two federal laws, Title VII of the Civil Rights Act of 1964¹⁶ and the Fair Credit Reporting Act¹⁷ (FCRA), overlap with, and potentially preempt, state ban-the-box initiatives.

A. *Development of Ban-the-Box Legislation*

The precursor to all state ban-the-box legislation was enacted in Hawaii in 1998.¹⁸ This legislation prohibits both public and private employers from asking an applicant about his or her criminal history until a conditional offer has been made.¹⁹ The law was enacted in light of a general reform movement in the United States to increase employment opportunities for persons with criminal histories.²⁰

Since 1998, the movement to promote hiring for people with criminal records has become known as the ban-the-box movement.²¹ The ban-the-box movement has so far expanded to thirteen states and fifty-two cities but is continuously gaining momentum.²² In 2014 alone, Delaware, Nebraska, and New Jersey adopted ban-the-box laws.²³ In general, ban-the-box laws forbid companies from asking about an applicant's criminal history on their

16. 42 U.S.C. §§ 2000e–2000e-17 (2012).

17. 15 U.S.C. §§ 1681–1681x (2012).

18. See HAW. REV. STAT. § 378-2.5(a), (d) (2013); 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/>. Hawaii was the first state to remove questions about criminal history from job applications, but the term “ban the box” was coined by the activist group “All of Us or None,” which began the movement in California. See Liam Julian, *States Ban the Box Removing Barriers to Work for People with Criminal Records*, JUSTICE CTR. (Dec. 19, 2014), <http://csgjusticecenter.org/reentry/posts/states-ban-the-box-removing-barriers-to-work-for-people-with-criminal-records/>.

19. See HAW. REV. STAT. § 378-2.5(b).

20. See Smith, *supra* note 18.

21. See *id.*

22. See RODRIGUEZ, *supra* note 15, at 2 (highlighting that, combining state and city adopted ban-the-box laws, there are thirty states with some kind of ban-the-box legislation).

23. *Id.*; see also DEL. CODE ANN. tit. 19, § 711(g) (West 2013); NEB. REV. STAT. § 48-202(1) (2014); N.J. STAT. ANN. § 34:6B-11-19 (West 2014).

initial hiring forms.²⁴ The laws also delay an employer's ability to conduct background checks until later in the hiring process to combat discrimination an applicant may face during the initial stages of hiring.²⁵

Employers have also adopted ban-the-box hiring policies.²⁶ For example, this past year, Target, the second largest retailer in America, announced that it will "ban the box" on its initial hiring documents in all of its locations.²⁷

"All of Us or None"—a national civil rights group mainly composed of the formerly incarcerated and their families—has greatly expanded the ban-the-box movement.²⁸ The group was formed in 2004, after recognizing the problems people with criminal histories experience reintegrating into society.²⁹ To combat these problems, All of Us or None is asking employers around the country to pledge to "open up opportunities for people with past convictions in our workplace."³⁰

Supporters of the ban-the-box movement cite the numerous benefits of incorporating people with prior criminal histories into the country's workforce.³¹ First, employing persons with criminal histories can help the economy by generating income tax and increasing sales tax revenue.³² Second, hiring persons with criminal histories can save society the cost of having past offenders return to the criminal justice system.³³ Third, employing persons with criminal histories can positively affect our communities by improving public safety,³⁴ as employment has been shown

24. See generally RODRIGUEZ, *supra* note 15.

25. See *id.* at 2.

26. See Smith, *supra* note 18 (stating that Target, Wal-Mart, and Bed, Bath & Beyond have all adopted the policy of not asking about an applicant's background during the initial stages of hiring).

27. Maxwell Strachan, *Target to Drop Criminal Background Questions in Job Applications*, HUFFINGTON POST (Oct. 29, 2013), http://www.huffingtonpost.com/2013/10/29/target-criminal-history-questions_n_4175407.html (noting that Target is both banning the box in all states in which it does business and is also focusing efforts on hiring former convicts).

28. *Take the Fair Change Pledge*, BAN THE BOX, <http://bantheboxcampaign.org/?p=20> (last visited Mar. 25, 2015). Some of the states in which supporters of All of Us or None are located include California, Colorado, Florida, Georgia, Illinois, New York, and Ohio. See *Endorsers*, BAN THE BOX, http://bantheboxcampaign.org/?page_id=14 (last visited Mar. 25, 2015) (including a full list of supporters).

29. *About*, BAN THE BOX, <http://bantheboxcampaign.org/?p=20> (last visited Mar. 25, 2015). It is reported that over 65 million Americans (approximately one in four adults) have a criminal record that could be revealed in employer's background checks. RODRIGUEZ & EMSELLEM, *supra* note 14, at 3.

30. See *Take the Fair Chance Pledge*, *supra* note 28. Other aspects of the pledge include welcoming back people to the community after incarceration, instituting fair hiring practices, and eliminating any restrictions on participation of people with arrest or conviction histories in society. *Id.*

31. See MICHELLE RODRIGUEZ, NAT'L EMP'T LAW PROJECT, "BAN THE BOX" RESEARCH SUMMARY 2 (2014), available at http://www.nelp.org/page/-/SCLP/2014/Guides/NELP_Research_Factsheet.pdf?nocdn=1 (noting that nearly 700,000 people return to their home communities from incarceration every year).

32. *Id.* at 1–2.

33. *Id.*

34. *Id.* at 2.

to be a very important factor in decreasing recidivism.³⁵ Finally, hiring persons with criminal histories will reduce the burden on their families, who will be spared the economic strain of supporting the unemployed individual.³⁶

Supporters also argue that this movement is necessary because a 1999 study found that over 76 percent of hiring discrimination takes place during the initial hiring process.³⁷ As a result of this practice, applicants with criminal records are significantly less likely to be called in for an interview.³⁸ In a study conducted in New York City, the existence of a criminal record reduced the likelihood of an applicant's callback by over 50 percent.³⁹ Substantial data shows that personal contact with an applicant may allow the applicant to put his or her criminal record into context and change the employer's initial perception.⁴⁰

Employers are hostile to the ban-the-box movement because they worry that limitations on when a background check may be conducted will make it harder for employers to ensure that their workplaces are safe.⁴¹ Employers are also concerned about the threat of negligent hiring liability.⁴² Statistics show that negligent hiring can and often does result in substantial damage awards.⁴³ It is therefore important for an employer to consider not only an

35. See Mark T. Berg & Beth M. Huebner, *Reentry and the Ties That Bind: An Examination of Social Ties, Employment, and Recidivism*, 28 JUST. Q. 382, 389 (2011). Two years after release ex-offenders who were employed were half as likely to face arrest or conviction. *Id.* Another study concluded that a 1 percent drop in the unemployment rate causes a 2 percent decline in burglary, a 1.5 percent decrease in larceny, and a 1 percent decrease in auto theft. See Steven Raphael & Rudolf Winter-Ebmer, *Identifying the Effect of Unemployment on Crime*, 44 U. CHI. J.L. & ECON. 259, 273 (2001).

36. See RODRIGUEZ, *supra* note 31, at 2. For example, in one study where interviews were conducted among family members of previously incarcerated men, it was found that 83 percent of families had provided financial support to the previously incarcerated family member. See Rebecca L. Naser & Christy A. Visher, *Family Members' Experiences with Incarceration and Reentry*, 7 W. CRIMINOLOGY REV. 20, 26 (2006). One-third of those giving aid stated that this support was causing financial challenges. *Id.*

37. See Devah Pager, *The Mark of a Criminal Record*, 105 AM. J. SOC. 937, 948 (2003).

38. Jessy Stout, policy director for the sponsor of All of Us or None explains, "The idea is that someone is able to have a holistic first encounter, where someone who sits down for an interview is not judged based on their convictions." See Chad Brooks, *Growing 'Ban the Box' Movement Impacts Hiring Practices*, FOX BUS. (Aug. 14, 2014), <http://smallbusiness.foxbusiness.com/legal-hr/2014/08/14/growing-ban-box-movement-impacts-hiring-practices/>.

39. See DEVAH PAGER & BRUCE WESTERN, NAT'L INST. JUSTICE, INVESTIGATING PRISONER REENTRY: THE IMPACT OF CONVICTION STATUS ON THE EMPLOYMENT PROSPECTS OF YOUNG MEN 4 (2009).

40. See RODRIGUEZ, *supra* note 31, at 4. In one study, researchers found that having personal contact with the employer reduced the negative effect of a criminal record by approximately 15 percent. See Devah Pager, Bruce Western & Naomi Sugie, *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANN. AM. ACAD. POL. SOC. SCI. 195, 200 (2009).

41. See Smith, *supra* note 18.

42. "Negligent hiring" refers to a legal remedy available to third parties who are injured by the acts of an employee, and who seek to hold the employer liable because of the employer's "deep pockets." *Welsh Mfg., Div. of Tectron, Inc. v. Pinkerton's, Inc.*, 474 A.2d 436, 439-41 (R.I. 1984).

43. See Mary L. Connerley, Richard D. Arvey & Charles J. Bernardy, *Criminal Background Checks for Prospective and Current Employees: Current Practices Among*

applicant's qualification and relevant experience but also their background to gauge their potential for harm.⁴⁴

Supporters of the ban-the-box movement, however, argue that ban-the-box laws do not increase an employer's liability for negligent hiring because the laws do not forbid a background check.⁴⁵ The laws only limit *when* the check may occur in the hiring process.⁴⁶ Further, states have created exemptions from the law's coverage when the job position is sensitive in nature (for example, when the job involves working with the elderly or with children).⁴⁷

Employers also express concerns over hiring those with criminal histories because of the probability that an ex-offender will reoffend.⁴⁸ For example, in a 2005 study conducted by the Bureau of Justice Statistics, data showed that five years after release from incarceration, approximately 77 percent of ex-convicts again had been arrested.⁴⁹ In this manner, time since release from prison appears to adequately measure a convict's recidivism rate.⁵⁰ However, supporters argue that employers are not considering the whole picture, pointing to evidence demonstrating that as time since release increases, recidivism rates decline significantly.⁵¹

In response to employer concerns, advocates of the ban-the-box movement also highlight a potential benefit for employers: hiring a person with a criminal background gives the employer a chance to gain an exceptionally committed employee.⁵² There is substantial evidence showing that those who have been incarcerated see their employment opportunity as chance to reintegrate into their communities and prove themselves as contributing members of society.⁵³ Employers should consider the effects that employment can have on recidivism rates and how an applicant who has struggled to find employment would value the position.

Municipal Agencies, 30 PUB. PERSONNEL MGMT. 173, 174 (2001) (finding that employers lose around 72 percent of negligent hiring cases with an average settlement of more than \$1.6 million).

44. See Aaron F. Nadich, *Ban the Box: An Employer's Medicine Masked As a Headache*, 19 ROGER WILLIAMS U. L. REV. 768, 777 (2014).

45. See Smith, *supra* note 18.

46. See *id.*

47. See *id.*

48. See Stacy Hickox, *Employer Liability for Negligent Hiring of Ex-Offenders*, 55 ST. LOUIS U. L.J. 1001, 1002 (2011) (noting how employer concerns about "potential liability for harm . . . may increase substantially" when an employee has a criminal record).

49. See Press Release, Bureau of Justice Statistics, 3 in 4 Former Prisoners in 30 States Arrested Within 5 Years of Release (Apr. 22, 2014), *available at* <http://www.bjs.gov/content/pub/press/rprts05p0510pr.cfm> (stating that two-thirds of a sample of prisoners released were arrested for a new crime within three years, and three-fourths were arrested within five years).

50. RODRIGUEZ, *supra* note 31, at 4.

51. One study shows that six or seven years after incarceration, those with criminal records have only a marginally higher rate of committing a crime than those who have never committed an offense. See Megan Kurlychek, *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 483, 499 (2006).

52. RODRIGUEZ, *supra* note 31, at 4–5.

53. *Id.*

B. Federal Legislation

Before this Note discusses ban-the-box legislation at the state level, this section looks at how existing federal laws could address employment discrimination for ex-convicts. Two federal laws, Title VII and the FCRA, have substantial overlap with ban-the-box regulations. Part I.B.1 addresses how the EEOC and Title VII has the potential to cover a large portion of ban-the-box cases and how courts have interpreted Title VII's provisions to extend to situations where an employer discriminates on the basis of criminal history. Part I.B.2 conducts the same analysis for the FCRA and its enforcement agency, the Federal Trade Commission (FTC). Part I.B.3 discusses the recent increase in litigation under these two federal statutes.⁵⁴ Finally, Part I.B.4 explains how either Title VII or the FCRA can potentially preempt state ban-the-box legislation, because these laws regulate similar discriminatory hiring practices.

1. Disparate Impact Claims under Title VII

Title VII bars employers from discriminating on the basis of race, color, religion, sex, and national origin.⁵⁵ Under Title VII, an applicant may be able to bring a disparate impact claim against an employer who uses the applicant's criminal history to deny the applicant a job.⁵⁶ Disparate impact refers to hiring policies that are neutral on their face, but "discriminatory in operation."⁵⁷ The disparate impact theory was first adopted by the U.S. Supreme Court in *Griggs v. Duke Power Co.*⁵⁸ In *Griggs*, the Court articulated the disparate impact doctrine by holding that under Title VII, employers cannot maintain an employee screening policy that excludes a protected class from gaining employment even if the policy is neutral on its face.⁵⁹

Today, disparate impact claims are analyzed under a three-part burden-shifting framework codified in the Civil Rights Act of 1991.⁶⁰ First, the

54. For a more in-depth discussion on how Title VII and the FCRA have "introduced a series of new and vexing problems for both employers and [persons] with criminal records," see Kimani Paul-Emile, *Beyond Title VII: Rethinking Race, Ex-Offender Status, and Employment Discrimination in the Information Age*, 100 VA. L. REV. 893, 897 (2014).

55. 42 U.S.C. § 2000e-2 (2012). Title VII applies to any employer with fifteen or more employees. *Id.* § 2000e(b).

56. See Johnathan J. Smith, *Banning the Box But Keeping the Discrimination?: Disparate Impact and Employer's Overreliance on Criminal Background Checks*, 49 HARV. C.R.-C.L. L. REV. 197, 199–200 (2009).

57. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

58. 401 U.S. 424 (1971).

59. *Id.* at 430. The plaintiff challenged an employer policy requiring applicants to have either a high school diploma or pass a general intelligence test in order to gain employment, when such skills were not necessary for the job sought. *See id.* at 425–26. Since such requirements had a negative impact on black applicants and were not related to job success, the U.S. Supreme Court held that the company had violated Title VII. *Id.* at 431. The Court held that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.*

60. 42 U.S.C. § 2000e-2. The three-part burden-shifting framework was originally adopted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), before it was later

plaintiff must establish that the employer's facially neutral employment practice has a significantly adverse impact on a protected class.⁶¹ Second, if the complaining party meets this burden, the employer has the opportunity to demonstrate that the policy is consistent with "business necessity."⁶² Third, the plaintiff still can prevail if he or she demonstrates that there is a less discriminatory alternative to the stated policy.⁶³

An employer policy that discriminates on the basis of a criminal background could inadvertently discriminate on the basis of race because the prison population in the United States disproportionately consists of African American and Hispanic men.⁶⁴ One in every fifteen black men and one in every thirty-six Hispanic men are incarcerated.⁶⁵ This is compared to one in every 106 white men.⁶⁶ It also is alleged that black and Hispanic men are arrested in much higher proportions than their white counterparts, in part because of racial profiling and discriminatory criminal justice policies.⁶⁷ For example, New York City's stop-and-frisk program has been the target of much criticism because of its disproportionate effects on minorities.⁶⁸ One study compiling data from the Bureau of Labor Statistics found that 49 percent of black men, 44 percent of Hispanic men, and 38

codified in the Civil Rights Act. The Court in *McDonnell* held that a plaintiff must first make out a prima facie case of discrimination, with the burden then shifting to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* at 802. Finally, even if the employer provides a legitimate nondiscriminatory reason for a policy, the plaintiff can still show that a less discriminatory alternative exists. *Id.*

61. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

62. *Id.* Business necessity has had changing meanings over the years in Supreme Court opinions. See generally Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1478 (1995) (discussing the meaning of business necessity and how the Supreme Court has altered the burden on employers to demonstrate "business necessity" over time).

63. 42 U.S.C. § 2000e-2(b)(k)(1)(A)(ii).

64. See Sophia Kerby, *The Top 10 Most Startling Facts About People of Color and Criminal Justice in the United States*, CTR. AM. PROGRESS (Mar. 13, 2012), <http://www.americanprogress.org/issues/race/news/2012/03/13/11351/the-top-10-most-startling-facts-about-people-of-color-and-criminal-justice-in-the-united-states/>.

65. See *Infographic: Combating Mass Incarceration—The Facts*, AM. CIVIL LIBERTIES UNION (June 17, 2011), <https://www.aclu.org/combating-mass-incarceration-facts-0>.

66. See *id.*

67. Smith, *supra* note 56, at 198–99. FBI statistics reveal that African Americans accounted for more than three million arrests in 2009 (28 percent of total arrests), even though they represented around 13 percent of the total population in the past decade; whites, who have made up around 72 percent of the population in the past decade, accounted for fewer than 7.4 million arrests (69.1 percent of total arrests). *Id.*

68. Stop and frisk allows the police to arrest individuals who the police reasonably suspect may have committed crimes. See *Stop and Frisk Facts*, N.Y. CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1598> (last visited Mar. 25, 2015). Critics argue that stop and frisk policies are discriminatory because of the broad discretion given to law enforcement agencies. See *id.* Between 2002 and 2011, blacks and Latinos residents made up 90 percent of those who were stopped. *Id.* But see *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (upholding the use of stop-and-frisk policies in light of the governmental interest in effective crime prevention and detection). There is also evidence demonstrating that such policies have huge impacts on decreasing crime in their respective neighborhoods. See David Rudovsky & Lawrence Rosenthal, *The Constitutionality of Stop-and-Frisk in New York City*, 162 U. PA. L. REV. ONLINE 117, 119 (2013).

percent of white men had been arrested by the age of 23.⁶⁹ With such disparities in arrest rates among races, an employer policy that discriminates on the basis of criminal background checks could also discriminate on the basis of race, a protected Title VII class.⁷⁰

To allege that an employer has discriminated on the basis of criminal background, a claimant must first file a claim with the EEOC.⁷¹ As the agency charged with enforcing Title VII, the EEOC will investigate to determine if there is a “reasonable cause” that the claimant suffered actionable discrimination.⁷² If the EEOC finds reasonable cause, the agency will proceed with the claimant’s case through mediation, arbitration, or litigation.⁷³ If the EEOC declines to take up the case, the claimant will be issued a Notice-of-Right-to-Sue, granting permission to file a lawsuit.⁷⁴

The outcome of lawsuits which claim discrimination on the issue of conviction records have been mixed. The analysis stems from the 1975 Eighth Circuit decision, *Green v. Missouri Pacific Railroad Co.*⁷⁵ In *Green*, a black job applicant brought a Title VII claim against the Missouri Pacific Railroad Company for having an employment policy that “refus[ed] consideration for employment to any person convicted of a crime other than a minor traffic offense.”⁷⁶ The plaintiff argued that this policy violated Title VII because it excluded a higher number of black applicants than white applicants and was not job related.⁷⁷ The defendant argued that such

69. See Joe Palazzolo, *Study: 49% of Black Men Are Arrested by Age 23*, WALL ST. J. (Jan. 8, 2014, 12:38 PM), <http://blogs.wsj.com/law/2014/01/08/study-49-of-black-men-are-arrested-by-age-23/>. When analyzing this disparity, it is important to keep in mind that blacks and Hispanics make up a much smaller portion of the population than whites, which means that the statistical differences are more pronounced than at first glance. In 2013, the U.S. Census Bureau reported that whites made up 77.7 percent of the population, blacks 13.2 percent, and Hispanics 17.1 percent. *State & County Quick Facts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Mar. 25, 2015).

70. See Smith, *supra* note 56, at 199–200.

71. See *Administrative Enforcement and Litigation*, EEOC, http://www.eeoc.gov/eeoc/enforcement_litigation.cfm (last visited Mar. 25, 2015). Although the EEOC enforces Title VII, the EEOC cannot create rules that will be binding on courts based on Title VII’s substantive provisions. See *Edelman v. Lynchburg Coll.*, 535 U.S. 106, 122 (2002) (O’Connor, J., concurring); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991). Courts will consider EEOC regulations based on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994); see also James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 505 (discussing how Courts have not given EEOC guideline the “same weight as rules that Congress has declared”).

72. 42 U.S.C. § 2000e-5(b) (2006).

73. *Id.* § 2000e-5(f)(1), (3); see also *About EEOC*, EEOC, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Mar. 25, 2015).

74. 42 U.S.C. § 2000e-5(b); see also *Filing a Lawsuit*, EEOC, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Mar. 25, 2015) (discussing the proper procedures for a plaintiff to bring a Title VII claim).

75. 523 F.2d 1290 (8th Cir. 1975); see also EEOC, EEOC POLICY STATEMENT ON THE USE OF STATISTICS IN CHARGES INVOLVING THE EXCLUSION OF INDIVIDUALS WITH CONVICTION RECORDS FROM EMPLOYMENT, <http://www.eeoc.gov/policy/docs/convict2.html> (last updated Sept. 20, 2006).

76. *Green*, 523 F.2d at 1292.

77. See *id.*

policy was necessary because of theft, negligent liability, and employment disruption concerns.⁷⁸ The Eighth Circuit upheld the plaintiff's Title VII claim, stating that a policy that disqualifies black applicants at a higher rate than white applicants is discriminatory.⁷⁹ Further, the court held that the employer did not meet its burden for the "business necessity" defense, as fears about theft and negligent hiring were insufficient to justify the discriminatory policy.⁸⁰

While *Green* is a success story for individuals seeking protection from an employer's discriminatory use of background checks, similar plaintiffs bringing disparate impact claims have had low success rates.⁸¹ Courts have made Title VII claims harder to bring by increasing the plaintiff's burden for establishing a prima facie case and making it easier for an employer to meet the business necessity defense.⁸²

Courts have increased the plaintiff's burden by rejecting the argument that a policy of not hiring persons with criminal backgrounds is racially discriminatory given the disproportionate representation of minorities in the prison population.⁸³ For example, in *EEOC v. Freeman*,⁸⁴ a district court held that for a plaintiff to meet its prima facie showing of disparate impact, the statistics used "must be representative of the relevant applicant pool."⁸⁵ Since the EEOC in this case used statistics based only on the population at large and not the relevant applicant pool, the court found the statistics inadequate to satisfy the necessary burden of proof.⁸⁶ This higher burden, which requires plaintiffs to tailor their statistics to each employer's hiring pool, makes it harder for plaintiffs to bring forth evidence to support their case.

Courts also have made it harder for plaintiffs to bring successful Title VII claims by expanding what qualifies as a "business necessity" defense.⁸⁷

78. *See id.* at 1298.

79. *Id.* at 1293, 1296.

80. *Id.* at 1298 ("To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.").

81. *See Smith, supra* note 56, at 205.

82. *See id.*; *see also supra* notes 61–62 and accompanying text.

83. The shift in requiring a plaintiff to bring forth specific evidence tailored to the job at issue began with court decisions in the 1980s and has persisted until this day. *See Smith, supra* note 56, at 206; *see also EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 737–38, 751 (S.D. Fla. 1989) (holding the EEOC's data analyzing disparities between rates of prison sentences for Latinos and whites as insufficient because it was not specific to the "national origin composition of the jobs at issue and the national origin composition of the relevant labor market"); *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1302 (S.D.N.Y. 1981) (holding that plaintiff's presentation of arrest and conviction statistics for several time periods, geographic locations, and the population as a whole was insufficient because it was not specific enough to the position for which applicant applied).

84. 961 F. Supp. 2d 783 (D. Md. 2013).

85. *Id.* at 798.

86. *Id.*

87. *See, e.g., Clinkscale v. City of Phila.*, No. Civ. A. 97–2165, 1998 WL 372138, at *2 (E.D. Pa. June 16, 1998) (holding that it was fair for a police department to base hiring decisions on arrest records even if the arrests never led to convictions because "an unjustified arrest may be indicative of character traits that would be undesirable in a police

One of the more important decisions in this area is *El v. Southeastern Pennsylvania Transportation Authority*.⁸⁸ In *El*, the Third Circuit held that an employer's policy does not have to take into account the varying individual characteristics of each applicant, rather that policies could satisfy business necessity as long as they "accurately distinguish between applicants that pose an unacceptable level of risk and those that do not."⁸⁹ By allowing employers to have general hiring policies that do not consider each applicant as a unique individual, an employer's business necessity defense can justify the use of discriminatory hiring policies.

2. Fair Credit Reporting Act and Its Interpretations

The FCRA not only regulates an employer's use of criminal background information but also the credit reporting agencies (CRAs) in charge of compiling such information. The FCRA applies to all "users of consumer reports" and CRAs,⁹⁰ including employers who conduct background checks on prospective job applicants.⁹¹ The goal of the FCRA is to monitor accuracy in credit reporting by regulating CRAs and employer disclosure once a report is consulted.⁹²

Until 2010, the statute was solely enforced by the FTC⁹³ with its "procedural, investigative, and enforcement powers."⁹⁴ The FCRA gives the FTC power to issue "procedural" rules enforcing the requirements of the FCRA.⁹⁵ However, the FTC does not have the authority to issue rules with

officer"); *Carolina Freight Carriers Corp.*, 723 F. Supp. at 752 (allowing the employer to screen applicants based on criminal records because company losses often came from employee theft).

88. 479 F.3d 232 (3d Cir. 2007).

89. *Id.* at 245.

90. See Fair Credit Reporting Act, 15 U.S.C. §§ 1681a, 1681f, 1681m (2012). A "consumer reporting agency" means "any person which, for monetary fees . . . regularly engages . . . in the practice of assembling or evaluating . . . information on consumers for the purpose of furnishing consumer reports to third parties." *Id.* § 1681a.

91. See *id.* § 1681a(4); see also *id.* § 1681a(h) ("The term 'employment purposes' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."); *Employment Background Checks*, FTC, <http://www.consumer.ftc.gov/articles/0157-employment-background-checks> (last visited Mar. 25, 2015).

92. See Luke Casselman, *Permissive Discrimination: How Committing a Crime Makes You a Criminal in Georgia*, 65 MERCER L. REV. 759, 786 (2013). The FCRA's purpose is "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information." See 15 U.S.C. § 1681b.

93. In 2010, the authority to publish FCRA rules and guidelines was given to the Consumer Financial Protection Bureau (CFPB). See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5581(5) (2010); *CFPB Tasked with FCRA Interpretation—FTC Issues Staff Report to Aid Transition*, INFO. LAW GROUP (July 26, 2011), <http://www.infolawgroup.com/2011/07/articles/fcra-and-facta/cfpb-tasked-with-fcra-interpretation-ftc-issues-staff-report-to-aid-transition>. However, the FTC and CFPB have some overlapping enforcement authority over FCRA claims. See *CFPB Tasked with FCRA Interpretation—FTC Issues Staff Report to Aid Transition*, *supra*.

94. 15 U.S.C. § 1681s(a)(1).

95. See *id.*

the force of law.⁹⁶ As with the EEOC's guidelines for enforcing Title VII, any procedural rules issued by the FTC to administer the FCRA will be examined by the court based on their "power to persuade."⁹⁷

The FCRA outlines three basic requirements for using a background check. First, the employer must receive signed permission from the applicant prior to conducting the background check.⁹⁸ Second, if the employer wishes to use information from the background check to deny an applicant employment, the employer must provide the applicant with a copy of the report and a document summarizing the applicant's rights under the FCRA.⁹⁹ Lastly, if the employer does take adverse action against the applicant based on the contents of the background check, notice must be provided.¹⁰⁰ Notice must include: (1) the name, address, and phone number of the company that supplied the information, (2) a statement that the CRA is unable to provide the consumer with reasons why the adverse action was taken, and (3) a notice of the right to dispute the accuracy of the report.¹⁰¹

The FCRA also provides courts with guidance on the level of civil penalties to impose for employer violations.¹⁰² Courts should consider (1) the degree of the employer's culpability, (2) the employer's history of prior violations, (3) the employer's ability to pay, (4) the effect of the penalty on the continuation of the employer's business, and (5) such other matters "as justice may require."¹⁰³

The statutory language of the FCRA has the potential to provide applicants with a chance to challenge a misleading report prepared by a CRA and the opportunity to discuss prior criminal history with the employer. However, plaintiffs have had low success rates because courts have required a high showing to hold CRAs liable for inaccurate reporting and the FTC has not provided much guidance on the interpretation of the FCRA's provisions.¹⁰⁴

While the FCRA does offer individuals a private cause of action¹⁰⁵ against CRAs, the claimant must prove that the inaccuracies were due to

96. See 16 C.F.R. § 1.73(a)(2) (2001); *McPhee v. Chilton Corp.*, 468 F. Supp. 494, 496, n.4 (D. Conn. 1978) (noting that the FTC does not have the power to issue binding law, but its views are persuasive because Congress gave it the power to administer the Act).

97. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994).

98. See 15 U.S.C. § 1681b(b)(2)(A).

99. See *id.* § 1681b(b)(3)(A).

100. *Id.* § 1681b (b)(3)(B)(i).

101. *Id.*

102. *Id.* § 1681s(a)(2)(A).

103. *Id.* § 1681s(a)(2)(B).

104. See Casselman, *supra* note 92, at 788.

105. A private right of action is "a private person's right to invoke a federal enforcement statute against another private person in a civil suit." See James T. O'Reilly, *Deregulation and Private Causes of Action: Second Bites at the Apple*, 28 WM. & MARY L. REV. 235, 235 (1987).

“negligent or willful noncompliance.”¹⁰⁶ The plaintiff also must show that such violation proximately caused the plaintiff’s injury.¹⁰⁷

Plaintiffs have difficulty proving FCRA violations because courts have refused to hold CRAs liable for (1) providing information on charges that were later dropped or (2) issuing reports that contain inaccuracies,¹⁰⁸ despite the well-known fact that credit reports are often incomplete or misleading.¹⁰⁹ Under a technical accuracy approach, “a credit reporting agency satisfies its duty of accuracy [under the FCRA] if it produces a report that contains factually correct information about a consumer that might nonetheless be misleading or incomplete in some respect.”¹¹⁰ The technical accuracy approach is shown in *Obabueki v. Choicepoint, Inc.*¹¹¹ In *Obabueki*, the plaintiff sued Choicepoint for providing the potential employer, IBM, with an incomplete criminal history report.¹¹² While the applicant previously had been convicted of “committing fraud in obtaining public assistance,” the conviction had been dismissed two years later.¹¹³ The report provided by Choicepoint, however, only contained information about the charge (not the dismissal) leading the employer to withdraw the applicant’s job offer.¹¹⁴ The court did not find Choicepoint liable for reporting only the conviction without any information concerning the dismissal.¹¹⁵ *Obabueki* shows how CRAs can avoid liability for providing incomplete information on criminal charges, placing a high burden on the applicant to ensure that their record reflects all current dismissal information.

Plaintiffs also face difficulty in proving violations of the FCRA by CRAs because, to prove a violation, a plaintiff must convince a jury that a CRA’s

106. 15 U.S.C. §§ 1681n, 1681o.

107. See *Garrison v. Equifax Info. Servs., LLC*, No. 10–CV–13990, 2012 WL 1278048, at *9 (E.D. Mich. Feb. 13, 2012); *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1238 (E.D. Mich. 1980).

108. Since there is little guidance from the FTC on what exactly is accurate, some courts have held that an incomplete or misleading report is not inaccurate as long as the information is not false. See, e.g., *Smith v. HireRight Solutions, Inc.*, 711 F. Supp. 2d 426, 433 n.5 (E.D. Pa. 2010) (stating that the Sixth Circuit has adopted a “technical accuracy” standard which allows a CRA to satisfy its duty by producing a report that is factually correct even if it is incomplete (citing *Holmes v. TeleCheck Int’l*, 556 F. Supp. 2d 819, 833 (M.D. Tenn. 2008))); *Heupel v. Trans Union LLC*, 193 F. Supp. 2d 1234, 1240 (N.D. Ala. 2002) (“[r]equiring that each report be void of material omission would place too great a burden on credit reporting agencies”); *Grant v. TRW, Inc.*, 789 F. Supp. 690, 692 (D. Md. 1992) (distinguishing between the requirements of accuracy and completeness).

109. See Derek Gilna, *Criminal Background Checks Criticized for Incorrect Data, Racial Discrimination*, PRISON LEGAL NEWS, Feb. 2014, at 40, available at <https://www.prisonlegalnews.org/media/issues/02pln14.pdf> (explaining that even the gold standard FBI’s records are widely inaccurate); Editorial, *Accuracy in Criminal Background Checks*, N.Y. TIMES, Aug. 10, 2012, at A18 (commenting on the problems of inaccuracy when companies purchase records in bulk and urging the FTC to step up its scrutiny).

110. *Cahlin v. Gen. Motors Acceptance Corp.*, 936 F.2d 1151, 1157 (11th Cir. 1991).

111. 236 F. Supp. 2d 278 (S.D.N.Y. 2002).

112. *Id.* at 279–80.

113. *Id.* at 280.

114. *Id.* at 281.

115. *Id.* at 284.

procedure for obtaining and using background checks is unreasonable.¹¹⁶ This task is made more difficult because there is a lack of guidance from courts and the FTC on how to interpret the “reasonableness” of such procedures.¹¹⁷ Courts have suggested that, in analyzing the reasonableness of a CRA’s procedure for evaluating background checks, juries should “[weigh] the potential harm from inaccuracy against the burden of safeguarding against such inaccuracy.”¹¹⁸ The FTC guidelines state that the reasonableness of a procedure depends on the unique circumstances surrounding the business and can vary from credit bureau to credit bureau.¹¹⁹ These instructions arguably are not sufficiently specific and do not inform juries of the factors that should be considered in determining if an employer’s procedure is reasonable.¹²⁰

Due to this lack of guidance, an FCRA case against a CRA is often reduced to a “battle . . . of witnesses” between the experts called to testify by the opposing parties.¹²¹ Therefore, instead of analyzing a CRA’s procedures based on specific factors, juries decide what is reasonable based on which parties’ expert testimony regarding a reasonable procedure is more compelling.¹²² This method of determining the “reasonableness” of an employer procedure was upheld in *Adams*,¹²³ where the court stated that “[t]he trial constituted a battle of the parties’ expert witnesses who attempted to define what the parties’ responsibilities were under the law.”¹²⁴ The court also stated that “[t]he jury reasonably found that defendants’ experts provided a better understanding of what the law mandates.”¹²⁵ When a court’s holding is based on persuasive expert opinion on what the law “mandates,” rather than uniform guidelines stating what the law requires, it is difficult to create precedent because each case’s reasoning will have little meaning beyond its established fact pattern. When employers and applicants do not know the clear boundaries of a federal law, CRAs will have difficulty developing a “reasonable”

116. 15 U.S.C. § 1681e(b) (2012). CRAs must use “reasonable procedures to assure maximum possible accuracy” when preparing consumer reports. *Id.*; see *Cahlin*, 936 F.2d at 1156.

117. Noam Weiss, Note, *Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act*, 78 BROOK. L. REV. 271, 289–90 (2012).

118. *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984); see *Koropoulos v. Credit Bureau, Inc.*, 734 F.2d 37, 41 (D.C. Cir. 1984); *Price v. Trans Union, L.L.C.*, 839 F. Supp. 2d 785, 793 (E.D. Pa. 2012).

119. See *Bryant v. TRW, Inc.*, 487 F. Supp. 1234, 1241 (E.D. Mich. 1980).

120. See Weiss, *supra* note 117, at 288–89.

121. *Adams v. Nat’l Eng’g Serv. Corp.*, N. 3:07-cv-1035, 2010 WL 1444541, at *2 (D. Conn. Apr. 12, 2010).

122. See Weiss, *supra* note 117, at 289–91 (discussing *Adams* and noting that litigating reasonableness on a case-by-case basis often leads to jury confusion and unpredictability).

123. *Adams*, 2010 WL 1444541, at *2.

124. *Id.* In this case, the plaintiff sued National Engineering Service Corp. and Verifications Inc., for supplying a report to an employer based on another person’s identity with a similar name and same date of birth but who had felony and misdemeanor charges. *Id.* at *1.

125. *Id.* at *2.

procedure, applicants will be unaware of their available legal remedies, and lawyers will lack guidance on how to construct winning legal arguments.

Even if a plaintiff proves that a report is inaccurate despite these hurdles, the plaintiff still has to show that the CRA's negligent or willful conduct *proximately caused*¹²⁶ the plaintiff's injury.¹²⁷ For example, in *Obabueki*, the court held that it was enough that the employer became aware of the dismissal through the employee's voluntary disclosure, and, therefore, the CRA's incomplete report did not proximately cause injury to the plaintiff.¹²⁸ Proximate cause therefore presents a final burden, making it even harder for a plaintiff to succeed in an action brought against a CRA.

In sum, because the FTC has not provided substantial guidance on the definition of accuracy or what constitutes a reasonable procedure,¹²⁹ and the plaintiff has the burden of proving proximate cause,¹³⁰ it is difficult for a plaintiff with a criminal history to prevail on charging a CRA with violating the FCRA.

3. Recent Wave of Litigation Under Federal Laws

In the past five years there has been a surge in litigation challenging discriminatory hiring practices against persons with criminal records.¹³¹ In 2010 alone, four lawsuits alleging Title VII violations were filed against large companies.¹³² In 2009, the New York Attorney General, with the goal of enforcing state regulations for background checks, brought charges against (and eventually settled with) three CRAs for engaging in illegal credit reporting procedures.¹³³ These settlements were notable because of the prominent employers and CRAs involved.¹³⁴ One settlement was with

126. Proximate cause is the extent to which the plaintiff's injury is the foreseeable or "direct, continuous, or natural result of the defendant's risky behavior." Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. U. L. REV. 77, 85 (2013).

127. See, e.g., *Obabueki v. Choicepoint, Inc.*, 236 F. Supp. 2d 278, 285 (S.D.N.Y. 2002).

128. *Id.* at 284–85 ("Choicepoint's negligence—which may have caused the production of the initial report—cannot be said to have been the proximate cause of IBM's decision.")

129. See *supra* note 119 and accompanying text.

130. See *supra* notes 127–28 and accompanying text.

131. RODRIGUEZ & Emsellem, *supra* note 14, at 9.

132. These lawsuits include: *Mays v. BNSF Railway Co.*, 974 F. Supp. 2d 1166 (N.D. Ill. 2013) (challenging a hiring policy prohibiting any applicant with a felony conviction in the past seven years from being considered for employment); *Hudson v. First Transit, Inc.*, No. C 10-03158, 2011 WL 445683, at *1 (N.D. Cal. Feb. 3, 2011) (charging one of the nation's largest transit providers for having a discriminatory policy barring applicants who have spent as much as a day in jail); *Arroyo v. Accenture*, No. 10civ3013, 2010 WL 106504 (S.D.N.Y. Apr. 8, 2010) (challenging Accenture's policy of rejecting all applicants with criminal histories regardless of the history's relevance to job qualifications); *Johnson v. Locke*, No. 10 civ. 3105, 2011 WL 1044151 (S.D.N.Y. Mar. 14, 2011) (suing the U.S. Census Bureau for refusing to hire people with criminal records for temporary positions). See also RODRIGUEZ & Emsellem, *supra* note 14, at 9–10 (discussing the aforementioned cases).

133. See RODRIGUEZ & Emsellem, *supra* note 14, at 10–11.

134. *Id.* at 11. Settlements were with RadioShack, Choicepoint, and Aramark. *Id.*; see also Assurance of Discontinuance at 1, *In re Investigation of Andrew M. Cuomo, Attorney Gen. of the State of N.Y., of Radioshack Corp.*, No. 09-148 (Nov. 20, 2009); Assurance of Discontinuance at 6, *In re Investigation of Andrew M. Cuomo, Attorney Gen. of the State of*

Choicepoint, a major CRA that accounts for 20 percent of the credit reporting industry and issues over ten million reports annually.¹³⁵

In addition to the EEOC and states revamping their enforcement of discriminatory and unlawful use of background checks, there also has been a wave of FCRA litigation.¹³⁶ The FCRA suits have focused on the adequacy of the notice provided to applicants and the accuracy of the reports issued.¹³⁷ The recent suits also were brought against major companies in the credit reporting industry. One suit was against HireRight,¹³⁸ a company that provides credit reporting services for large internet job boards, including Monster and Oracle.¹³⁹ Another suit against LexisNexis resulted in a settlement for over \$20 million.¹⁴⁰

This resurgence in litigation aimed at fair hiring practices for persons with criminal histories is a direct reaction to the widespread discrimination against people with criminal backgrounds and the growing ban-the-box movement nationwide.¹⁴¹ The increased amount of litigation has the potential to encourage hiring of the millions of Americans with arrest and conviction records.

4. Preemption

If courts adopt a broad reading of either Title VII¹⁴² or the FCRA,¹⁴³ state ban-the-box legislation may be preempted. Preemption therefore creates a potential concern about the validity of state ban-the-box laws

N.Y., of ChoicePoint Workplace Solutions Inc., et al., No. 09-165, 6 (Dec. 17, 2009); Assurance of Discontinuance at 5, *In re Investigation of Andrew M. Cuomo*, Attorney Gen. of the State of N.Y., of Aramark Corporation, No. 09-164, 5 (Feb. 2, 2010).

135. See RODRIGUEZ & EMSELLEM, *supra* note 14, at 11; *ChoicePoint Settles Data Security Case*, N.Y. TIMES, June 1, 2007, available at http://www.nytimes.com/2007/06/01/technology/01data.html?_r=0.

136. See RODRIGUEZ & EMSELLEM, *supra* note 14, at 12.

137. *Id.*

138. See *Smith v. HireRight Solutions et al.*, No. 4:10-cv-444 (N.D. Okla. 2010); *Henderson v. HireRight Solutions et al.*, No. 10-cv-443 (N.D. Okla. 2010); *Ryals v. HireRight Solutions et al.*, No. 3:09-cv-00625-RLW (E.D. Va. 2009). These cases were all consolidated and settled. See *Civil Rights Consumer Protection and Litigation Docket*, NAT'L EMP'T LAW PROJECT 6-7 (2011), <http://www.nelp.org/page/-/sclp/2011/civilrightsconsumerprotectionlitigationdocket.pdf?nocdn=1>.

139. See *HireRight Partners*, HIRERIGHT, <http://www.hireright.com/Partner-Overview.aspx> (last visited Mar. 25, 2015) (listing HireRight's clients).

140. See generally *Williams v. LexisNexis Risk Mgmt.*, No. 3:06cv241, 2008 WL 2871902 (E.D. Va. June 25, 2008); RODRIGUEZ & EMSELLEM, *supra* note 14, at 12.

141. See RODRIGUEZ & EMSELLEM, *supra* note 14, at 12. The NELP report states: "The rise in legal actions highlights both the widespread noncompliance of major companies with federal law, and the growing interest in pursuing legal actions against employers . . . for unlawfully excluding people with criminal records from work." *Id.*

142. See 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, 926 (2013) (citing Elizabeth A. Gerlach, Comment, *The Background Check Balancing Act: Protecting Applicants with Criminal Convictions While Encouraging Criminal Background Checks in Hiring*, 8 U. PA. J. LAB. & EMP. L. 981, 983 (2006)).

143. Arguably the FCRA's regulation differs from ban-the-box legislation because it regulates consent and disclosure but not the use of or access to the information provided in criminal background checks. Casselman, *supra* note 92, at 791 n.238.

because if either Title VII or the FCRA is found to preempt state ban-the-box laws, then these new laws will be invalid.¹⁴⁴ The Supreme Court often has used preemption as grounds for striking down state laws that conflict with a federal mandate.¹⁴⁵

If ban-the-box laws are preempted, it would be through the doctrine of implicit preemption, because neither Title VII nor the FCRA expressly states a congressional intent to displace state legislation in this area.¹⁴⁶ This preemption concern is especially relevant given the recent resurgence of Title VII and FCRA cases aimed at protecting the rights of persons with criminal histories from employment discrimination.¹⁴⁷ In 2012, the EEOC announced a policy to “crack down on employers” who use criminal histories to discriminately screen applicants.¹⁴⁸ With the EEOC pursuing such claims under Title VII, ban-the-box laws can be preempted.

The FCRA also may overlap with ban-the-box laws by placing disclosure obligations on an employer when a background check has been consulted and adverse action is taken based on the contents of this check.¹⁴⁹ Additionally, the FCRA may encourage the open communication between the applicant and employer that ban-the-box laws seek. When an applicant has consented to and receives a copy of the background check, the applicant has an opportunity to discuss any misleading information or rehabilitation efforts.¹⁵⁰ Ban-the-box laws have not yet appeared in civil litigation, but when they do, a court may possibly view these state laws as intruding on an area already regulated by federal law.

II. DIFFERENCES IN STATE BAN-THE-BOX LEGISLATION

Part II of this Note examines the differences in state adopted ban-the-box legislation.¹⁵¹ Additionally, this part analyzes states that have not adopted ban-the-box laws but have implemented legislation modeled on both federal law and ban-the-box statutes. Lastly, this part addresses some of the main

144. Preemption is a constitutional doctrine stating that, when state and federal laws conflict, federal law will be upheld over state law. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225–26 (2000). This doctrine is derived from the U.S. Constitution’s Supremacy Clause. U.S. CONST. art. VI, § 2.

145. *See Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (holding “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield” (citing *Felder v. Casey*, 487 U.S. 131, 138 (1988))).

146. There are three types of preemption. The first type is called express preemption and occurs when the federal government explicitly states that the issued law is intended to displace all state legislation. *See Gade*, 505 U.S. at 115. The other two types of preemption are implied. Field preemption refers to situations where Congress has legislated so heavily in one field that state law is effectively preempted. *Id.* Conflict preemption occurs when compliance with both state and federal law is impossible. *Id.*

147. *See supra* Part I.B.3.

148. *See* Robb Mandelbaum, *U.S. Push on Illegal Bias Against Hiring Those With Criminal Records*, N.Y. TIMES, June 20, 2012, at B8.

149. *See supra* Part II.B.2 (discussing the FCRA’s compliance requirements); *see also infra* Part III.A.5 (discussing various disclosure obligations that ban-the-box laws impose on employers).

150. *See supra* Part II.B.2.

151. *See infra* Part III.A.

arguments for and against the adoption of ban-the-box legislation through a state-by-state approach.

States have heeded the call of All of Us or None and have adopted laws to deal with the growing hurdles persons with criminal histories face in finding employment. The National Employment Law Project (NELP)¹⁵² has created a fifty-state survey to analyze the different state and local variations of ban-the-box laws.¹⁵³ As evidenced by this report, states (and even cities within the state) have taken different approaches.¹⁵⁴ For example, while Massachusetts has adopted its own ban-the-box law, Boston has adopted an even stricter policy, eliminating all background checks unless there is a “good faith determination that the relevant position is of such sensitivity that a [background check] is warranted.”¹⁵⁵ This raises additional preemption concerns between states and localities causing some states to declare that their ban-the-box laws preempts any local ordinances.¹⁵⁶

A. Statewide Variations

This section examines the six areas where state ban-the-box laws diverge¹⁵⁷: (1) whether public or private employers are covered under the law; (2) when an employer can lawfully conduct a background check;¹⁵⁸ (3) which types of information that can be considered when conducting a

152. NELP is a non-profit organization that is dedicated to “restor[ing] the promise of economic opportunity to the 21st century economy.” See *About Us*, NAT’L EMP’T LAW PROJECT, http://www.nelp.org/index.php/content/content_about_us/background/ (last visited Mar. 25, 2015). NELP has offices across the nation, and is composed of attorneys, scholars, and policy analysts, who have dedicated their work to helping achieve the mission of NELP. *Id.*

153. See generally RODRIGUEZ, *supra* note 15 (providing a brief summary of current ban-the-box state laws).

154. *Id.*

155. Compare MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2014), with BOSTON, MASS., REV. ORDINANCES Ch. IV, § 4-7.3 (2006).

156. See N.J. STAT. ANN. § 34:6B-11-17(b) (West 2013) (“The provisions of this act shall preempt any ordinance, resolution, law, rule or regulation . . .”).

157. This Note focuses on the states that have actually adopted legislation, including the following thirteen states: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New Mexico, and Rhode Island. There are numerous states that currently have legislation pending and also a number of cities that have adopted ban-the-box laws, even though the state has not. See RODRIGUEZ, *supra* note 31; see also CAL. LAB. CODE § 432.9 (West 2014); COLO. REV. STAT. ANN. § 24-5-101 (West 2014); CONN. GEN. STAT. § 46a-80 (2014); DEL. CODE ANN. tit. 19, § 711(g) (West 2014); HAW. REV. STAT. § 378-2.5 (2005); 820 ILL. COMP. STAT. 75/15(a) (2014); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); MINN. STAT. § 364.021 (2013); MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2012); NEB. REV. STAT. § 48-202 (2014); N.J. STAT. ANN. §§ 34:6B-11 to -19 (West 2014); N.M. STAT. ANN. § 28-2-3 (West 2013); R.I. GEN. LAWS ANN. § 28-5-7 (West 2013).

158. For example, some states—like Delaware—do not allow an employer to conduct a background check until after completion of the first interview. See DEL. CODE ANN. tit. 19, § 711(g). Other states—like Colorado—say that the employer must first make a conditional offer. See COLO. REV. STAT. ANN. § 24-5-101.

background check;¹⁵⁹ (4) which factors an employer must use to guide its consideration of criminal histories;¹⁶⁰ (5) what the disclosure obligations are for an employer who has conducted a background check;¹⁶¹ and (6) how to delegate enforcement (for example, to localities within the state or to state-created agencies).¹⁶²

1. Whether Legislation Applies to Public or Private Employers

There are potentially three groups of employers to which a state ban-the-box law could apply: public employers, both public and private employers, or all employers other than those exempted.¹⁶³ Supporters of the ban-the-box movement argue that ban-the-box laws should apply to both public and private employers to afford applicants with criminal histories the best chance at finding employment.¹⁶⁴ Opponents of such expansive coverage argue that making ban-the-box laws applicable to all employers will be burdensome on small employers.¹⁶⁵ Further, opponents argue that expansive coverage ignores the nature of certain jobs and their relation to negligent hiring liability.¹⁶⁶

Most states that have adopted ban-the-box laws impose such legislation on public employers only.¹⁶⁷ These laws tend to cover state, city, and district jobs. States that have ban-the-box laws applicable only to public employers include California, Colorado, Connecticut, Delaware, Maryland, Nebraska, and New Mexico.¹⁶⁸

159. Compare MD. CODE ANN., STATE PERS. & PENS. § 2-203 (imposing limitations on how many years back an employer can consider an applicant's criminal history), with MINN. STAT. § 364.03 (2013) (stating that only information that is "directly related" to the position at issue can be used).

160. Some states impose no restriction while others such as Delaware require that an employer look at the nature of the conviction, its relationship to the job's duties, rehabilitation efforts, and time since conviction. Compare DEL. CODE ANN. tit. 19, § 711(g)(3), with CAL. LAB. CODE § 432.9(a).

161. See *infra* Part II.A.5.

162. See *infra* Part II.A.6.

163. See Garcia, *supra* note 142, at 942.

164. *Id.* at 943.

165. *Id.* at 943-44; see also *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 453-54 (2003) (holding that the reason to exempt employers with fifteen or less employees was "to spare very small firms from the potentially crushing expense of mastering the intricacies of the antidiscrimination laws . . ." (quoting *Papa v. Katy Ind., Inc.*, 166 F.3d 937, 940 (7th Cir. 1999))).

166. See Garcia, *supra* note 142, at 944 (arguing that ban-the-box laws should exempt employers "whose employees have access to third parties that are particularly susceptible to harm").

167. See *id.* at 928; Roy Maurer, *Ban-the-Box Movement Goes Viral*, SOC'Y FOR HUMAN RES. MGMT. (Aug. 22, 2014), <http://www.shrm.org/hrdisciplines/safetysecurity/articles/pages/ban-the-box-movement-viral.aspx>.

168. See RODRIGUEZ, *supra* note 31, at 4-8; see also CAL. LAB. CODE § 432.9 (West 2014); COLO. REV. STAT. ANN. § 24-5-101 (West 2014); CONN. GEN. STAT. § 46a-80 (2014); DEL. CODE ANN. tit. 19, § 711(g) (West 2014); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); NEB. REV. STAT. § 48-202 (2014); N.M. STAT. ANN. § 28-2-3 (West 2013).

Within the listed public employer–only state statutes, some states define public employer very narrowly, as applying to employment by the state.¹⁶⁹ For example, Connecticut’s statute states that “a person shall not be disqualified from employment by the state [of Connecticut] or any of its agencies. . . .”¹⁷⁰ The Connecticut law therefore does not apply to city or district jobs within Connecticut but only to jobs at the state level.¹⁷¹

While the majority of ban-the-box laws cover public employers, there are a number of states that regulate the hiring policies of private companies as well. This important distinction highlights the steady decrease in the number of persons employed in the public sector since 1975, as well as the rise in the number of private sector employees.¹⁷² Supporters of expansive ban-the-box legislation argue that for ban-the-box laws to provide the most opportunity, these laws should cover both public and private sector employment.¹⁷³

States that have ban-the-box laws that apply to public and private employers include Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, and Rhode Island.¹⁷⁴ Hawaii’s statute applies to all employers with exceptions for institutions that have greater risks of negligent hiring due to the job’s sensitive nature.¹⁷⁵

2. When a Background Check Can Be Requested

State laws also vary on when an employer can conduct a background check. The main concern in setting the time frame for when an employer can conduct a background check is balancing both the applicant’s interest in demonstrating his or her qualifications to an employer¹⁷⁶ with the employer’s interest in using its time productively.¹⁷⁷

The first category of laws requires that an employer determine that an applicant is qualified for a position before looking into his or her criminal background. California’s law states that an employer can ask for an

169. COLO. REV. STAT. ANN. § 24-5-101; CONN. GEN. STAT. § 46a-80; MD. CODE ANN., STATE PERS. & PENS. § 2-203.

170. CONN. GEN. STAT. § 46a-80(a).

171. *Id.*

172. See GERALD MAYER, CONG. RESEARCH SERV., SELECTED CHARACTERISTICS OF PRIVATE AND PUBLIC SECTOR WORKERS 2 (2014), available at <http://www.fas.org/sgp/crs/misc/R41897.pdf>.

173. See Garcia, *supra* note 142, at 943.

174. See RODRIGUEZ, *supra* note 31, at 4–8; see also HAW. REV. STAT. § 378-2.5 (2005); 820 ILL. COMP. STAT. 75/15(a) (2014); MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2014); MINN. STAT. § 364.021 (2014); N.J. STAT. ANN. §§ 34:6B-11 to -19 (West 2014); R.I. GEN. LAWS ANN. § 28-5-7 (West 2013).

175. HAW. REV. STAT. § 378-2.5(a), (d). This list includes exemptions for the department of education (children), armed security services (protecting the public), and financial institutions in which deposits are insured by a federal agency (security of governmental funds). *Id.* § 378-2.5(d).

176. See Garcia, *supra* note 142, at 946.

177. See Nadich, *supra* note 44, at 798–99 (“[B]an the box represents time taken away from productivity in order to meet with someone whose criminal history may inevitably disqualify them from the position.”).

applicant's conviction history after the employer has determined that the employee meets the minimum qualifications for the position.¹⁷⁸ Similarly, Connecticut's law allows an employer to conduct a background check once the employer has determined the applicant is "deemed otherwise qualified."¹⁷⁹ Nebraska's law requires that the employee meet the minimum job qualifications.¹⁸⁰

Another type of ban-the-box law states that the background check may not be conducted until after the first interview. Delaware, Maryland, and Rhode Island have taken this approach.¹⁸¹ This option prevents the applicant from being "per se rejected" before he or she has had an opportunity to interview, and it allows employees to show he or she is qualified for the position despite having a record.¹⁸²

Some state laws permit the background check to be conducted at various times during the employment process. For example, Illinois's law states that employers may not inquire about an applicant's criminal history until an interview is scheduled or a conditional offer is made.¹⁸³ Minnesota also states that an employer cannot ask about an applicant's criminal history until after the first interview is scheduled but can conduct a check before an offer is made.¹⁸⁴

Massachusetts and New Jersey are more vague in directing when an employer can conduct a background check. Massachusetts's law states that an employer cannot ask about an applicant's history on the "initial written application," but does not reference when a check can be conducted.¹⁸⁵ Similar to Massachusetts, New Jersey's approach forbids an employer from making inquiries during the "initial employment application process,"¹⁸⁶ a term not defined in the statute.

Lastly, some states hold that an employer cannot conduct a background check until the employer deems the applicant a finalist for the position or

178. See CAL. LAB. CODE § 432.9(a) (West 2014) ("A state or local agency shall not ask an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant . . . until the agency has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position.").

179. CONN. GEN. STAT. § 46a-80(b) (2014).

180. NEB. REV. STAT. § 48-202(1) (2014).

181. See DEL. CODE ANN. tit. 19, § 711(g)(2) (West 2014) (forbidding an employer from conducting a check until the employer has determined that the applicant is "otherwise qualified" and after the first interview); MD. CODE ANN., STATE PERS. & PENS. § 2-203(c) (West 2013) ("[A]n appointing authority may not inquire into the criminal record or criminal history of an applicant for employment until the applicant has been provided an opportunity for an interview."); R.I. GEN. LAWS ANN. § 28-5-7(7)(iii) (West 2013) ("[A]ny employer may ask an applicant for information about his or her criminal convictions at the first interview or thereafter . . .").

182. See Garcia, *supra* note 142, at 931.

183. See 820 ILL. COMP. STAT. 75/15(a) (2014). An employer cannot conduct a background check, "until the applicant has been determined qualified for the position and notified that the applicant has been selected for an interview by the employer or employment agency or, if there is not an interview, until after a conditional offer of employment is made . . ." *Id.*

184. MINN. STAT. § 364.021 (2014).

185. MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2014).

186. N.J. STAT. ANN. § 34:6B-14 (West 2014).

makes a conditional offer. These states include Colorado,¹⁸⁷ Hawaii,¹⁸⁸ and New Mexico.¹⁸⁹ By not allowing an employer to conduct a background check until the final stages of hiring, these state approaches provide applicants with the greatest chance of demonstrating to an employer that they are qualified for the position despite their criminal history.¹⁹⁰

The foregoing summary of state laws indicates that an employer's ability to conduct a background check ranges from the time an applicant is determined qualified for the position to an indeterminate point during the hiring process or until a conditional offer is made.

3. Criminal History Information an Employer May Consider

While the majority of states do not bar an employer from considering all of the information disclosed in a criminal background check, several states do require employers to limit their consideration of information to specific time periods and offenses. States imposing no limitations on the information that can be considered include California,¹⁹¹ Delaware,¹⁹² Nebraska,¹⁹³ New Jersey,¹⁹⁴ Maryland,¹⁹⁵ and Illinois.¹⁹⁶

Several states, however, prohibit an employer from considering arrests that do not result in conviction and charges that are dismissed from the applicant's record.¹⁹⁷ For example, Connecticut's law states: "In no case may records of arrest . . . not followed by a conviction," or "convictions, which have been erased" be considered.¹⁹⁸ Colorado, Hawaii, Minnesota, New Mexico, and Rhode Island take a similar approach.¹⁹⁹

187. COLO. REV. STAT. ANN. § 24-5-101(1)(VII)(3)(b) (West 2014) (stating that an employer may not conduct a background check until an applicant is deemed a "finalist" or a "conditional offer [] is made").

188. HAW. REV. STAT. § 378-2.5(b) (2005) ("[A check] shall take place only after the prospective employee has received a conditional offer of employment which may be withdrawn if the prospective employee has a conviction record that bears a rational relationship to the duties and responsibilities of the position.").

189. N.M. STAT. ANN. § 28-2-3(A) (West 2013).

190. See Garcia, *supra* note 142, at 946.

191. CAL. LAB. CODE § 432.9 (West 2014). California's statute only imposes restrictions on when an employer can conduct the background check but makes no mention of what information may be consulted. *Id.*

192. DEL. CODE ANN. tit. 19, § 711(g)(2) (West 2014).

193. NEB. REV. STAT. § 48-202 (2014).

194. N.J. STAT. ANN. § 34:6B-11-19 (West 2014).

195. MD. CODE ANN., STATE PERS. & PENS. § 2-203(c) (West 2013).

196. 820 ILL. COMP. STAT. ANN. 75/15(a) (West 2014).

197. This presents the interesting question of whether ban-the-box laws increase the obligations on CRAs. CRAs have minimal obligations under the FCRA's "technical accuracy approach" and do not have to report on all expungements. See *supra* note 106 and accompanying text. Under ban-the-box laws, CRAs may have to report on all dismissals so the employer can disregard prior convictions.

198. CONN. GEN. STAT. § 46a-80(e) (2014).

199. COLO. REV. STAT. ANN. § 24-5-101 (1)(VII)(3)(c)-(d) (West 2014); HAW. REV. STAT. § 378-2.5(c) (2005) (barring an employer from considering any conviction that has occurred ten years before the application was filed); MINN. STAT. § 364.04 (2014); N.M. STAT. ANN. § 28-2-3(B) (West 2013); R.I. GEN. LAWS ANN. § 28-5-6(4) (West 2013).

Massachusetts's law imposes greater limitations. It bars an employer from considering any criminal history before the applicant was seventeen years old or any criminal offense not punishable by incarceration.²⁰⁰

Most states do not limit an employer's consideration of the information gained from conducting a background check; however, in some states, an employer may not lawfully consider arrest records or time-barred convictions.

4. How an Employer Must Analyze an Applicant's Criminal History

Several state ban-the-box laws adopt specific guidelines for how an employer should consider an applicant's criminal history. Typical factors include: the seriousness of the conviction, the crime's relationship to the job, the time elapsed since arrest or conviction, and the applicant's rehabilitation efforts. States include such factors to encourage an employer to view an applicant's criminal history in a holistic manner.²⁰¹ For example, Connecticut's ban-the-box law focuses on the type of crime committed, the crime's relationship to the job, information concerning the degree of rehabilitation, and time since release.²⁰² The statutes of Colorado,²⁰³ Delaware,²⁰⁴ and Minnesota²⁰⁵ require an employer to use similar factors to evaluate an applicant's criminal history and fit for the job. Hawaii's ban-the-box law does not ask an employer to take a multifactor approach but does state that an employer cannot withdraw an offer unless the check reveals a criminal history that bears a "rational relationship" to the job responsibilities.²⁰⁶

States that do not provide any factors to evaluate an applicant's criminal history include California, Nebraska, New Jersey, Maryland, Rhode Island, Illinois, Massachusetts, and New Mexico.²⁰⁷

200. MASS. GEN. LAWS ch. 6, § 172(a)(4) (2014). Massachusetts's statute is also unique because it sets up a statewide database system that can issue background checks. *Id.* § 172(a). This system is intended to deal with credit reporting agencies that issue inaccurate reports. See RODRIGUEZ, *supra* note 15, at 8. Reports issued from the state agency may not include information on felony charges more than ten years old and misdemeanor charges more than five years old. MASS. GEN. LAWS ch. 6, § 172(a)(3).

201. See Garcia, *supra* note 142, at 948.

202. See CONN. GEN. STAT. § 46a-80(c).

203. See COLO. REV. STAT. ANN. § 24-5-101(1)(VII)(4). An employer should look to the nature of the conviction, whether there is a direct relationship between the conviction and the job duties, any information the applicant has provided on good conduct or rehabilitation, and time since conviction. *Id.*

204. See DEL. CODE ANN. tit. 19, § 711(g)(3) (West 2014) (requiring an employer to consider the "nature and gravity of the offense," time since offense, and "the nature of the job held or sought").

205. See MINN. STAT. § 364.03(2)–(3). Minnesota law states that in considering whether a conviction directly relates to a position of public employment, the employer must consider "the nature and seriousness" of the crime, the relationship of the crime to the position sought, and the applicant's rehabilitation efforts. *Id.*

206. HAW. REV. STAT. § 378-2.5(b) (2005).

207. CAL. LAB. CODE § 432.9 (West 2014); NEB. REV. STAT. § 48-202 (2014); N.J. STAT. ANN. §§ 34:6B-11 to -19 (West 2014); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); R.I. GEN. LAWS ANN. § 28-5-6(4) (West 2013); 820 ILL. COMP. STAT. 75/15(a)

Both ban-the-box laws that limit which convictions an employer may consider and those that provide factors to guide an employer's analysis of a criminal record are aimed at encouraging an employer to view past criminal history in light of mitigating factors.²⁰⁸ Critics argue that because an employer can be held financially liable for negligent hiring, an applicant's criminal history should not be viewed in this manner, but instead past behavior should be viewed as an accurate indicator of future behavior.²⁰⁹ On the other hand, supporters argue that employers should consider how an applicant's rehabilitation efforts could have a mitigating effect on recidivism.²¹⁰

5. Employer Obligations Once a Report Is Consulted

Several states place disclosure obligations on an employer once it has consulted a background check. These duties are aimed at informing the applicant that a background check has been conducted, explaining what the background check revealed, and providing the applicant with reasons why employment was not offered. Connecticut's law has such a provision, requiring the employer to send a letter to the applicant detailing the reasons for the applicant's rejection when the rejection is based on the applicant's criminal history.²¹¹ Similarly, Minnesota requires the employer to notify the applicant in writing of the reasons for the applicant's denial and the proper procedure to file a grievance against the employer.²¹² Another approach similar to the requirements under the FCRA is that of Massachusetts,²¹³ which obligates the employer to provide the applicant with a copy of the criminal background check.²¹⁴

States that impose no disclosure obligations on an employer include California, Illinois, Nebraska, Maryland, Rhode Island, Colorado, Delaware, Hawaii, New Jersey, and New Mexico.²¹⁵ However, even if a

(2014); MASS. GEN. LAWS ch. 151B, § 4(9 1/2) (2014); N.M. STAT. ANN. § 28-2-3(B) (West 2014).

208. See Garcia, *supra* note 142, at 948–49.

209. See Shawn D. Vance, *How Reforming the Tort of Negligent Hiring Can Enhance the Economic Activity of a State, Be Good for Business and Protect the Victims of Certain Crimes*, 6 LEGIS. & POL'Y BRIEF 171, 208 (2014) (noting that that employers should not solely bear the burden of reassimilating ex-convicts into society when the employer faces potential liability).

210. See Timothy Creed, *Negligent Hiring and Criminal Rehabilitation: Employing Ex-Convicts Yet Avoiding Liability*, 20 ST. THOMAS L. REV. 183, 194 (2008) (stating that rehabilitation forms the primary policy basis for supporting employment of ex-convicts).

211. See CONN. GEN. STAT. § 46a-80(d) (2014).

212. See MINN. STAT. § 364.05(1)–(2) (2014). The letter must also contain when the applicant can reapply for the position and a statement that the employer will consider any evidence of rehabilitation. *Id.* § 364.05(3)–(4).

213. See MASS. GEN. LAWS ch. 6, § 171A (2014). The Massachusetts law also requires an employer who conducts more than five background checks annually to maintain a policy that the applicant will be notified of any adverse action taken as a result of the background check's contents and that a copy of that check will be delivered to the applicant. *Id.*

214. 15 U.S.C. § 1681b(b)(3)(A) (2012).

215. CAL. LAB. CODE § 432.9 (West 2014); COLO. REV. STAT. ANN. 24-5-101(1)(VII) (West 2014); DEL. CODE ANN. tit. 19, § 711(g) (2014); HAW. REV. STAT. § 378-2.5 (2005);

state ban-the-box law does not impose any disclosure obligations, the FCRA may require the employer to provide the applicant with notice of adverse action.²¹⁶

6. Enforcement of Ban-the-Box Statutes

Enforcement procedures vary from state to state; some states leave it unclear who should enforce its new legislation and other states create an agency specifically tasked with investigating violations of these laws. There is no court case to date alleging violations of ban-the-box laws which may signal that these differing and unclear enforcement regimes have not been effective at tackling discrimination against those with criminal histories. Two additional questions that arise when analyzing ban-the-box laws are (1) who monitors their enforcement and (2) is an employer that violates such laws can be subject to civil penalties.

Most statutes are silent on the question of who enforces their ban-the-box law and what remedies are available to a potential plaintiff. The ban-the-box laws of California, Colorado, Connecticut, Hawaii, Maryland, Nebraska, and New Mexico do not expressly charge any state government agency with enforcement responsibilities.²¹⁷

When there is no specific assignment for enforcement, it may fall to the cities within the state to ensure compliance. For example, in California, implementation of the state's ban-the-box law has been left to cities and counties that have in turn adopted their own ban-the-box laws.²¹⁸ One major city, San Francisco, has tasked its Office of Labor Standards Enforcement with enforcing San Francisco's ban-the-box law—the San Francisco Fair Chance Ordinance.²¹⁹ This creates preemption concerns, because San Francisco's fair chance initiative is much stricter than California's ban-the-box law.²²⁰

Other states, such as New Jersey,²²¹ may not delegate enforcement, but do outline potential penalties that employers guilty of violating these laws can face.²²²

820 ILL. COMP. STAT. 75/15(b)–(c) (2014); MD. CODE ANN., STATE PERS. & PENS. § 2-203 (West 2013); NEB. REV. STAT. § 48-202 (2014); N.J. STAT. ANN. §§ 34:6B-11 to -19 (West 2014); N.M. STAT. ANN. § 28-2-3(B) (West 2013); R.I. GEN. LAWS ANN. § 28-5-6(4) (West 2013).

216. *See supra* Part I.B.2.

217. CAL. LAB. CODE § 432.9; COLO. REV. STAT. ANN. § 24-5-101; CONN. GEN. STAT. § 46a-80 (2014); HAW. REV. STAT. § 378-2.5; MD. CODE ANN., STATE PERS. & PENS. § 2-203; NEB. REV. STAT. § 48-202(1) (2014); N.M. STAT. ANN. § 28-2-3(A).

218. *See Implementation of California "Ban the Box" Legislation*, NAT'L EMP'T LAW PROJECT (July 1, 2014), <http://www.nelp.org/page/-/SCLP/2014/NELP-California-AB-218-Ban-the-Box-Implementation-Survey-Memo.pdf?nocdn=1>.

219. *See* SAN FRANCISCO, CAL., CODE § 2A.23 (2006).

220. For example, San Francisco's ordinance applies to both public and private employers, while California's law only applies to public sector employment. SAN FRANCISCO, CAL., FAIR CHANCE ORDINANCE 17-14 § 4903 (2014).

221. While the statute does not state who is in charge of enforcement, secondary sources have published articles arguing that the New Jersey Division of Civil Rights is still in charge of enforcement. *See* Christopher M. Santomassimo, *New Concern for NJ Employers:*

Other states, however, take a more comprehensive approach in defining who is in charge of enforcement. Delaware places its Department of Labor in charge of all unlawful employment practices, including discrimination on the basis of a background check.²²³ Illinois takes a similar approach to Delaware by tasking the Illinois Department of Labor with the responsibility of investigating violations of the Illinois ban-the-box law.²²⁴ The Illinois Department of Labor has the power to issue differing penalties based on how many prior violations an employer has incurred²²⁵ and to bring civil actions against the employer.²²⁶

Massachusetts and Rhode Island handle enforcement through special commissions created and tasked to investigate ban-the-box violations. Massachusetts's law creates a criminal review board with the power to "hear complaints[,] investigate all incidents," and impose fines.²²⁷ Upon a finding of a willful employer violation, the board can issue penalties of up to \$5000 for each violation.²²⁸ Rhode Island's statute creates a "Rhode Island commission for human rights."²²⁹ Rhode Island's law allows for the recovery of monetary fines, back pay, and other compensatory awards if the commission finds that the employer engaged in intentional discrimination.²³⁰

Minnesota takes a two-tiered approach to enforcement. First, Minnesota places public employers in charge of their own compliance with Minnesota's ban-the-box legislation and instructs government agencies to

Governor Christie Signs the "Opportunity to Compete Act," NICOLL DAVIS & SPINELLA LLP (Aug. 14, 2014), <http://www.ndslaw.com/blog/new-concern-nj-employers-governor-christie-signs-%E2%80%9COpportunity-competes-act%E2%80%9D>; *Governor Christie Signs New Jersey's "Ban the Box Law,"* RICCI, FAVA & BAGLEY, <http://www.riccifavalaw.com/civil-law/governor-christie-signs-new-jerseys-ban-the-box-law> (last visited Mar. 25, 2015).

222. See, e.g., N.J. STAT. ANN. § 34:6B-18 (West 2014). New Jersey's statute holds that an employer who violates New Jersey's ban-the-box law will be fined \$1000 for the violation, \$5000 for the second violation, and \$10,000 for each subsequent violation. *Id.* § 34:6B-19. The statute also states that these monetary fines are the "sole remedy" for violations and that there is no private cause of action for an applicant who has been harmed by an employer's violation of this Act. *Id.* § 34:6B-18.

223. DEL. CODE ANN. tit. 19, § 712(a) (West 2014). The Department of Labor has the power to investigate unlawful employment practices, bring suit against employers, and create regulations as necessary to enforce fair employment practices. *Id.* § 712(a)(1)-(2).

224. 820 ILL. COMP. STAT. 75/20 (2014).

225. For the first violation the employer is provided with a written warning and given thirty days to amend the employer's policies. *Id.* 75/20(a). However by the fourth warning, or if the first warning is not amended within ninety days, the director of the Department of Labor may impose a \$1500 fine for each violation. *Id.*

226. *Id.* 75/20(b) ("Penalties under this Section may be assessed by the Department and recovered in a civil action brought by the Department in any circuit court or in any administrative adjudicative proceeding under this Act.").

227. MASS. GEN. LAWS ch. 6, § 168(a)-(b) (2014).

228. *Id.* § 168(b).

229. R.I. GEN. LAWS ANN. § 28-5-8 (West 2013). The Commission has the power to "receive, investigate, and pass upon charges of unlawful employment practices." *Id.* § 28-5-13(6).

230. *Id.* § 28-5-24(a)-(b). Rhode Island's statute further allows for the award of punitive damages in situations where the conduct shown was motivated by "malice," "ill will," or "reckless or callous indifference." *Id.* § 28-5-29.1.

follow the adjudication procedures set forth in the Administrative Procedure Act.²³¹ For private employers, the state's commissioner of human rights conducts investigations of alleged violations and imposes monetary penalties.²³²

Because states vary in enforcing their ban-the-box laws, an employer may not fully understand the likelihood and types of penalties that it may face for violating a ban-the-box law provision.

B. States with Pending and Similar Legislation

Florida, Georgia, Louisiana, Michigan, New Hampshire, North Carolina, Ohio, South Carolina, Virginia, and Washington, all have introduced ban-the-box legislation within the past two years.²³³

While legislation has not yet passed in the House in Georgia, its governor has issued an executive order stating that the government agencies in Georgia should "implement a hiring policy intended to encourage the full participation of motivated and qualified persons with criminal histories."²³⁴ This would make Georgia the first state in the Deep South to implement such a policy change.²³⁵

Most of the pending legislation follows the patterns detailed in the previous section of this Note by outlining which employers are covered, when an employer can conduct a background check, and what guiding factors an employer should use in making such a decision.²³⁶ It is unknown whether all of these proposed laws will eventually pass in these states, because most are currently stalled in committee, but if they do, twenty-three states will have such legislation.²³⁷

Other states have taken a different approach by not banning the criminal history box on applicant forms but instead adopting laws relating to how and when an employer may consider an applicant's criminal history.²³⁸

231. MINN. STAT. § 364.06 (2014).

232. *Id.* § 364.06.2. Violations range from written warnings to fines of up to \$2000 per month. *Id.*

233. See H.R. 505, 2014 Leg., 116th Reg. Sess. (Fla. 2014) (stalled in committee); H.R. 1102, 2013 Gen. Assemb., 152d Reg. Sess. (Ga. 2013) (stalled in committee); H.R. 485, 2014 Gen. Assemb., 39th Reg. Sess. (La. 2014) (stalled in committee); H.R. 4366, 2013 Leg., 97th Reg. Sess. (Mich. 2013) (stalled in committee); H.R. 1368, 2014 Gen. Assemb., 163d Reg. Sess. (N.H. 2014) (amended and ban-the-box provision removed); H.R. 208, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (currently in the Committee of Rules, Calendar, and Operations of the House); H.R. 4978, 2013 Gen. Assemb., 120th Reg. Sess. (S.C. 2013) (currently stalled); H.R. 892, 2014 Gen. Assemb., Reg. Sess. (Va. 2014) (currently stalled); H.R. 2545, 2014 Leg., 63d Reg. Sess. (Wash. 2014) (did not pass in the 2014 Legislative session).

234. Exec. Order, (Feb. 23, 2015), available at http://gov.georgia.gov/sites/gov.georgia.gov/files/related_files/document/02.23.15.03.pdf.

235. See RODRIGUEZ, *supra* note 15, at 10.

236. See *id.* at 10–15.

237. See generally *id.* This number is the result of adding up the states that already have legislation (thirteen in total as listed in Part II.A.) and those with pending legislation (ten in total as listed in Part II.D).

238. *Id.* at 18.

These states include New York, Pennsylvania, and Wisconsin.²³⁹ These laws are loosely based on the federal laws examined in Part I.B (Title VII and the FCRA).²⁴⁰

New York's Fair Chance hiring policy²⁴¹ bars discrimination and adverse employment action "by reason of the individual's having been previously convicted of one or more criminal offenses."²⁴² An employer is allowed to use background information to deny employment when there is a "direct relationship" between the offense and job duties or if hiring the applicant would create an unreasonable risk to the employer.²⁴³ New York's law also provides a comprehensive list of the factors that an employer should consider in evaluating an applicant's criminal record and fitness for a position.²⁴⁴ Such factors include: time elapsed since an offense, the age of the applicant when the conviction occurred, the relation of the offense to the employment sought, the seriousness of the offense, and the applicant's rehabilitation efforts.²⁴⁵ New York's law also allows an applicant who was denied employment to request from the employer a written explanation concerning the adverse action.²⁴⁶ Recently, the New York Attorney General has been aggressively enforcing New York's law.²⁴⁷

Pennsylvania takes a similar approach to New York. The state does not limit when an employer can inquire about an applicant's criminal history, but it does set standards for the use of such information and thus more closely resembles the requirements of the FCRA.²⁴⁸ An applicant's criminal history only may be used "to the extent to which [it] relate[s] to the applicant's suitability for employment," and the employer must notify the applicant in writing if adverse employment action is taken on the basis of a record.²⁴⁹ Like ban-the-box laws that narrow the definition of criminal background history,²⁵⁰ Pennsylvania's law states that "[f]elony and

239. *Id.*; see also N.Y. CORR. LAW § 752 (McKinney 2007); 18 PA. CONS. STAT. ANN. § 9125 (West 2000); WIS. STAT. ANN. § 111.321 (West 2002).

240. RODRIGUEZ, *supra* note 15, at 18.

241. New York's law is not a ban-the-box statute, although it does contain many of the same elements as ban-the-box laws. For instance, it does not forbid an employer from including a criminal history box on the initial hiring form or asking about an applicant's criminal history in the initial hiring process, but it does set standard that an employer should follow when analyzing such information. N.Y. CORR. LAW § 752.

242. *Id.*

243. *Id.*

244. *Id.* § 753.

245. *Id.*

246. *Id.* § 754.

247. See *supra* Part I.B.3. There also is a movement in New York City to adopt a "Fair Chance Act" that would "prohibit[] discrimination based on one's arrest record or criminal conviction." See *Legislative Research Center*, N.Y.C. COUNCIL, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1739365&GUID=EF70B69C-074A-4B8E-9D36-187C76BB1098> (last visited on Mar. 25, 2015). The bill was introduced in April 2014, and in December 2014, the council's Committee on Civil Rights held a hearing on the proposed legislation. *Id.*

248. 18 PA. CONS. STAT. ANN. § 9125(a) (West 2000).

249. *Id.* § 9125(b)-(c).

250. See *supra* Part II.A.3.

misdeemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment."²⁵¹

Wisconsin's law is similar to both state ban-the-box laws and Title VII. Wisconsin's law places emphasis on banning discrimination and limiting the instances that an employer is lawfully able to conduct a background check.²⁵² This state law prevents an employer from using an applicant's criminal history in making an employment decision unless "the charge substantially relate[s] to the circumstances of the particular job."²⁵³

As evidenced by the foregoing discussion, these laws are very similar to ban-the-box statutes because their goal is not to discourage the hiring of persons with criminal records. However, these laws differ in that they focus on preventing an employer from discriminating against an applicant with a criminal background and not on discouraging employers from conducting a background check during the initial stages of the employment process.

C. *The Effects of Differing Legislation*

Ban-the-box laws have been adopted in many states to combat the obstacles faced by applicants with criminal records in gaining employment.²⁵⁴ Hiring these applicants can have positive effects on society, economically and socially.²⁵⁵ Although these laws are relatively new, one study conducted in Hawaii found that implementation of Hawaii's ban-the-box law "substantially attenuated felony offending among individuals with a prior criminal conviction."²⁵⁶ While there is recognized potential for these laws to open up employment opportunities for those with criminal records, it remains to be seen whether a state-by-state or uniform approach would best serve the goals of this movement.

Among the states that have "ban-the-box" laws, significant variations exist.²⁵⁷ These differences can be viewed in two ways. Allowing states to experiment and tailor their laws according to local needs is a positive result.²⁵⁸ However, with so many statewide variations, these new laws

251. 18 PA. CONS. STAT. ANN. § 9125(b).

252. WIS. STAT. ANN. § 111.321 (West 2002). Wisconsin's statute states that no employer may discriminate on the basis of "age, race, creed, color, disability, marital status, sex, national origin, ancestry, *arrest record, conviction record . . .*" *Id.* (emphasis added).

253. *Id.* § 111.335(b).

254. *See supra* Part I.A.

255. *See supra* notes 32–36 and accompanying text.

256. Stewart J. D'Alessio et al., *The Effect of Hawaii's Ban the Box Law on Repeat Offending*, AM. J. CRIM. JUST., June 2014, at 14.

257. Compare CAL. LABOR CODE § 432.9 (West 2014) (having a bare minimum ban-the-box approach by only applying the law to public employers and stating that an employer cannot conduct a background check during the initial hiring process), with MASS. GEN. LAWS ch. 6, § 168 (2014) (applying to public and private employers and further creating a whole department in charge of implementing the statute); *see also* Garcia, *supra* note 142, at 929 (stating that while many states have ban-the-box legislation, statutes can "vary quite substantially" among states).

258. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). In this case, Justice Brandeis discussed how states serve as laboratories for democracy. *Id.* at 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous

create significant difficulties for multi-jurisdictional employers who attempt to comply with them.²⁵⁹

In the United States, the federal and state governments work together to create laws that address the needs of their residents.²⁶⁰ This is the familiar concept of federalism.²⁶¹ Federalism is based on the notion that the federal and state governments have law-making capabilities that should be limited to protect state and national governments from each other.²⁶² Under the doctrine of federalism, state ban-the-box laws allow each state to handle employment of persons with a criminal history by tailoring state laws to their local needs.²⁶³ Moreover, states can experiment with different versions of legislation to see which fits best, while not imposing failures on the rest of the nation.²⁶⁴

One of the biggest criticisms of ban-the-box laws is that all of the state and federal law variations can potentially create compliance problems for multi-jurisdictional employers.²⁶⁵ Employers have to comply with federal laws (Title VII and the FCRA) and ban-the-box mandates to make sure they are not conducting background checks in an illegal manner. Further, an employer has to balance the requirements of these laws (which often conflict) with negligent hiring liability, while ensuring that its workplace is safe.²⁶⁶ Employers may also view ban-the-box laws as an inconvenience because they are forced to meet with potential applicants who will later be deemed unqualified for the position once their criminal histories are revealed.²⁶⁷

While there are merits to the arguments for and against state adoption of ban-the-box laws, it is debatable whether a federal or state approach would best accomplish the goals of the ban-the-box movement.

state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

259. See generally *infra* notes 265–67 and accompanying text.

260. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005).

261. U.S. CONST. amend. X. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” *Id.*

262. See Schapiro, *supra* note 260, at 246.

263. See *New State Ice Co.*, 285 U.S. at 280 (majority opinion). Brandeis notes that when dealing with certain public policy issues, “[t]he legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments.” *Id.* at 285 (Brandeis, J., dissenting).

264. *Id.* at 311. Brandeis’s dissent goes on to discuss that it is a great benefit to the whole country that states can experiment with solutions to social and economic problems “without risk to the rest of the country.” *Id.*

265. See Ryan Watstein, Note, *Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender’s Employment Prospects*, 61 FLA. L. REV. 581, 601 (2009) (explaining how with the increasing globalization of firms, complying with different state mandates becomes practically impossible for the employer).

266. See Nadich, *supra* note 44, at 768–69.

267. *Id.* at 798–99 (arguing that the employer time is wasted when forced to meet with an applicant who could never qualify for the position because of a prior record).

III. ADOPTION OF A FEDERAL BAN-THE-BOX LAW

The best way for the ban-the-box movement to achieve its intended goals is for the federal government to adopt a uniform ban-the-box statute. Creating the best federal ban-the-box law requires balancing an employer's right to exercise its business judgment with the interests of the those with criminal backgrounds in gaining employment. An employer's goal is to conduct its hiring process in what it considers to be the most efficient and useful manner. After all, if an employee commits a crime on the job, the employer may be liable.²⁶⁸ Because so many factors contribute to an employer's analysis of an applicant's suitability for a position, it is hard to determine when discrimination based on an applicant's criminal history in the hiring process occurs, and an employer should be able to make the determination of applicant qualification as it sees fit.

From an applicant's perspective, if he or she has been arrested or has served jail time, he or she should not have to face further punishment by being denied the potential for employment.²⁶⁹ Employment plays a large role in one's societal identity, as people tend to evaluate each other based on their employment status.²⁷⁰ Being employed allows an individual to feel that he or she is a contributing member of society.²⁷¹ Furthermore, employment gives a person a chance to positively affect the lives of others around them—for example, by helping a daughter go to college or a mother obtain needed medical treatment. The difficulty in finding the appropriate balance between employer concerns and applicant desires is evidenced by the many different state approaches.

Although state experimentation can bring value to the ban-the-box movement, employment discrimination is best handled at the federal level. This is because Congress (1) can analyze state ban-the-box laws and determine the best policies, (2) has experience creating employment discrimination laws, and (3) can delegate enforcement to the EEOC, which can use its familiarity with employment discrimination to inform its enforcement approach.

Therefore, this Note argues that the federal government should enact a ban-the-box law. This law should apply to all employers with fifteen or more employees (as Title VII does).²⁷² This requirement will guarantee that the law has a far-reaching effect and creates the most employment opportunities for applicants with criminal records by covering

268. See *supra* notes 43–44 and accompanying text.

269. See Stephen Shepard, *Negligent Hiring Liability: A Look at How It Affects Employers and the Rehabilitation and Reintegration of Ex-Offenders*, 10 APPALACHIAN L.J. 145, 146 (2011) (discussing “the collateral sentencing consequences of incarceration” as including denial of “valuable social and economic opportunities to fully participate” in society).

270. “Work means so much to us Americans that without it some people don’t want to get out of bed in the morning.” Andrea Kay Gannett, *At Work: Job, Self-Esteem Tied Tightly Together*, USA TODAY (Aug. 31, 2013, 12:57 PM), <http://www.usatoday.com/story/money/columnist/kay/2013/08/31/at-work-self-esteem-depression/2736083/>.

271. *Id.*

272. 42 U.S.C. § 2000e(b) (2012).

discrimination claims in public and private settings.²⁷³ This requirement also excludes small employers who will not be burdened by compliance.²⁷⁴ However, similar to Hawaii's statute, this federal ban-the-box law should exempt jobs, such as teaching and law enforcement, that involve working with sensitive third parties.²⁷⁵ These exemptions will allow employers to conduct a background check during the initial hiring stages, when it is clear that a background check is essential to the position. For example, a background check must be conducted on a prospective teacher who will be working with children, a vulnerable group in our population.

Secondly, the federal ban-the-box law should allow the employer to conduct a background check after the first interview.²⁷⁶ Permitting an employer to conduct a background check at this stage balances the applicant's interest in showing the employer that he or she is qualified for the position with an employer's concern that an applicant's criminal history makes the applicant ill-suited for the position.²⁷⁷ An applicant can overcome the initial employer stigma of having a criminal record and get their "foot in the door," while the employer still is able to conduct the check after only expending a reasonable amount of time and resources on the applicant.

The federal ban-the-box law should not bar an employer from considering an applicant's prior record.²⁷⁸ Because an employer will be held to the standards of negligent hiring, the employer is entitled to know the complete background of the applicant it is hiring. However, the federal law could include factors that guide an employer's analysis when making a hiring decision. Examples of such factors are whether the charge was dismissed, the time that has passed since the criminal event, the severity of the offense, and any rehabilitation or mitigation efforts the applicant has demonstrated.²⁷⁹

As far as disclosure obligations, an employer should be required to notify the applicant when a background check is being conducted and provide a copy of the background check to the applicant (which, to some extent, may overlap with the provisions of the FCRA).²⁸⁰ Providing the applicant with a copy of the background check received by the employer gives the applicant a chance to discuss any relevant rehabilitation efforts or any mitigating factors that the applicant feels the employer should consider (or

273. See *supra* note 164 and accompanying text.

274. See *supra* note 165 and accompanying text.

275. See HAW. REV. STAT. § 378-2.5(a), (d) (2005).

276. See MD. CODE ANN., STATE PERS. & PENS. § 2-203(c) (West 2013); R.I. GEN. LAWS ANN. § 28-5-7(7)(iii) (2013).

277. See *supra* note 181 and accompanying text.

278. See *supra* notes 191–201.

279. See, e.g., CONN. GEN. STAT. § 46a-80(c) (2014); COLO. REV. STAT. ANN. 24-5-101(1)(VII)(4) (West 2014); DEL. CODE ANN. tit. 19, § 711(g)(4) (West 2014); MINN. STAT. § 364.03(2)–(3) (2014).

280. See *supra* Part I.B.2.

correct any omissions due to the “technical accuracy” approach employed by many courts).²⁸¹

The employer, however, should not have to provide the applicant with an explanation of why the contents of the background check may have disqualified the applicant from the position. It is important that the federal ban-the-box law protects an employer’s degree of flexibility in making its hiring decisions (because so many factors go into its determination) and imposing such a requirement could easily become burdensome and promote litigiousness among applicants.

Lastly, the EEOC should be in charge of enforcing this federal ban-the-box law. The EEOC is recognized for handling employment discrimination claims effectively,²⁸² and the ultimate goal of the ban-the-box movement is to combat employment discrimination faced by those with criminal backgrounds. The EEOC should be tasked with enforcement because the agency has been monumental in analyzing and issuing detailed guidance on the federal statutes within its control.²⁸³ For example, as mentioned above, the EEOC has had much success issuing policy guidance for employers under Title VII and urging courts to adopt specific tests to implement Title VII’s provisions.²⁸⁴ Once the EEOC is given the power to regulate criminal background checks, the agency can set forth regulations dealing with both the fairness and the content of background checks, as well as issue guidelines detailing what constitutes “reasonable” CRA procedures for conducting background checks.²⁸⁵

The EEOC also has much experience enforcing discrimination regimens on a national level, which can help make enforcement tactics uniform.²⁸⁶ Under the current ban-the-box framework, there is much variation in enforcement techniques.²⁸⁷ The Minnesota Department of Human Services already has been accused of “flip-flopping” on enforcement tactics, leading to further employer confusion.²⁸⁸ These problems would be lessened on a federal level because the EEOC would use its experience to guide its enforcement of a policy that would affect all employers with businesses across the nation.

281. *See supra* note 108 and accompanying text.

282. *See EEOC Issues Comprehensive Litigation Report*, EEOC (Aug. 13, 2002), <http://www.eeoc.gov/eeoc/newsroom/release/8-13-02.cfm> (stating that over 91 percent of federal employment discrimination lawsuits by the EEOC are successfully resolved).

283. *Id.*

284. *See supra* Part II.A.1.

285. In fact, the EEOC has already issued some guidance on how employers should consider criminal histories in order to avoid Title VII discrimination claims. *See generally* EEOC, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (2012), *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

286. *See supra* Part I.B.1.

287. *See supra* Part II.A.

288. *See e.g.*, *DHS Flip-Flops on ‘Ban-the-Box’ Guidance*, FELHABER LARSON, <http://www.felhaber.com/news-events/news-releases/131-dhs-flip-flops-on-%E2%80%9Cban-the-box%E2%80%9D-guidance.html> (last visited Mar. 25, 2015) (discussing the conflicting guidance of the Minnesota Department of Human Services with the text of Minnesota’s ban-the-box statute).

This solution addresses many of the issues that may hinder the effectiveness of current ban-the-box laws. First, there would be a uniform framework for employment compliance. Second, this proposal balances the interests of an applicant who wishes to demonstrate his or her qualifications for a position with an employer's concerns about liability for negligent hiring and using the employer's time most efficiently. Additionally, if the law is backed by the EEOC, employers will be incentivized to comply to avoid facing sanctions from a federal agency.

It is clear that the ban-the-box movement has been growing exponentially since Hawaii's adoption of the first statute in 1998.²⁸⁹ To avoid issues of preemption and statewide variations for multi-jurisdictional employers, it is time for Congress to heed the call of this social movement and deal with employment discrimination against this class of sixty-five million Americans in a consistent, fair, and uniform way.

CONCLUSION

The employment of persons with criminal records has become a growing problem in our society. Providing opportunities for those with criminal records to gain stable employment has the potential to help the economy and communities across the nation. States have recognized the benefits of increasing employment for this group of people and have adopted ban-the-box laws. These ban-the-box laws, however, create problems when they overlap with the requirements of federal laws, including Title VII and the FCRA. Further, these ban-the-box laws may become difficult for employers to comply with, as many states have adopted laws that differ significantly, and many employers have businesses operating in multiple states.

The federal government is in the best position to analyze all of the currently adopted ban-the-box laws and to create a uniform framework for employer compliance. The EEOC should be tasked with enforcement, because the EEOC is a large federal agency known for handling employment discrimination claims effectively.

289. HAW. REV. STAT. § 378-2.5 (2013); *see supra* note 18 and accompanying text.