

Beyond the Box: Safeguarding Employment for Arrested Employees

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ABSTRACT. Individuals across the country are often denied employment opportunities because of their criminal histories. Growing awareness and concern for this form of lingering punishment has engendered a proliferation of laws, colloquially known as ban-the-box or fair-chance laws. These laws aim to address the employment-related collateral consequences of a criminal record. In New York City, the Fair Chance Act (FCA) was enacted to provide job applicants with a fair and meaningful opportunity to be judged on their merits and qualifications—and not simply on their prior involvement in the criminal justice system. Despite being an important step towards protecting individuals with criminal histories from discrimination, laws like the FCA largely exclude a significant category of individuals within the criminal justice system: individuals with pending criminal cases. Failing to provide protections for people who have not been found guilty of any crime violates the fundamental principles of justice and fairness that should guide our criminal justice system. This Essay highlights the unique and important aspects of the FCA while also arguing that the FCA should be expanded, or interpreted, to include protections for current employees with open criminal cases.

INTRODUCTION

Contact with the criminal justice system severely and detrimentally affects a person's employment opportunities. As a fellow at Brooklyn Defender Services (BDS)—a public defense organization that serves nearly 30,000 New York City residents a year—I have represented numerous clients who have lost, or have been completely excluded from, employment opportunities due to current or prior criminal justice involvement. The stories of two clients are particularly illustrative.

Ms. H worked as a home-health aide caring for elderly individuals, a position she held for nearly eight years. In 2017, Ms. H was arrested

while trying to physically defend herself from her sibling. Although she did not have a prior criminal history, as a result of the arrest, Ms. H was suspended from her job without pay or benefits. At the time, she was the sole financial provider for her children. It took nearly two months for her case to be dismissed, and every day she worried about losing her home and providing for her children. After her defender successfully negotiated a non-criminal disposition, her employer eventually allowed her to return to work. No court ever found Ms. H guilty of a crime. Nonetheless, she could not help but feel that she had been punished.

Mr. L has one conviction, a drug charge, from nearly fifteen years ago. He was incarcerated for a year. Today, he is still struggling to find a job that will allow him to afford his own apartment. Employers consistently deny him job opportunities because of his conviction. He wants to know when, if ever, he will be done paying for one mistake made over a decade ago.

The stories of Ms. H and Mr. L illustrate the pervasive discrimination faced by individuals who have come in contact with the criminal justice system. Today, an estimated seventy million people in the United States have arrest or conviction records that make it difficult for them to find work.¹ These individuals are effectively excluded from opportunities that would allow them to provide for themselves and their families. They are also largely low-income persons of color, and thus this practice of exclusion disproportionately impacts low-income, black and brown individuals who are subject to discriminatory law enforcement practices.²

The barriers to employment these individuals face are both vast and enduring. In response, multiple states, cities, and municipalities have enacted laws to mitigate the negative impact that a criminal record has on a person's ability to find work. These laws, colloquially known as ban-the-box or fair-chance laws, vary in their specific provisions, but generally delay an employer's inquiry into

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1. Seizing the "Ban the Box" Momentum to Advance a New Generation of Fair Chance Hiring Reforms, NAT'L EMP. L. PROJECT 2 (2014), <https://www.nelp.org/wp-content/uploads/2015/03/Seizing-Ban-the-Box-Momentum-Advance-New-Generation-Fair-Chance-Hiring-Reforms.pdf> [<https://perma.cc/83LY-WFUY>]; see also Christy A. Visher & Vera Kachnowski, *Finding Work on the Outside: Results from the "Returning Home" Project in Chicago*, in BARRIERS TO REENTRY? THE LABOR MARKET FOR RELEASED PRISONERS IN POST-INDUSTRIAL AMERICA 80, 81 (Shawn D. Bushway, Michael A. Stoll & David Weiman eds., 2007) ("[A] recent survey of three thousand employers in four major metropolitan areas revealed that two-thirds of the employers would not knowingly hire an ex-prisoner.").
 2. See Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 462 (2000).

an applicant's criminal history until later stages of the hiring process. These laws also typically establish procedures that an employer must follow if they decide to deny an individual a position due to their criminal record.³

There are two rationales for delaying this inquiry into an individual's criminal history. First, employers may be more likely to hire an individual with a criminal record if they are able to meet the individual in person and if the applicant has the opportunity to independently demonstrate that they are well-qualified for the position.⁴ Second, fair-chance laws make it more cumbersome and difficult for an employer to discriminate against an individual with a criminal history. Fair-chance laws may include provisions that require employers to permit the applicant to provide mitigating information, such as recommendation letters or occupational training certificates. Other provisions require employers who decide to reject an applicant based on their criminal history to provide the applicant with a written analysis that connects their criminal record history to the eligibility requirements for the position. By attaching procedural costs to an employer's decision to reject applicants because of their criminal histories, fair-chance laws aim to incentivize an employer to hire an applicant when their hesitation is due to that individual's prior criminal record.

This Essay examines New York City's ban-the-box law, the Fair Chance Act (FCA), arguing that it is a model ordinance for improving employment prospects for people who already have criminal records. But this Essay also finds areas for improvement: it argues that fair-chance ordinances should go even further than the FCA, and should include explicit protections for current employees with pending criminal cases.⁵ Those with pending cases are no less

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3. See Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NAT'L EMP. L. PROJECT (Apr. 20, 2018), <https://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide> [<https://perma.cc/VGY2-MKLR>].
 4. Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 HOW. L.J. 753, 774 (2011).
 5. The New York City Commission on Human Rights, the agency charged with enforcing the FCA, has determined that the FCA does not protect individuals with open cases. See NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63, NYC COMMISSION ON HUM. RTS. 9 (June 24, 2016), <https://www1.nyc.gov/assets/cchr/downloads/pdf/FCA-InterpretiveGuide-112015.pdf> [<https://perma.cc/55S8-W9XV>] [hereinafter NYC Commission, *Local Law No. 63*]. However, some experts disagree with the Commission's interpretation of the statute, arguing that, as written, the FCA should be interpreted to protect individuals from discrimination on the basis of an arrest. In fact, when the FCA initially entered the rulemaking phase, it did protect individuals with open cases. However, these protections for individuals with pending cases were ultimately not adopted. See Notice of Public Hearing and Opportunity to Comment on Proposed Rules, NYC COMMISSION ON HUM. RTS. (Feb. 12, 2016), http://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/notice_of_hearing_and_opportunity_to_comment_on_proposed_rules_fair_chance_act_2.pdf [<https://perma.cc/6DGJ-U3AB>].

vulnerable to discrimination, but they have little to no protections under current fair-chance laws.

This Essay has two principal aims. First, it intends to advance a broader effort to pressure local governments to pass or amend fair-chance laws to include explicit protections for current employees or applicants with open criminal cases. I argue that such protections are necessary given the goals of the fair chance movement and the fundamental principle that individuals are innocent until proven guilty in a court of law. As the client stories above demonstrate, in losing their access to employment, people with open cases are essentially punished without any finding of criminal culpability. Second, it seeks to contribute to the existing literature on fair-chance laws, positing that the rationale and normative underpinnings of such laws support—if not necessitate—protections for individuals whose cases in criminal court remain pending.

The literature on fair-chance laws is dominated by discussions and data regarding the effects of criminal *convictions* on employment opportunities. Meanwhile, scholarly discussion of the impact of *open* criminal cases on employment opportunities is nearly nonexistent. This Essay aims to address that gap. Part I begins by discussing the barriers to employment that individuals with criminal histories face, stressing the importance of fair-chance laws in eliminating discrimination in employment evaluations. Part II briefly accounts the rise of ban-the-box or fair chance laws. Part III argues that states can, and should, fill the void created by the absence of federal protections for individuals with criminal records. Part IV then elaborates upon the effect of a pending criminal case on individuals who are currently employed. This Part parses the theoretical justifications for ban-the-box laws, arguing that if theories of punishment, redemption, and prevention truly undergird such laws, then fair-chance statutes should also protect individuals with open cases. Part V addresses how the fair chance laws could be amended to comprehensively address the discrimination faced by individuals with criminal justice system-involvement.

I. DISCRIMINATORY HIRING PRACTICES FOR INDIVIDUALS WITH CRIMINAL HISTORIES

People with criminal records face numerous informal and formal barriers to employment. Formal barriers often take the form of statutes and regulations that bar people from certain employment and licensing opportunities.⁶ Infor-

6. See Sandra J. Mullings, *Employment of Ex-Offenders: The Time Has Come for a True Antidiscrimination Statute*, 64 SYRACUSE L. REV. 261, 261-62 (2014) (noting that thousands of statutes across the country have created a complex regulatory system that affects employment prospects of individuals with criminal histories).

mally, employers consistently discriminate against those with criminal histories. Nearly ninety-two percent of employers require an inquiry into an applicant's criminal history at some stage of the hiring process.⁷ Certain employers even adopt harsh hiring policies—sometimes even a zero-tolerance policy—for particular criminal charges, refusing to hire applicants regardless of whether they were actually convicted and in spite of their qualifications for the position.⁸ Employers may also justify their reluctance to hire people with criminal records on the basis that they are seeking what some have called “work readiness”—a term that one leading economic research institute defined as encompassing “personal qualities such as honesty and reliability, an inclination to arrive at work on time every day, a positive attitude toward work.”⁹ Employers may, without good reason, regard the existence of a criminal record as a proxy for the absence of those qualities.¹⁰ However, research shows that these presumptions are not only discriminatory, but are indeed false. In a study comprised of over a quarter million applicants for customer service positions, researchers at the Kellogg and Northwestern University School of Law found that people with criminal histories did not perform their duties any worse than non-offenders. The study also found that those with prior criminal records were also less likely to voluntarily quit—saving their employers turnover costs.¹¹

7. *Background Checking: Conducting Criminal Background Checks*, SOC'Y HUM. RESOURCE MGMT. 3 (2010), <http://www.slideshare.net/shrm/background-check-criminal> [<https://perma.cc/Q8SZ-7V3Q>].

8. See, e.g., *Wash. Metro. Area Transit Auth. v. Local 689, Amalgamated Transit Union*, 113 F. Supp. 3d 121, 127–28 (D.D.C. 2015) (involving an employer's policy that prevented rehiring former employees with criminal records); *May v. Wal-Mart Stores, Inc.*, 819 F. Supp. 2d 652, 656–57 (E.D. Mich. 2011) (finding employer's decision to terminate most registered sex offenders was permissible); *Jackson v. Se. Pa. Transp. Auth.*, 260 F.R.D. 168, 176 (E.D. Pa. 2009) (involving an employer's criminal record policy that prohibited hiring any person with a criminal record without allowing any inquiry into the circumstances of the conviction); see also Press Release, Equal Emp't Opportunity Comm'n, *Pepsi to Pay \$3.13 Million and Made Major Policy Changes to Resolve EEOC Finding of Nationwide Hiring Discrimination Against African Americans* (Jan. 11, 2012), <https://www.eeoc.gov/eeoc/newsroom/release/1-11-12a.cfm>. [<https://perma.cc/7CGP-DRA8>] (resolving a dispute over Pepsi's hiring policy, which excluded applicants who were arrested for any offense regardless of whether they had actually been convicted).

9. Harry J. Holzer et al., *Can Employers Play a More Positive Role in Prisoner Reentry?*, URB. INST. 1–2 (2002), <https://www.urban.org/sites/default/files/publication/60761/410803-Can-Employers-Play-a-More-Positive-Role-in-Prisoner-Reentry-.PDF> [<https://perma.cc/K4TF-5QP9>].

10. See *id.*

11. *Should you Hire Someone with a Criminal Record?*, KELLOGGINSIGHT (Feb. 3, 2017), <https://insight.kellogg.northwestern.edu/article/should-you-hire-someone-with-a-criminal-record> [<https://perma.cc/2NVL-YYC3tt>]; see Jena McGregor, *Why Former Felons May Be Good Em-*

Because of these formal and informal barriers, many applicants find themselves completely shut out from employment opportunities. The discrimination often begins before an employer makes a final hiring decision: many applicants are denied even the chance to interview for job opportunities because of their criminal records. One study conducted in Milwaukee found that a criminal record reduces the chances of an initial interview or job offer by approximately 50% for white applicants and 64% for black applicants.¹² Another recent study found that applicants without a felony conviction were 62% more likely to receive a callback interview than those with a conviction.¹³ This was true even though the convictions were for nonviolent drug or property crimes that occurred more than two years prior and did not result in any incarceration history, and despite the fact that the jobs applied for were positions that the researchers expected to be comparatively receptive to applicants with criminal records.¹⁴

The Milwaukee study also reveals how these discriminatory hiring practices disproportionately impact persons of color. Excluding individuals with criminal histories from employment further disenfranchises low-income, black and brown individuals who are targeted by racially biased law enforcement practices.¹⁵ In New York City, black and brown New Yorkers comprise the majority of stop-and-frisks. In 2016, black individuals accounted for approximately 53% of total stop-and-frisks while Hispanic (non-white) individuals accounted for 30% of total stop-and-frisks despite representing 24% and 29% of

ployees, WASH. POST (May 6, 2016), https://www.washingtonpost.com/news/on-leadership/wp/2016/05/06/why-former-felons-may-be-good-employees/?utm_term=.8616ba5ae69f [https://perma.cc/N929-Q2UDt].

12. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 955-58 (2003). The study included a cross section of employment opportunities that were advertised in a local newspaper. *Id.*; see also Devah Pager, Bruce Wester & Bart Bonikowski, *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777 (2009) (finding similar results regarding Latino and African-American job applicants in a study conducted in New York City).
13. Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment* 3 133 Q.J. ECON. 191, 222 (2017). This result was found to be true across multiple races. *Id.* at 204-05. The study involved an analysis of over 15,000 test applications sent out in New Jersey and New York City. *Id.* at 202.
14. *Id.* at 11-12, 31. The researchers focused on entry-level positions that required no specialized skills or secondary education. *Id.* at 10.
15. Tammy Rinehart Kochel et al., *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 490-91 (2011). But see Agan & Starr, *supra* note 13, at 191 (noting that "withholding information about criminal records could risk encouraging statistical discrimination: employers may make assumptions about criminality based on the applicant's race").

the total New York City population respectively.¹⁶ These statistics are unsurprising given a number of racially biased policing practices including the New York Police Department's notorious stop and frisk practice and the over-policing of communities of color for minor offenses such as marijuana possession and turnstile jumping.¹⁷ Thus it is important to acknowledge that ban-the-box laws do not operate within the vacuum. They are but one legal mechanism operating within a system that disenfranchises and discriminates against black and brown people.

These studies show how pervasive de facto discrimination is for applicants with criminal histories, even during the early stages of a hiring process. This uphill battle to employment is particularly concerning given the impact that stable employment can have on a person's life—especially for those with criminal histories. Gainful employment has been shown to “accelerate successful re-integration” into society.¹⁸ While searching for employment, many individuals with criminal histories must often depend on assistance from family or friends.¹⁹ Many of my clients have little choice but to live with family members during their search. Others are completely unsuccessful at gaining employment through formal application processes and turn to family members or friends to connect them with opportunities. Excluding those with criminal records from employment not only creates a strain on their loved ones but also denies them the opportunity to achieve financial independence. Those without family or friends to call on are at even greater risk of failing to achieve financial stabil-

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16. See James P. O'Neill, *Crime and Enforcement Activity in New York City (Jan 1 - Dec 31, 2016)*, N.Y.C. POLICE DEP'T 15, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf [https://perma.cc/W4C9-TSFL] (providing stop and frisk statistics); *QuickFacts: New York City, New York*, U.S. CENSUS BUREAU (Jul. 1, 2017), <https://www.census.gov/quickfacts/fact/table/newyorkcitynewyork/PST045217> [https://perma.cc/9SZ7-BVGN] (providing New York City population statistics).
 17. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (finding that New York Police Department officers engaged in “indirect racial profiling” by targeting racial minority neighborhoods at higher rates); see also Harold Stolper & Jeff Jones, *The Crime of Being Short \$2.75: Policing Communities of Color at the Turnstile*, COMMUNITY SERVICES SOC'Y (October 2017), http://lghttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Fare_Evasion_FINAL_10_6_17_smaller.pdf [https://perma.cc/Y49M-GM3S]; *Racial Disparities in NYC Arrest Data for Marijuana Possession*, INNOCENCE PROJECT (May 14, 2018), <https://www.innocenceproject.org/racial-disparities-in-nyc-arrest-data-marijuana-possession/> [https://perma.cc/GBG7-NVFZ] (finding that between January and March of 2018, 93% of those arrested for marijuana use were persons of color.)
 18. Darren Wheelock et al., *Employment Restrictions for Individuals with Felon Status and Racial Inequality in the Labor Market*, in GLOBAL PERSPECTIVES ON RE-ENTRY 278, 306 (Ikponwosa O. Ekunwe & Richard S. Jones eds., 2011).
 19. Christy A. Visser et al., *Employment After Prison: A Longitudinal Study of Former Prisoners*, 28 JUST. Q. 698, 703 (2011).

ity.²⁰ Attaining financial stability is crucial, as it allows individuals to create lives outside the criminal justice system, decreases the chance that they will engage in criminal activity in the future, and increases the likelihood of successful reentry into their communities.²¹

II. THE NEED FOR FAIR-CHANCE LAWS

Federal law provides little protection against discriminatory hiring practices that target individuals with criminal records. Title VII of the Civil Rights Act of 1964 generally does not protect people with criminal records unless a hiring policy can be shown to have a disparate impact on a protected group.²² Consequently, many scholars have noted the great difficulty that such a person faces in succeeding in a claim under Title VII.²³ These claims are unlikely to succeed for a variety of reasons: the lenient standard by which employers may establish a nexus between the individual's offense and the position in question; the cost of filing a Title VII claim; the limited scope of Title VII; and a general hostility by the judiciary to extend Title VII protection to individuals with criminal records.²⁴ These difficulties make Title VII claims untenable as both a legal and practical matter for those who face discrimination due to their criminal histories. Many people struggle to find or maintain housing or to provide for their

20. One client's story is particularly illustrative. Mr. A had no family or friends in the United States. When he lost his job due to an open case, he was unable to pay his rent and was evicted. After losing his job and his apartment, he had nowhere else to go and was forced to reside in a men's shelter in Brooklyn. He was completely dependent on the shelter for all of his basic necessities.

21. See *id.*; see also Xia Wang et al., *Race-Specific Employment Contexts and Recidivism*, 48 CRIMINOLOGY 1171, 1172-73 (2010) (summarizing the literature on prisoner reentry).

22. See, e.g., *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1293 (8th Cir. 1975) (reinstating a Title VII claim against an employer for its policy of automatically rejecting applicant's with a criminal record when such a policy had a disparate impact on black applicants); *Gregory v. Litton Sys., Inc.*, 472 F.2d 631, 632 (9th Cir. 1972) (holding that an employer's policy denying employment on the basis of arrest records violated Title VII because the policy had a disparate impact on racial minorities).

23. See, e.g., Alexandra Harwin, *Title VII Challenges to Employment Discrimination Against Minority Men with Criminal Records*, 14 BERKELEY J. AFR.-AM. L. & POL'Y 2, 5 (2012); Jordan Segall, *Mass Incarceration, Ex-Felon Discrimination & Black Labor Market Disadvantage*, 14 U. PA. J.L. & SOC. CHANGE 159, 175 (2011); Jocelyn Simonson, *Rethinking "Rational Discrimination" Against Ex-Offenders*, 13 GEO. J. POVERTY L. & POL'Y 283, 286 (2006).

24. See, e.g., *El v. Se. Pa. Transp. Auth.*, 479 F.3d 232, 244-45 (3d Cir. 2007); *Clinkscale v. City of Phila.*, No. Civ. A. 97-2165, 1998 WL 372138, at *2 (E.D. Pa. June 16, 1998); *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 751 (S.D. Fla. 1989); *Hill v. U.S. Postal Serv.*, 522 F. Supp. 1283, 1302 (S.D.N.Y. 1981).

families, and attempting to vindicate their rights through a lengthy, expensive and uphill legal battle is a risk few can afford.

In the absence of any meaningful federal mandate, states and municipalities across the country have passed laws aimed at improving employment outcomes for individuals with criminal histories. These laws essentially seek to allow individuals to be judged on their merit and qualifications rather than their criminal history. Currently, thirty states²⁵ and 150 cities and municipalities²⁶ have enacted their own ban-the-box laws. Over 236 million Americans—almost three-quarters of the U.S. population—live in a jurisdiction that has enacted some form of ban-the-box or fair-chance policy.²⁷ While most fair chance laws were passed within the last five years, they have already increased access to jobs for people with criminal records. Studies have shown that ban-the-box laws have increased employment rates for people with criminal records. In Washington, D.C. for example, employment rates for those with criminal histories increased by 33 percent.²⁸ Other states such as Georgia and North Carolina have also seen similar success.²⁹

These laws typically delay an employer's inquiry into an applicant's criminal record, allowing employers to first evaluate an applicant based on their qualifications and merit. Ultimately, fair-chance laws posit that employers will be less likely to deny employment to people with a criminal record after they have already formed a connection with the applicant and deemed them qualified. On a pragmatic level, these laws could be viewed as a part of a larger policy strategy to eliminate applications that contain questions about prior convictions, which often discourage individuals from applying to positions in the first place.³⁰ On a normative level, the ban-the-box movement aims to dismantle

25. These states are Arizona (2017), California (2013), Colorado (2012), Connecticut (2016), Delaware (2014), Georgia (2015), Hawaii (1998), Illinois (2014), Indiana (2017), Kentucky (2017), Louisiana (2016), Maryland (2013), Massachusetts (2010), Minnesota (2013), Missouri (2016), Nebraska (2014), Nevada (2017), New Jersey (2014), New Mexico (2010), New York (2015), Ohio (2015), Oklahoma (2016), Oregon (2015), Pennsylvania (2017), Rhode Island (2013), Tennessee (2016), Utah (2017), Vermont (2015, 2016), Virginia (2015), and Wisconsin (2016). Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair-Chance Policies to Advance Employment Opportunities for People with Past Convictions*, NAT'L EMP. L. PROJECT 2 (Apr. 2018) <https://www.nelp.org/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide.pdf> [<https://perma.cc/5BLJ-SMSH>].

26. *Id.*

27. *Id.*

28. Phil Hernandez, *Ban-the-Box "Statistical Discrimination" Studies Draw the Wrong Conclusions*, NAT'L EMP. L. PROJECT (Aug. 29, 2017), <https://www.nelp.org/blog/ban-the-box-statistical-discrimination-studies-draw-the-wrong-conclusions/> [<https://perma.cc/ZU4P-HP6P>].

29. *Id.*

30. *Id.*

stereotypes about the desirability of formerly incarcerated workers and increase hiring rates for that population.³¹

III. NEW YORK CITY'S FAIR CHANCE ACT

New York City's Fair Chance Act (FCA) took effect on October 16, 2015.³² In many ways, the FCA is a model ordinance for other cities and municipalities considering similar legislation. The FCA creates numerous protections to ensure that people with criminal histories have a fair chance at employment by affording them a right to be judged on their qualifications and merit. Prior to the FCA, New York state law, known as Article 23-A, provided limited protections for individuals facing discrimination due to their criminal record.³³ While the FCA borrows extensively from Article 23-A, it does contain two new and significant provisions: first, the FCA limits the timing of an employer's inquiry into an applicant's criminal history; and second, it creates a legal process if an employer rescinds an offer of employment following a background check. I discuss each in turn.

First, the FCA prohibits an employer from inquiring into an applicant's criminal history until *after* a conditional offer of employment has been made. Other ban-the-box laws only prohibit an employer from inquiring about an applicant's criminal record on the initial application or before an interview.³⁴ This difference is critical. This delayed inquiry provides applicants with a meaningful opportunity to demonstrate that they are the most qualified person for the position before they are eliminated from consideration.³⁵

Next, the FCA creates a legal process that is triggered if an employer decides to rescind a conditional offer of employment after a criminal background check. Under New York Correction Law, Article 23-A, an employer can only re-

31. Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIM. & PUB. POL'Y 755 (2007).

32. N.Y.C., N.Y., ADMIN. CODE § 8-107 (2016).

33. N.Y. CORRECT. L., § 752.

34. See, e.g., CONN. GEN. STAT. § 46a-80 (2018); 820 ILL. COMP. STAT. 75/15 (2018); MINN. STAT. § 364.021 (2018); N.J. STAT. ANN. § 34:6B-11 to 19 (West 2018); CHI., ILL. CODE 2-160-054 (2018).

35. For positions that require an interview, the FCA prohibits the employer from conducting a background check prior to the interview, ensuring that a greater number of people with criminal records are able to reach the interview stage. An individual's chances of receiving a job offer could increase with the opportunity to interview, as at least one study found that the opportunity for personal contact with the employer reduces the negative impact of a criminal record by approximately fifteen percent. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 200 (2009).

scind an offer if they can demonstrate that they meet one of two exceptions: an employer claiming an exception must be able to either (1) draw a direct relationship between the applicant's criminal record and the prospective job; or (2) show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."³⁶

In order for an employer to claim a direct relationship exception, they first must draw a connection between the nature of conduct that led to the conviction and the applicant's unsuitability for the position. If a direct relationship exists, an employer must then evaluate specific factors set out in Article 23-A to determine whether the concerns presented by the relationship have been mitigated.³⁷ For example, if an applicant has previously been convicted of a relatively minor theft offense, and is applying for a cashier position at a retailer, the employer could arguably establish a direct relationship between the position and the conviction. However, because one of the factors to be considered includes that New York public policy encourages the employment of individuals

36. N.Y. CORRECT. LAW § 752 (McKinney 2018).

37. NYC Commission, *Local Law No. 63*, *supra* note 5, at 7.. The Article 23-A factors to be considered are the following:

1. That New York public policy encourages the licensure and employment of people with criminal records;
2. The specific duties and responsibilities of the prospective job;
3. The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
4. The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
5. The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
6. The seriousness of the applicant's conviction history;
7. Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct;
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
9. Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.

Id.

with criminal histories, the employer should consider mitigating factors including, for example, the length of the time that has passed since the conviction and the applicant's age at the time of the offense.

Alternatively, to assert an unreasonable risk exception, an employer must begin by assuming that no risk exists, and then show how the Article 23-A factors combine to create an unreasonable risk in hiring the individual.³⁸ After conducting this analysis, an employer who decides to rescind a conditional offer of employment must then follow several steps that are detailed in the Act and in guidance released by the New York City Commission on Human Rights.³⁹ The FCA guidance makes it clear that an employer's failure to complete any of the steps within this process will constitute a per se violation of the FCA.⁴⁰

The FCA's conditional-offer provision mitigates one of the largest hurdles plaintiffs in these cases face: finding definitive proof that an employer discriminated against them because of their criminal record. In the absence of laws like the FCA, individuals with criminal records often do not succeed in employment discrimination cases because they cannot prove that they were qualified and denied employment solely because of their criminal history.⁴¹ By creating a conditional-offer provision, the FCA prevents employers from disclaiming a person's criminal record as the reason for their adverse employment decisions.⁴²

IV. PROTECTIONS FOR CURRENT EMPLOYEES AND APPLICANTS WITH OPEN CASES

As the previous sections illustrate, the literature and data surrounding employment-related collateral consequences focus almost entirely on the difficul-

38. *Id.*

39. An employer who decides to rescind a conditional offer of employment must: (1) Disclose to the applicant a copy of any inquiry it conducted into the applicant's criminal history; (2) share with the applicant a written copy of its Article 23-A analysis; and (3) allow the applicant at least three business days, from the receipt of the inquiry and analysis, to respond to the employer's concerns. The job must also be kept open for three business days to allow the applicant time to contest or correct the employer's inquiry. N.Y.C. HUM. RTS. L. ADMIN. CODE § 8-107-11-a(2) (2016).

40. NYC Commission, *Local Law No. 63*, *supra* note 5, at 4..

41. See *Fletcher v. Berkowitz Oliver Williams Shaw & Eisenbrandt, LLP*, 537 F. Supp. 2d 1028 (W.D. Mo. 2008); *El v. Se. Pa. Transp. Auth.*, 418 F. Supp. 2d 659 (E.D. Pa. 2005); *Obabueki v. Int'l Bus. Machs. Corp.*, 145 F. Supp. 2d 371 (S.D.N.Y. 2001); *C.R.M. v. Chief Legal Counsel of Ill. Dep't of Human Rights*, 866 N.E.2d 1177 (Ill. App. Ct. 2007).

42. See *Wright v. Pittsylvania Cty. Sch.*, No. 4:16-cv-00029, 2016 WL 7409383 (W.D. Va. Dec. 22, 2016).

ties facing applicants with criminal convictions. Unsurprisingly, fair-chance laws across the country are designed specifically to protect individuals with criminal convictions from discrimination during the hiring process. While this is and should be the heart of any fair-chance law, a large and vulnerable population is largely excluded from these protections—current employees with *open* cases. In 2017, approximately 240,000 adult arrests were made in New York City. This means that up to a quarter million New Yorkers were vulnerable to employment-related collateral consequences and were excluded from legal protection.⁴³

At Brooklyn Defender Services (BDS), many clients are suspended or terminated from their current employment merely because of an arrest. This is alarming because an arrest does not amount to a finding of criminal culpability—by definition, neither guilt nor innocence has been adjudicated by a court of law at the charging stage of the criminal process. Further, individuals are too often arrested and processed through the criminal justice system without any criminal culpability: overpolicing of communities and persons of color, unnecessary intrusion into domestic affairs, and false reports can all factor into an individual's arrest.⁴⁴

An arrest often triggers a frustrating state of limbo in which a person's life is simultaneously upended and stalled. An individual who has been arrested and processed through the New York criminal courts can wait months before their case is resolved—even for fabricated or false allegations.⁴⁵ A recent Bronx Defenders study underscores this point, finding that the typical defendant charged with misdemeanor drug possession wishing to fight her case could expect to wait 240 days and make five court appearances before any disposition is reached.⁴⁶ In the meantime, if she is employed, she could be suspended without pay, lose her health and employment benefits, and even be terminated due

43. *Adult Arrests: 2008-2017*, N.Y. DIVISION OF CRIM. J. SERVS. (Feb. 16, 2018), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/nyc.pdf> [<https://perma.cc/W5YE-SQX7>].

44. See *supra* 17 and accompanying text. See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012) (discussing overpolicing in communities of color).

45. New York law allows the state anywhere from thirty days to six months—depending on the nature of the charges—to substantiate its case and be ready for trial. N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018). An individual whose case is likely to result in a dismissal is still subject to this waiting period. In practice, most cases linger for months or years before resolution, lengthening the amount of time that a person is subject to this harm.

46. *No Day in Court: Marijuana Possession Cases and the Failure of the Bronx Criminal Courts*, BRONX DEFENDERS FUNDAMENTAL FAIRNESS PROJECT 6 (May 2013), <http://www.bronxdefenders.org/wp-content/uploads/2013/05/No-Day-in-Court-A-Report-by-The-Bronx-Defenders-May-2013.pdf> [<https://perma.cc/SGM2-VTNT>].

to her open case. Unemployed and without income, she will not only face an uphill battle to obtain government benefits, but will also find it very difficult to find alternative work as certain employers will hold applications in abeyance until the case is resolved.⁴⁷ The severe consequences that can follow an arrest are concerning for multiple reasons.

An arrest can also detrimentally affect an individual's employment or employment opportunities even if the charges do not have a direct or substantial relationship to the job in question. This is true even if an individual faces charges that will likely be dismissed or result in no criminal liability. In one instance, a BDS client was suspended from his job as a custodian for allegedly using an improper license plate—even though the charges in no way reflected his ability to perform his job and despite the fact that he had no prior criminal record or previous disciplinary issues with his employer.

Even if a person's arrest charges do appear to relate to the position in question, those charges may not paint an accurate picture of the underlying incident. First, initial arrest charges can include a litany of charges that are ultimately not pursued by the district attorney's office. This is in large part because the arrest charges are actually determined by the arresting police officers and not a lawyer within the district attorney's office. Second, even if the charges are pursued, the charges themselves are often misleading and provide little context into the actual incident. For example, after attempting to defend herself from an abusive partner, one of our clients found herself with an open assault case. She was suspended from her job as a result. Third, we should not discount that many arrests are made on faulty or false reports. Even in these instances, it can take weeks or months before the individual is cleared of the pending criminal charges. Courts themselves have recognized that the gap between the legal standard necessary to file a complaint or make an arrest (probable cause) and the evidentiary burden necessary to sustain a conviction (beyond a reasonable doubt) is one filled with a "risk of error."⁴⁸ Put simply, because individuals may

47. For example, the New York State Justice Center, which regulates all organizations within New York that work with individuals with disabilities or special needs, will hold certain individual applications in abeyance until their case is resolved. N.Y. COMP. CODES R. & REGS. TIT. 14, § 701.6 (2018); *see also* Division of State Gov't Accountability, *Criminal History Background Checks of Unlicensed Health Care Employees*, N.Y. OFF. OF STATE COMPTROLLER 2, <https://osc.state.ny.us/audits/allaudits/093017/16s65.pdf> [<https://perma.cc/3JZ6-29HM>].

48. *Connecticut v. Doe*, 501 U.S. 1, 14 (1991) (noting that a prejudgment attachment of defendant's property based merely on a facially valid complaint presented a substantial "risk of error"); *see also* *Brown v. Dep't of Justice*, 715 F.2d 662, 669 (D.C. Cir. 1983) (commenting that in evaluating the relief due a plaintiff based on a suspension for job-related offense, the "final disposition of the charges is vitally important"); *Valmonte v. Bane*, 18 F.3d 992, 1004 (2d Cir. 1994) (noting that initial determinations made by an agency identifying cases of child abuse were "at best imperfect").

be arrested on unsubstantiated allegations or very little evidence, many are later found to be not criminally culpable. In fact, in 2017 only 22% of adult arrests made in New York City, for either a misdemeanor or felony, resulted in a criminal conviction.⁴⁹

The uncertainties surrounding and following an arrest are particularly concerning in the employment context. It is not uncommon for an employer to routinely suspend an employee based solely on arrest charges. One BDS client, for example, had his taxi cab license suspended by the New York City Taxi and Limousine Commission (TLC) because his arrest charges included an assault charge; however, this charge was ultimately never pursued by the District Attorney's office.⁵⁰ Had BDS not intervened and informed TLC that the assault charge had been dropped, our client would likely have been unable to work during the entire duration of his case (which very well could have lasted months)—all due to a dismissed and unsubstantiated charge.⁵¹ Other clients are not so lucky: they are forced to choose between fighting their cases in court and taking a plea arrangement so that they may return to work. Many clients simply cannot afford to be unemployed during the entire pendency of their case.⁵²

This practice violates fundamental precepts of justice and fairness and undercuts the animating purpose of fair-chance laws. Given that arrests are not always representative of criminal culpability, all individuals are innocent until proven guilty in a court of law. Yet the current practice—according to one BDS staff attorney, about fifty percent of her clients are either suspended or terminated due to a pending case⁵³—runs contrary to that fundamental principle of American justice. This practice runs contrary to the underlying theory behind

49. *Data Source Notes*, N.Y. DIVISION CRIM. J. SERVS. 2, 5 (Apr. 20, 2018), <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nyc.pdf> [<https://perma.cc/T4BY-MS6B>]. The 22% was obtained by dividing 51,500 by 234,898: the numerator is the sum of Adult Non-YO Convictions for felonies and misdemeanors for top arrest charges of felony (10,655 + 15,831, = 26,486) and misdemeanor (447 + 24,567 = 25,014); the denominator is the total dispositions with a top arrest charge of felony or misdemeanor (78,992 + 155,906).

50. The Taxi and Limousine Commission's practice of post-arrest suspensions is being challenged in court. See *Stallworth v. Joshi*, No: 1:17-cv-07119, 2017 WL 8777378 (S.D.N.Y. Nov. 22, 2017).

51. It is worth noting, however, that while this client's story is illustrative of the harm an initial arrest charge, the FCA does not apply to certain employers, including the Taxi and Limousine Commission and Department of Education. N.Y.C., N.Y., ADMIN. CODE § 8-107(11-a)(2)(e) (2016).

52. Interview with Ryan Cleary, Senior Staff Attorney, Brooklyn Defender Servs., in Brooklyn, N.Y. (June 1, 2018).

53. Interview with Catherine Gonzalez, Staff Attorney, Brooklyn Defender Servs., in Brooklyn, N.Y. (June 1, 2018).

fair-chance laws—that an individual is not necessarily unqualified or an unreasonable risk because of involvement in the criminal justice system.

It is also critical to acknowledge that persons of color are disproportionately harmed by the collateral consequences of an arrest. As mentioned earlier, police arrest black and brown individuals at disproportionate rates and these communities are therefore more at risk of losing their employment. By allowing the racial inequalities of our criminal justice system to permeate into the employment context, this practice further stifles economic opportunities for low-income communities of color.

Despite the dire circumstances that employees with open cases face, most fair-chance laws offer little to no protection for employees with open criminal cases.⁵⁴ Indeed, the only protections available to current employees under the FCA, for example, are for employees who are denied promotion opportunities due to a prior criminal conviction. Thus, without even assessing whether the employee now charged with a crime poses a safety concern, an employer may suspend or terminate an employee due to an arrest.

The risks and uncertainty surrounding certain criminal charges may understandably alarm some employers. However it is unclear what about an arrest itself makes an individual such an unreasonable risk that she should *automatically* be terminated. In my own conversations with employers, some employers seem to attribute the risk of an open case to a level of uncertainty regarding whether the employee will have to miss work because of his or her pending charges; others are primarily concerned about liability—either legal or through backlash following potential press coverage—if the employer does not suspend or terminate the employee, and the employee subsequently engages in unlawful or offensive conduct on the job. However, Deborah Weiss, director of Northwestern University’s Work Force Science Project, notes that in terms of employer liability, there are “zero hard numbers on this. Everything we were able to find on negligent hiring was just pure anecdotes.”⁵⁵

A few of these concerns are not without merit. An employee may in fact have to miss days at work to attend a court proceeding. Other individuals with open cases may work with particularly vulnerable individuals, including those with physical or mental disabilities, children and the elderly. In these cases, erring on the side of caution may be appropriate in limited circumstances. While it is understandable that an employer would want to protect their business and the clients they may serve, an automatic decision to terminate or suspend an

54. See generally Avery & Hernandez, *supra* note 25 (summarizing all current fair-chance laws).

55. Brentin Mock, *The Case For Hiring Ex-Offenders*, CITYLAB (Jun. 15, 2017) <https://www.citylab.com/equity/2017/06/the-case-for-hiring-ex-offenders/529896/> [<https://perma.cc/49YZ-5QJU>].

employee without at least first conducting a basic risk assessment both hinders the progress of the fair-chance movement and does nothing to advance private business interests. At its most fundamental level, the ban-the-box movement seeks to break down the false and dehumanizing misconceptions surrounding people with criminal records. The very aim of ban-the-box is to give legal recognition to the fact that criminal justice involvement is not a dispositive predictor of a person's employment potential or future behavior. Fair chance laws must hold employers fully accountable to this mandate.

V. NEXT STEPS

The FCA's requirement that employers consider certain mitigating factors in addition to the risk posed by an individual's criminal conviction should explicitly extend to employers who wish to terminate or suspend an employee because of a pending criminal case. It is unclear why an individual with a conviction should receive a risk assessment under fair-chance laws, while individuals who have only been arrested are not afforded the same process. A more thorough discussion of what this process may look like in practice is beyond the scope of this Essay, but it may include establishing an assessment procedure that allows the individual to present mitigating evidence or it may require employers to conduct an evaluation as to whether the charges against the individual relate directly to the employee's position of employment.

Such a proposal would not be unprecedented; at least one state has passed a fair-chance law that contains explicit protections for recently-arrested individuals. In Wisconsin, it is considered employment discrimination to suspend "any individual who is subject to a pending criminal charge" from employment or licensing "if the circumstances of the charge" do not "*substantially relate* to the circumstances of the particular job or licensed activity."⁵⁶ Wisconsin's law acknowledges that to suspend or terminate an individual's employment for a charge that in no way reflects her ability to perform her duties is a discriminatory practice that should be prohibited. It is too soon to tell how Wisconsin employers are making determinations as to whether a charge substantially relates to the individual's position, but the law itself fulfills an important expressive function. In this way, Wisconsin's statute has the capacity to deliver on the full promise and potential of the fair-chance movement—and if it succeeds in practice, could become the best model for states to follow.

Further research must also be done on the impact of ban-the-box laws and the individuals who are not only excluded by them but who also may be harmed them as well. For example, while fair chance laws have increased em-

56. WIS. STAT. § 111.335(1)(b) (2018) (emphasis added).

ployment opportunities for many individuals, it is important to acknowledge that ban-the-box laws may unintentionally result in more discrimination against persons of color. As the argument goes, if employers are not allowed to ask about an applicant's criminal history on the initial application, they may discriminate against black and brown applicants by using their race as a proxy for criminal justice involvement. In other words, employers will be less likely to interview or hire black and brown applicants because they will assume that they have criminal histories. One study conducted by Amanda Agan and Sonia Starr, confirmed this theory, finding that ban-the-box laws actually increased the hiring disparity between black and white male applicants.⁵⁷ This essay does not fully address the potentially counterproductive consequences of ban-the-box laws and further field studies are necessary to determine the full efficacy and impact of these laws.

CONCLUSION

Advocates have long acknowledged and worked to counteract the stigma attached to criminal records and the attendant collateral consequences that attach to a prior conviction, but there is still much more to be done on behalf of individuals who find themselves processed through the criminal justice system. Prohibiting, or at the very least regulating, the practice of suspending or terminating individuals with open cases is an essential component of any serious effort to address the detrimental collateral consequences of interactions with the criminal justice system. It is also particularly important given that these employment consequences only serve to exacerbate the racial disparities within the criminal justice system. While an arrest may alarm employers, a person should not lose her livelihood because of an unadjudicated charge.

The reach of the criminal justice system and the devastating effects it can impose is wide. Only by expanding our efforts and laws to include greater protections for everyone affected can we truly offer a fair chance for all.

57. Agan & Starr, *supra* note 13, at 4, 6.