



POLICY BRIEF:

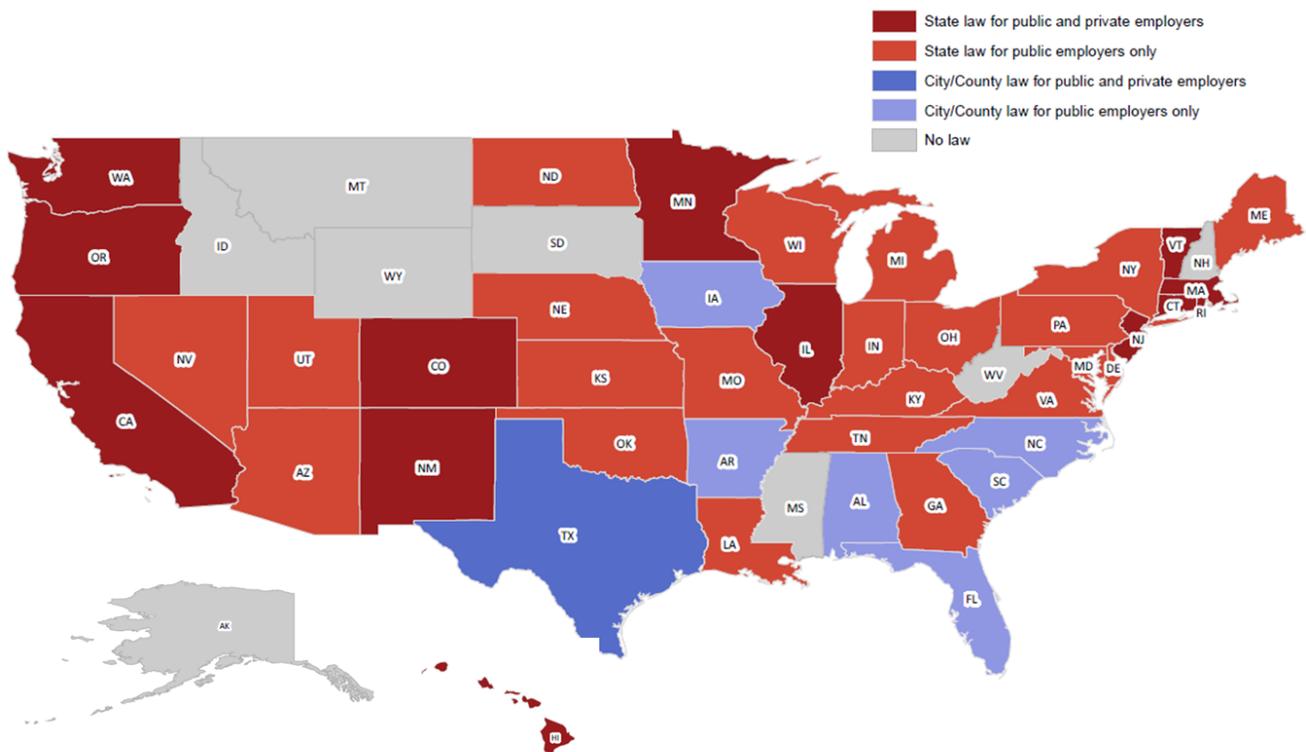
U.S. FAIR CHANCE LEGISLATION





Background

“Fair Chance” or “Ban the Box” are policies that prevent employers from inquiring about an applicant's criminal history on job applications or delays when employers can run background checks for job applicants. These policies seek to ensure that justice-involved individuals (those who have had interaction with the criminal justice system via juvenile detention, incarceration, arrests, etc.) are hired based on their merit and qualifications, rather than their past. As shown in Figure 1, Ban the Box policies have been adopted by 35 states, the District of Columbia, and approximately 150 cities and counties (Avery, 2019). Thirteen of these states and eighteen cities apply these laws to private employers (Avery, 2019).



KEY TAKEAWAYS:

Under AB 1008, California employers cannot inquire about an applicant's criminal history on job applications. Employers can only conduct background checks after the applicant has a conditional offer of employment.

According to California state law, neither employers nor Consumer Reporting Agencies can inquire about the applicant's arrest records that did not lead to a conviction.

After providing a conditional job offer, California employers must perform an individualized assessment of each applicant with a criminal record based on three factors, which include: the nature and gravity of the offense or conduct, time passed since the conviction, and the nature of the job held or sought. Employers have discretion to hire after the assessment is completed.

Policy Overview

Before Ban the Box policies were implemented, employers were allowed to ask criminal record questions on job applications through a simple check-box. Additionally, background checks could be conducted before a job offer was in place. Employers could deny job applicants a position simply because of their criminal record. The law did not require the employer to explain why an applicant's records affected their candidacy for the position.

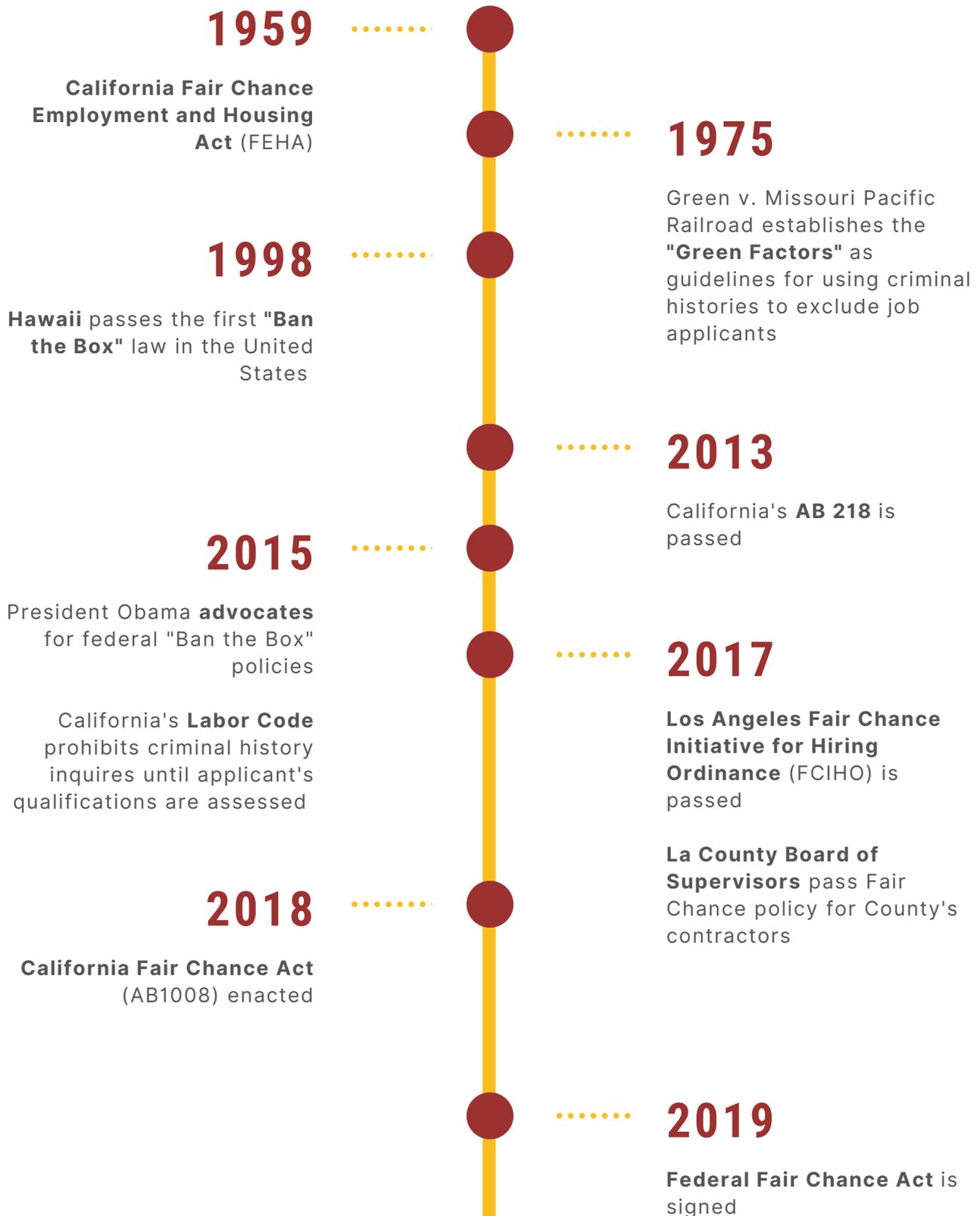
In 1998, Hawaii became the first state to begin changing the conventional hiring process by passing a Ban the Box law that eliminated criminal record questions from job applications (D'Alessio, Stolzenberg, and Flexon, 2014). In 2013, the California state legislature passed Assembly Bill (AB) 218. This landmark bill prohibited all state and local agencies from asking about conviction history on job applications (Garret, 2017). Since AB 218, 35 states, the District of Columbia and 150 cities/counties have implemented similar

Ban the Box policies to public and or private employers (Avery, 2019).

In 2015, President Barack Obama called on Congress to design and pass Ban the Box policies for federal job applications to align with the growing number of cities and states that had begun implementing similar policies (Office of the Press Secretary, 2015). As a response to this request, the federal Fair Chance Act was signed in 2019. Effective in 2021, the Fair Chance Act states that the federal government and its contractors cannot consider an applicant's conviction history until after assessing if the applicant is qualified for the position (Cobert, 2016; Nagele-Piazza, 2020).

The following section briefly summarizes and outlines the most important regulations that have built the current Fair Chance policy infrastructure in California. Figure 2 illustrates a timeline of these Ban the Box laws and events.

Figure 2. Fair Chance Policy Timeline





Previous Legislation and Regulation

California Fair Employment and Housing Act

The California Fair Employment and Housing Act (FEHA) lays the foundation for fair employment practices in California. FEHA makes it illegal for employers to discriminate against job applicants and employees based on their race, color, ancestry, religion, age, disability, sex, sexual orientation, gender identity, medical condition, marital status, and military or veteran status. FEHA applies to public and private employers, as well as labor organizations and employment agencies.

California Labor Code

Originally, the 2015 California Labor Code prohibited employers from asking applicants to disclose any information regarding their conviction history until it was determined that the applicant meet the minimum qualifications for the position. Different from AB 1008, the Labor Code only required a notice issued for the position and not a conditional offer.



California Fair Chance Act (AB 1008)

The California Fair Chance Act (A.B. 1008) was signed into law in 2017 and took effect in January 2018. The law prohibits both public and private employers, with five or more employees, from asking about a prospective job applicant's criminal history before making a conditional offer of employment. A.B. 1008 adds a new section to the FEHA, stipulating that it is unlawful for employers to "consider, distribute, or disseminate information related to specified prior arrests, diversions, and convictions" (Government Code § 12952) after conducting background checks.

AB 1008 provides broader protection for applicants. Employers who deny a position of employment, partially or exclusively based on the applicant's conviction history, must first perform an individualized assessment demonstrating how the conviction history is incompatible with the specific duties of the job. The applicant has to be notified in writing about the decision and justification. The applicant has five business days to respond to this notice. In this process applicants have an opportunity to submit evidence of rehabilitation or mitigation.

If the applicant believes that the employer has violated his or her rights under AB 1008, the applicant has up to a year to file a complaint to the state. The complaint form can be completed online, by phone, by mail, or in-person at the California Department of Fair Employment and Housing (DFEH). If the DFEH determines that the employer is guilty of violating the Fair Chance Act, the employer can be ordered to compensate the applicant. Alternatively, applicants or employees can choose to file a law suit in court.

This policy has some limitations and exceptions. For example, if another law requires a background check for specific industries or agencies, it prevails over AB 1008. These laws may vary among cities, industries, and job positions.



The Green Factors

AB 1008 provides certain guidelines (known as "Green Factors") to help employers implement the policy and modify their hiring practices. These factors are named after the case *Green v. Missouri Pacific Railroad* (1975), where the Eight Circuit identified three factors that must be considered to assess if the applicant can be excluded from consideration for the job position based on criminal history (*Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977)). These factors are:

1. The nature and gravity of the offense or conduct

Although in California employers cannot request or consider arrest records that did not lead to a conviction (A.B. 1008 § 2; DPW, 2017), it is important to distinguish between arrest records and conviction records for cases in which applicants disclose this information individually. [1] An arrest record alone does not indicate that the applicant was involved in a criminal act, whereas a conviction record proves that the person was involved in a criminal act ("Pre-Employment Inquiries," n/d). If the applicant possesses a conviction record, the differentiation between types of crimes is important when assessing his or her job application. California's Criminal Justice System recognizes three types of crimes (L.A.O., 2013):

- a. *Infraction*: Mostly related to motor vehicle violations that can result in a fine.
- b. *Misdemeanor*: Less serious offenses that can involve probation, jail, a fine, or a combination. Misdemeanor includes assault, petty theft, and public drunkenness.
- c. *Felony*: Most serious types of crimes that involved jail or prison sentences. These can be classified as "violent" or "serious" or both. Felonies include murder, rape, sex offense, robbery, among others.

2. Consider time passed since the conviction

None of the regulations discussed specify a threshold to explain how much weight the employer should add to the conviction. However, research indicates that those who have a criminal record in their youth and have not committed another crime for ten years after they are 20 years old, have the same likelihood of perpetrating any crime than a person who has never had a criminal record (Soothill & Francis, 2009; Denver, 2016).

3. The nature of the job held or sought

Employers should perform an individualized assessment of each applicant's criminal record considering the nature of the job tasks (e.g., moving boxes, taking care of children), risks of the job (e.g., supervision's level, co-workers' interactions), and job's environment (e.g., in-doors/out-doors, multiple private locations, warehouse) (EEOC Enforcement Guidance, 2012). If the employer believes that the applicant's conviction history is an impediment for hiring him/her, the employer must provide written notification to the applicant. If an applicant responds to the notice and provides additional information, the employer should consider the response before making a final decision. If the employer still denies employment to the applicant, they must notify him or her detailing the reason.

1. For more information about Criminal Records see Appendix A.



Local Policies

City of Los Angeles and Los Angeles County

On January 22, 2017, the City of Los Angeles adopted the Fair Chance Initiative for Hiring Ordinance (FCIHO). FCIHO forbids any employer within the city limits of Los Angeles, from inquiring about a job applicant's criminal history until the employer has made a conditional offer of employment. Under FCIHO, employers must complete a written assessment that "effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the employment position sought by the applicant" (L.A. Municipal Code § 189.03). If employers do not comply with FCIHO, they can be subject to civil action in court, administrative action before the Designated Administrative Agency (DAA), or a fine (DPW, 2017). [2]

FCIHO and AB 1008 largely overlap; however, FCIHO has additional employer obligations requiring all job posts to state that the employer will accept applicants with a criminal history. The employer has specific guidelines about informing job applicants, labor unions, and existing employees about the City Ordinance.

More locally in 2017, the L.A. County Board of Supervisors issued its own Fair Chance policies applicable to County contractors (Garret, 2017). Furthermore, the County has created a website to inform employers about fair hiring laws and practices. The County has partnered with local business to publicly recognize businesses that have implemented Fair Chance hiring practices and encourage other employers to embrace the policy. Under this initiative businesses can take the Los Angeles County Fair Chance Hiring Pledge and have access to benefits, awards, and implementation support services. [3]

2. The fine could be up to \$500, \$1,000, or \$2,000 for the first, second, and third and more violations, respectively. For more information see LAMC Section 189.10 and/or LAAC Section 10.48.9.

3. For more information see <https://fairchance.lacounty.gov/>

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Appendix A. Criminal Record System

This Appendix provides an overview of the criminal record system in California. The Appendix includes the sources and types of criminal records, regulations, and private background check agencies.

Sources of Criminal History Information

The Equal Employment Opportunity Commission (EEOC) considers that there are four major sources of criminal history records (EEOC, 2012). Those are:

1. *Court Records*: These records include the type of criminal charge, trial, and resolution information (e.g., arrangement, conviction, pleas, etc.)
2. *Law Enforcement and Corrections Agency Records*: This category includes state police agencies and state corrections. These agencies have records of complaints, arrests, parole, and probation, among others.
3. *Registries or Watch Lists*: States may have publicly available lists of individuals that committed certain types of crimes. For example, under Megan's Law, the California Department of Justice (CA DOJ) must "notify the public about specified registered sex offenders" ("Summary of Megan's Law," n/d).
4. *State Criminal Record Repositories*: Each State has its repository of criminal records.
5. *The Interstate Identification Index (III)*: This is the Federal Bureau of Investigation (F.B.I.) criminal records database. It is a complete database in the country and includes records from each of the state repositories, as well as records from federal and international criminal justice agencies. Only the federal government and employers in industries regulated by the federal or state government (banking, nursing home, nuclear energy, daycare, among others) can access F.B.I.'s III database.

Types of Criminal Records

Most of the criminal records include the full name of the person, birth date, race, fingerprints, physical description, previous and current indictments, arrest records and warrants, and conviction information. [4] The following is a non-exhaustive list of types of criminal records,

- Arrest Records
- Sex Offender Listings
- Serious Traffic Violations
- Conviction Records
- Jail and Inmate Records
- Probation Records
- Juvenile Criminal Records (under 18 years old)
- Credit History

Prohibited records for California employers

California employers are prohibited from accessing certain types of criminal records (unless authorized by a state or federal law). Excluded records include (NELP, 2009; Mora, 2018; and California Labor Code Section 432.7):

- Arrests that did not lead to a conviction.
- Juvenile records.
- Diversions and deferrals.
- Convictions from seven years or more.
- Convictions that have been sealed, dismissed, expunged, or statutorily eradicated according to law.

After a conditional offer, the employer may ask about the applicant's criminal history, except for records included in the previous list. If the applicant decides to share that information, the employer should not consider it.

Exceptions

Title VII of the Civil Rights Act of 1964 (as amended, 42 U.S.C. § 2000e et seq.), as well as AB 1008 and the L.A. Fair Chance Initiative of Hiring Ordinance, allow certain employers access to all types of criminal records. These exceptions include (D.P.W., 2017):

- Positions for which the state or local agency is otherwise required by law;
- Positions in certain industries such as school, criminal justice agencies, Farm Labor Contractor, nursing home, security, among others;
- Employers that are prohibited by law from hiring an individual who has been convicted of a crime;
- Federal Government.

4. California Criminal Records Organization website: <https://california.staterecords.org/criminal.php>

Sealing Juveniles Records

Juvenile records can be sealed automatically or by petition. [5] Juvenile records can be sealed automatically when the cases are dismissed and the individual, while aged 14 or older, is not found to have committed a serious offense listed in the Welfare and Institutions Code Section 707 (b) (includes violent offenses such as kidnapping, killing, or rapping), and satisfactorily completed the probation terms ("Sealing Juvenile Records," n/d).

If the individual needs to ask the Court to seal his/her records, she/he must contact the probation department to file a petition. To qualify for the petition, the committed offense/s must not be listed in the Welfare and Institutions Code section 707 (b), the person is 18 years old or older, it has been five years either since the case was closed or the last contact with probation or a judge decided that the person is rehabilitated. Depending on the case, it can take more than nine months to have a record sealed. [6]

Justice-involved youth cannot seal their records if: a) the offense is listed in the Welfare and Institutions Code section 707 (b), or b) he/she was convicted as an adult of an offense involving "moral turpitude" (such as murder or other violent crime, sex crimes, among others) ("Sealing Juvenile Records," n/d).

Consumer Reporting Agencies

Consumer reporting agencies sell criminal history information to employers (EEOC, 2012). These agencies are regulated under the Fair Credit Reporting Act (FCRA), (15 U.S.C. § 1681 et seq.) Generally, these agencies can only report information that is a matter of public record (F.T.C., 2018) and may not include any information from those prohibited for employers (see Prohibited Records for California Employers). These agencies create their database from multiple sources and may not be revised frequently. These databases may have missing information, such as updated convictions or sealed cases (Office of the Attorney General, 2006).

In the EEOC Enforcement Guidance (2012), the EEOC explains that official reports have concluded that even if the case is sealed, private companies can obtain the information from their systems. In addition, criminal background checks can lead to inaccurate results due to "misspellings, clerical errors or intentionally inaccurate identification information provided by search subjects who wish to avoid discovery of their prior criminal activities" (National Task Force to the U.S. Attorney General, 1999).

5. Often, the terms "seal" and "expungement" are used interchangeable, but expungement means that the record is eliminated. Sealed records can be accessed by certain government agencies in specific situations. There is no real expungement in California. For more information visit <https://www.courts.ca.gov/1070.htm>

6. For information on how to seal adult records visit <https://www.courts.ca.gov/1070.htm>. For information on how to clean records in other states visit <https://cleanslateclearinghouse.org/>