The Impact of Ban-the-Box Measures

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Dallan Flake, [Do Ban-the-Box-Laws Really Work?,](#) 104 **Iowa L. Rev.** 1079 (2019).

I haven't taught the basic Employment Law survey course in a few years, so I was updating my class notes relating to the kinds of pre-employment screening measures that many employers use. The casebook had a note about so-called ban-the-box measures—state laws that require employers to remove questions about criminal histories from a job application. I decided to do a little research into the subject when – lo and behold – I stumbled across one of those articles that helps an instructor add some value to the class while simultaneously making a practical contribution to the scholarship in the field.

Do Ban-the-Box-Laws Really Work? by Dallen Flake takes a look at the practical effect of ban-the-box laws. The article begins with an overview of the rise in these types of measures in recent years and the different approaches that the measures take. The ban-the-box laws reflect a recognition of the difficulties that those with arrest and conviction records often face in seeking to find employment. Much like the Americans with Disabilities Act's prohibition on disability-related inquiries at the pre-offer stage, ban-the-box measures delay the ability of employers to inquire about an applicant's criminal history. As Flake explains, "The hope is that an employer will be more likely to hire an ex-offender if it evaluates a candidate's qualifications for the position before discovering the applicant's criminal record." (P. 1084.)

But as more states (now up to approximately 33) have adopted these types of measures, there have remained questions as to how effective they actually are in practice. Others have raised concerns that the measures may actually adversely impact minority applicants by prompting employers to eliminate these candidates from consideration on the assumption that all minority applicants have a criminal record in light of their higher arrest and incarceration rates. While there have been other studies of ban-the-box measures by economists, Flake's is (I believe) the first empirical study of the issue from the perspective of legal academic. The article is also one of the first to conduct an experiment, rather than relying on employment data, to measure the effectiveness of ban-the-box measures.

Without giving too much of the game away, in an effort to test some of the competing arguments concerning these measures, Flake submitted fictitious job applications in a ban-the-box locality (Chicago) and a non-ban-the-box locality (Dallas) and then compared callback rates between the two groups. The fictitious Chicago candidates had a 27% higher callback rate than the Dallas candidates. Moreover, the callback rates were higher regardless of the perceived race of the fictious applicant, thus undercutting the argument that ban-the-box measures might adversely minority applicants. Indeed, the fictitious black applicants had the highest increase in callbacks. However, "the black applicants had much lower callback rates than the white and Latino applicants in both Chicago and Dallas, indicating race remains a formidable barrier to employment, regardless of whether an employer is aware of a candidate's criminal record." (P. 1080.)

All of the usual disclaimers that go along with empirical studies apply here – the sample size was relatively small (2,006 applications in two cities), the study only measures callbacks, not whether an applicant received a job, etc. But like any good empirical work, the article gives the reader plenty to chew on and dissect. Beyond that, the article adds an important piece to part of a renewed discussion of

employer screening practices. In the 1980s and 90s, there was considerable concern about employers' use of polygraph testing, personality testing, and similar measures during the hiring process. At the same time, there was the concern on the back end of the hiring process that an employer who failed to adequately screen its employees might hire inefficient workers or face liability in the form of negligent hiring or retention lawsuits. While the concerns on the back end largely remain the same in 2020, technology has changed so dramatically in the ensuing years that there are new concerns about the front end. These include fears about employers' use of face-scanning algorithms, data mining, and similar screening devices during the hiring process, particularly their impact on individual privacy and potential for discriminatory outcomes. Flake's article focuses on a decidedly low-tech screening method – questions about criminal history – but one that fits within the broader ongoing discussion. For anyone interested in these types of issues, *Do Ban-the-Box-Laws Really Work?* is a thought-provoking contribution to the scholarship in the area.

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