



## Fair Chance Improvement Act

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Since the enactment of the FY 2020 National Defense Authorization Act (NDAA), Federal agencies and Federal contractors have generally been prohibited from inquiring into a bidder's or job applicant's criminal history until the individual reaches the conditional offer stage, or consideration of criminal history information earlier in the hiring process unless otherwise required by law. This provision is commonly referred to as "Ban the Box." Before the provision was incorporated into the NDAA, the legislation was introduced as the *Fair Chance Act* in both the House and Senate, and had bipartisan support.

**Since enactment of the FY 2020 NDAA, GSA and Department of Defense (DoD) have worked to implement a particular requirement that concerns the prohibition on criminal history inquiries by contractors prior to conditional offer.** This is section 1123 in the FY 2020 NDAA (P.L. 116-92). This requirement limits inquiries by—

- Agencies into the criminal history record of an individual or sole proprietor who submits a bid for a contract before determining the apparent awardee; and
- Contractors into the criminal history record of an applicant for a position related to work under a contract before the contractor extends a conditional offer to the applicant.

The authority also requires that DoD and GSA create a complaint mechanism by which applicants who feel they may have wrongly been discriminated against can avail themselves. There are also prescribed actions for agencies to follow when determining if there has been a violation of the prohibition on criminal history inquiries.

This Fair Chance Act implementation structure has created challenges because the FY 2020 NDAA did not assign responsibilities to the Department of Labor (DOL). Typically, DOL establishes regulations on complaint procedures from cradle to grave, then the Federal Acquisition Regulation (FAR) implements DOL's procedures. However, the FY 2020 NDAA provision assigned these responsibilities directly to DoD for defense contracts and to GSA for civilian contracts. Neither DoD nor GSA have the infrastructure necessary to fully execute on these responsibilities, unlike DOL.

**The Administration is requesting that Congress reassign these compliance mechanisms from DoD and GSA to DOL. Reassigning these authorities to DOL will ensure more effective implementation and compliance with the requirements of the statute,** as DOL is generally tasked with ensuring compliance with applicable employment laws, including those governing federal contractors. DOL has the existing experience, infrastructure, and related

subject matter expertise to efficiently investigate complaints about Federal contractor compliance.

### **Section-by-Section Analysis**

The proposed amendment would affect subsections (b) and (c) of section 4714 of title 41, as enacted by subsection (a) of section 1123 of the National Defense Authorization Act for Fiscal Year 2020, by transferring authorities assigned to the Administrator of General Services to the Secretary of Labor. This would require DOL instead of GSA to administer and enforce the specified provisions of section 1123. The proposal would also authorize DOL to conduct complaint investigations and compliance evaluations and to publish the investigative procedures by regulation, guidance, or by means which DOL deems appropriate. The proposal also would authorize the Secretary of Labor, rather than the head of the contracting agency, to determine whether a violation of the prohibition on criminal history inquiries has occurred.

The proposed amendment would also affect subsections (b) and (c) of section 2339 of title 10, as enacted by subsection (b) of section 1123 of the National Defense Authorization Act for Fiscal Year 2020, by transferring authorities assigned to the Secretary of Defense to the Secretary of Labor. This would require DOL instead of DoD to administer and enforce the specified provisions of section 1123. The proposal would also authorize DOL to conduct complaint investigations and compliance evaluations and to publish the investigative procedures by regulation, guidance, or by means which DOL deems appropriate. The proposal also would authorize the Secretary of Labor, rather than the head of the contracting agency, to determine whether a violation of the prohibition on criminal history inquiries has occurred.

### **Proposed Legislative Text**

#### **SEC. \_\_. COMPLIANCE PROCEDURES FOR PROHIBITION ON CRIMINAL HISTORY INQUIRIES BY FEDERAL CONTRACTORS PRIOR TO CONDITIONAL OFFER.**

(a) DEFENSE CONTRACTS.—Section 4657 of title 10, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

“(b) COMPLIANCE —

(1) PROCEDURES FOR SUBMISSION OF COMPLAINT.— The Secretary of Labor shall establish, and make available to the public, procedures under which an applicant for a position with a Federal contractor may submit to the Secretary of Labor a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).

(2) INVESTIGATION OF COMPLIANCE.—In addition to the authority to investigate compliance by a contractor with subsection (a)(1)(B) pursuant to a complaint submitted under paragraph (1) of this subsection, the Secretary of Labor may investigate compliance with subsection (a)(1)(B) in conducting a compliance evaluation under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation). The Secretary may publish such procedures by regulation, guidance, or by means which the Secretary deems appropriate.”; and

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking “Defense” and inserting “Labor”;

(ii) by inserting “of Labor” before “shall”; and

(iii) by inserting “, based upon the results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation)” after “determines”;

(iv) in subparagraph (C), by striking “warning” and inserting “notice”.

(B) in paragraph (2)—

(i) by striking “Secretary of Defense” and inserting “Secretary of Labor” and inserting “of Labor”; and

(ii) by inserting “as may be necessary” after “Federal agencies”.

(iii) by striking subparagraph (C) and inserting the following:

“(C) taking any of the actions described under section 202(7) of Executive Order 11246 (related to equal employment opportunity) and section 60–1.27 of title 41, Code of Federal Regulations (or any successor regulation).”.

(b) CIVILIAN AGENCY CONTRACTS.—Section 4714 of title 41, United States Code, is amended—

(1) by amending subsection (b) to read as follows:

“(b) COMPLIANCE —

(1) PROCEDURES FOR SUBMISSION OF COMPLAINT.— The Secretary of Labor shall establish, and make available to the public, procedures under which an applicant for a position with a Federal contractor may submit to the Secretary a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).

(2) INVESTIGATION OF COMPLIANCE.—In addition to the authority to investigate compliance by a contractor with subsection (a)(1)(B) pursuant to a complaint submitted under paragraph (1) of this subsection, the Secretary of Labor may investigate compliance with subsection (a)(1)(B) in conducting a compliance evaluation under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation). The Secretary may publish such procedures by regulation, guidance, or by means which the Secretary deems appropriate.”; and

(2) in subsection (c)—

(A) in paragraph (1)—

(i) by striking “head of an executive agency” and inserting “Secretary of Labor”;

(ii) by inserting “, based upon the results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation)” after “determines”;

(iii) by striking “such head” and inserting “the Secretary of Labor”; and

(iv) in subparagraph (C), by striking “warning” and inserting “notice”; and

(B) in paragraph (2)—

(i) by striking “head of an executive agency” and inserting “Secretary of Labor”;

(ii) by inserting “, based upon the results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation),” after “determines”;

(iii) by striking “such head” and inserting “the Secretary of Labor”; and

(iv) by inserting “as may be necessary” after “Federal agencies”.

(v) by striking subparagraph (C) and inserting the following:

“(C) taking any of the actions described under section 202(7) of Executive Order 11246 (related to equal employment opportunity) and section 60–1.27 of title 41, Code of Federal Regulations (or any successor regulation).”.

(c) APPLICATION.—This Act, and the amendments made by this Act, shall apply with respect to contracts awarded on or after the date that is 16 months after the date of the enactment of this Act.

### **Proposed Changes to Law (Effect of Proposed Language)**

## **TITLE 10—ARMED FORCES**

### **§4657. Prohibition on criminal history inquiries by contractors prior to conditional offer**

#### (a) LIMITATION ON CRIMINAL HISTORY INQUIRIES.-

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), the head of an agency-

(A) may not require that an individual or sole proprietor who submits a bid for a contract to disclose criminal history record information regarding that individual or sole proprietor before determining the apparent awardee; and

(B) shall require as a condition of receiving a Federal contract and receiving payments under such contract that the contractor may not verbally or through written form request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before such contractor extends a conditional offer to the applicant.

(2) OTHERWISE REQUIRED BY LAW.—The prohibition under paragraph (1) does not apply with respect to a contract if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

#### (3) EXCEPTION FOR CERTAIN POSITIONS.-

(A) IN GENERAL.—The prohibition under paragraph (1) does not apply with respect to-

(i) a contract that requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

(ii) a position that the Secretary of Defense identifies under the regulations issued under subparagraph (B).

#### (B) REGULATIONS.-

(i) ISSUANCE.—Not later than 16 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2019, the Secretary of Defense, in consultation with the Administrator of General Services, shall issue regulations identifying additional positions with respect to which the prohibition under paragraph (1) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive

information, or managing financial transactions.

(ii) COMPLIANCE WITH CIVIL RIGHTS LAWS.-The regulations issued under clause (i) shall-

(I) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(II) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

~~(b) COMPLAINT PROCEDURES.-The Secretary of Defense shall establish and publish procedures under which an applicant for a position with a Department of Defense contractor may submit a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).~~ COMPLIANCE

*(1) PROCEDURES FOR SUBMISSION OF COMPLAINT.— The Secretary of Labor shall establish, and make available to the public, procedures under which an applicant for a position with a Federal contractor may submit to the Secretary a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).*

*(2) “INVESTIGATION OF COMPLIANCE.—In addition to the authority to investigate compliance by a contractor with subsection (a)(1)(B) pursuant to a complaint submitted under paragraph (1) of this subsection, the Secretary of Labor may investigate compliance with subsection (a)(1)(B) in conducting a compliance evaluation under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation). The Secretary may publish such procedures by regulation, guidance, or by means which the Secretary deems appropriate.”; and*

(c) ACTION FOR VIOLATIONS OF PROHIBITION ON CRIMINAL HISTORY INQUIRIES.-

(1) FIRST VIOLATION.-If the Secretary of Defense Labor determines *based upon the results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation* that a contractor has violated subsection (a)(1)(B), the Secretary of Labor shall-

(A) notify the contractor;

(B) provide 30 days after such notification for the contractor to appeal the determination; and

(C) issue a written ~~warning~~-notice to the contractor that includes a description of the violation and the additional remedies that may apply for subsequent violations.

(2) SUBSEQUENT VIOLATIONS.-If the Secretary of Defense Labor determines *based upon the*

*results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation) that a contractor that was subject to paragraph (1) has committed a subsequent violation of subsection (a)(1)(B), the Secretary of Labor shall notify the contractor, shall provide 30 days after such notification for the contractor to appeal the determination, and, in consultation with the relevant Federal agencies as may be necessary, may take actions, depending on the severity of the infraction and the contractor's history of violations, including-*

(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section;

(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section; and

(C) ~~taking any of the actions described under section 202(7) of Executive Order 11246 (related to equal employment opportunity) and section 60–1.27 of title 41, Code of Federal Regulations (or any successor regulation) suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section.~~

(d) DEFINITIONS.-In this section:

(1) **CONDITIONAL OFFER.**-The term "conditional offer" means an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.

(2) **CRIMINAL HISTORY RECORD INFORMATION.**-The term "criminal history record information" has the meaning given that term in [section 9201 of title 5](#).

## **TITLE 41—PUBLIC CONTRACTS**

### **§4714. Prohibition on criminal history inquiries by contractors prior to conditional offer**

(a) **LIMITATION ON CRIMINAL HISTORY INQUIRIES.**-

(1) **IN GENERAL.**-Except as provided in paragraphs (2) and (3), an executive agency-

(A) may not require that an individual or sole proprietor who submits a bid for a contract to disclose criminal history record information regarding that individual or sole proprietor before determining the apparent awardee; and

(B) shall require, as a condition of receiving a Federal contract and receiving payments under such contract that the contractor may not verbally, or through written form, request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before the contractor extends a conditional offer to the

applicant.

(2) OTHERWISE REQUIRED BY LAW.-The prohibition under paragraph (1) does not apply with respect to a contract if consideration of criminal history record information prior to a conditional offer with respect to the position is otherwise required by law.

(3) EXCEPTION FOR CERTAIN POSITIONS.-

(A) In general.-The prohibition under paragraph (1) does not apply with respect to-

(i) a contract that requires an individual hired under the contract to access classified information or to have sensitive law enforcement or national security duties; or

(ii) a position that the Administrator of General Services identifies under the regulations issued under subparagraph (B).

(B) REGULATIONS.-

(i) ISSUANCE.-Not later than 16 months after the date of enactment of the Fair Chance to Compete for Jobs Act of 2019, the Administrator of General Services, in consultation with the Secretary of Defense, shall issue regulations identifying additional positions with respect to which the prohibition under paragraph (1) shall not apply, giving due consideration to positions that involve interaction with minors, access to sensitive information, or managing financial transactions.

(ii) COMPLIANCE WITH CIVIL RIGHTS LAWS.-The regulations issued under clause (i) shall-

(I) be consistent with, and in no way supersede, restrict, or limit the application of title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.) or other relevant Federal civil rights laws; and

(II) ensure that all hiring activities conducted pursuant to the regulations are conducted in a manner consistent with relevant Federal civil rights laws.

~~(b) COMPLIANCE COMPLAINT PROCEDURES.-The Administrator of General Services shall establish and publish procedures under which an applicant for a position with a Federal contractor may submit to the Administrator a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).~~

*(1) PROCEDURES FOR SUBMISSION OF COMPLAINT.— The Secretary of Labor shall establish, and make available to the public, procedures under which an applicant for a position with a Federal contractor may submit to the Secretary a complaint, or any other information, relating to compliance by the contractor with subsection (a)(1)(B).*

*(2) INVESTIGATION OF COMPLIANCE.—In addition to the authority to investigate compliance by a contractor with subsection (a)(1)(B) pursuant to a complaint submitted under paragraph (1) of this subsection, the Secretary of Labor may investigate compliance with subsection (a)(1)(B) in conducting a compliance evaluation under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of Federal Regulations (or any successor regulation). The Secretary may publish such procedures by regulation, guidance, or by means which the Secretary deems appropriate.*

(c) ACTION FOR VIOLATIONS OF PROHIBITION ON CRIMINAL HISTORY INQUIRIES.-

(1) FIRST VIOLATION.-If the ~~head of an executive agency~~ Secretary of Labor determines based upon the results of a complaint investigation or compliance evaluation conducted by the Secretary of Labor under section 60–1.20, 60–300.60, or 60–741.60 of title 41, Code of



*Federal Regulations (or any successor regulation)* that a contractor has violated subsection (a)(1)(B), such head shall-

(A) notify the contractor;

(B) provide 30 days after such notification for the contractor to appeal the determination;

and

(C) issue a written ~~warning~~-*notice* to the contractor that includes a description of the violation and the additional remedies that may apply for subsequent violations.

(2) ~~SUBSEQUENT VIOLATION.~~-If the ~~head of an executive agency~~ *Secretary of Labor* determines that a contractor that was subject to paragraph (1) has committed a subsequent violation of subsection (a)(1)(B), ~~such head~~ *the Secretary of Labor* shall notify the contractor, shall provide 30 days after such notification for the contractor to appeal the determination, and, in consultation with the relevant Federal agencies *as may be necessary*, may take actions, depending on the severity of the infraction and the contractor's history of violations, including-

(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section;

(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section; and

(C) *taking any of the actions described under section 202(7) of Executive Order 11246 (related to equal employment opportunity) and section 60-1.27 of title 41, Code of Federal Regulations (or any successor regulation).* ~~suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section.~~

(d) ~~DEFINITIONS.~~-In this section:

(1) ~~CONDITIONAL OFFER.~~-The term "conditional offer" means an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry.

(2) ~~CRIMINAL HISTORY RECORD INFORMATION.~~-The term "criminal history record information" has the meaning given that term in section 9201 of title 5.

## **Budget Implications**

The proposal would shift implementation costs from DoD and GSA to DOL. CBO has estimated these costs to be less than \$500,000 annually. DOL may be able to more efficiently implement these requirements by leveraging existing personnel and procedures.